the company to accept it, and so to bind them. I find neither of these averments on record.

There is no specific averment of the date when the premium was paid, but it is said that we can gather on a fair construction of the statements that the pursuers intend to say that the premium was paid in the end of April. I do not think the pursuers are entitled to ask the Court to draw an inference with regard to such a matter, for this fact, which is indispensable to support their case, is within their own knowledge, and they should have no difficulty in setting it out in clear and unambiguous terms. Even assuming that it is reasonable to get at the facts by way of inference, I am hardly able to draw the conclusion that the pursuers did so intend, for all I find stated is [*quotes*]—I see no suggestion there from which I should infer that the premium had been paid before the occurrence of the fire.

The second material fact is not averred sufficiently by the mere use of the word "agent" as describing M'Elroy. That is an extremely vague and indefinite word, and may cover many varieties of authority. What it was really necessary to aver was that M'Elroy had due authority to accept the premium, and to bind the company.

I agree that the attention of the Lord Ordinary seems not to have been sufficiently directed to the exact terms of the letter which his Lordship refers to, for the Lord Ordinary reads that letter as if it were an acceptance by the company's manager of a premium for a policy about to be issued as from the 30th April, whereas it is clear, when the letter is read along with the covering-note to which it refers, that the risk was to run from the 8th June. The matter appears to me to involve not a question of fact, but the construction of correspondence, and on that I think no doubt can arise.

The Court recalled the interlocutor of the Lord Ordinary, found that the averments of the pursuers were not relevant to support the conclusions of the summons, and dismissed the action.

Counsel for the Pursuers — Watt — Maclaren. Agents — Patrick & James, S.S.C.

Counsel for the Defenders—Ure—Clyde. Agent—J. A. Cairns, S.S.C.

Wednesday, January 6.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

FLEMING AND OTHERS *v.* LIDDESDALE DISTRICT COMMITTEE OF THE COUNTY OF ROXBURGH AND OTHERS.

Local Government—Lighting—Burgh Police Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 99—*Oil as an Illuminant.*

Section 99 of the Burgh Police Act 1892 empowers the local authority to make provision for lighting their district by means of lamps, and to light the said lamps "by means of gas, or such other light of an improved kind, subject to the provisions of the Electric Lighting Act 1882, or any Act or Acts amending or superseding the same, as they may find expedient."

Held that the use of oil as an illuminant for that purpose was not excluded by the terms of the section.

This was a note of suspension and interdict presented by John Fleming, farmer, and others, occupiers within the parish of Castleton, against the Liddesdale District Committee of the County Council of Roxburgh, and the Lighting Committee of the Special Lighting District of the parish of Castleton, to have the respondents interdicted from "lighting, or entering into contracts, or otherwise making provisions for the public lighting, of the special lighting district of the parish of Castleton or any part thereof by oil lamps, or by lamps other than gas lamps, or lamps lit by means of light of an improved kind, subject to the provisions of the Electric Lighting Act 1882, or any Act or Acts amending the same."

The complainers averred that in consequence of a requisition from the Parish Council of Castleton the Liddesdale District Committee, on 11th February 1896, formed the parish of Castleton into a special lighting district, appointed a Lighting Committee, and resolved that sections 99, 100, 101, and 105 of the Burgh Police Act 1892 should be adopted within the special district.

Statement 5—"The respondents the said Lighting Committee, with the sanction and approval of the said District Committee, do not propose to light any part of the said special district except the said village of Newcastleton, to which they have resolved to confine the lighting scheme, notwithstanding the fact that the village alone will benefit, while the whole proprietors and occupiers throughout the special district will be liable to assessment. All objections competent to the complainers on this head are reserved meantime. The respondents, however, propose to carry out their lighting scheme by means of the same oil lamps which have been in use for the last fifteen years in the village. For this purpose they have acquired by donation, or for a merely

nominal price, the said lamps, and are about to light and maintain the same at the expense of the whole district, and are about to acquire additional lamps of exactly the same kind in order to extend the lighting of said village. The said lamps are ordinary oil lamps without any improvement or modern contrivance, but of the kind which were just in use prior to the introduction of gas lighting; they are of the commonest pattern, and not capable of giving any light of an improved kind as stated in condescendence 2. In windy weather they are blown out or become so blackened as to give almost no light. At the best the light they produce is greatly inferior in every respect to that given by ordinary street gas lamps or by electric light. The said oil lamps are not in any case 'light of an improved kind,' nor is it possible to apply to them the provisions of the Electric Lighting Act 1882. The complainers object to the respondents carrying out the lighting scheme in said special district in a manner which is inconsistent with the terms of said section 99 of the Burgh Police (Scotland) Act 1892. Explained that proposals to form special lighting districts to be lighted with oil lamps of the same character and description as those proposed to be used in the present case have been negatived by local authorities in Lanarkshire and other counties in Scotland, on account of the fact that gas or other improved light was not to be employed as the illuminant."

The respondents' answer to statement 5 was as follows:—"Admitted that the respondents propose to light certain parts of the parish with the oil lamps formerly in use, and some additional lamps of a similar character. *Quoad ultra* denied. The light given by the lamps in question is at least equal to that given by an ordinary gas street lamp, and is in every respect sufficient for the proper lighting of the district. The respondents are nevertheless willing to adopt any improvements which can be made on the said lamps, and being advised by an expert on oil lighting that the substitution of annular circular burners will give a light of from 40 to 45 candle power, they are willing to adopt this alteration, The respondents are also willing to provide the said lamps with reflectors, which will further increase the power of the light. The said oil lamps already furnish light of an improved kind, and, as already stated, the respondents are willing still further to improve them. Further, oil is used as an illuminant in many lighting districts throughout Scotland in virtue of said Acts. It is so used in Aberdeenshire, Perthshire, Berwickshire, Kincardineshire, Haddingtonshire, and other counties in Scotland. There are no works in the parish for the manufacture of gas or electric light, and hitherto the place has been lighted by paraffin lamps. The respondents have received these lamps in gift, and the whole cost of lighting per annum will be about £15, while if gas or electric light were to be employed the expense would be infinitely greater without any corresponding benefit."

The complainers pleaded—"The scheme of lighting the said special district by means of oil lamps being illegal and contrary to statute, and particularly to the terms of section 99 of the Burgh Police (Scotland) Act 1892, the complainers are entitled to interdict as craved."

The respondents pleaded, *inter alia*—"(3) The scheme of lighting the said special district proposed to be adopted by the respondents being legal and *intra vires*, the interdict craved for should be refused and the note dismissed with expenses."

The Local Government (Scotland) Act 1894 (57 and 58 Vict. c. 58), sec. 44, enacts—"(1) It shall be lawful in a county for a parish council . . . to make a requisition in writing to the district committee of the county council . . . calling upon them to form such parish into a special district for the following purposes, or any one or more of them—that is to say, (*a*) the lighting of the special district, and the adoption for such purposes by the district committee . . . of the provisions contained in sections 99 to 105 inclusive of the Burgh Police (Scotland) Act 1892, or any one or more of them." . . . (2) Upon such requisition being received the district committee shall . . . either approve or disapprove of the formation of a special district, and if they approve thereof shall define the boundaries of such special district, and specify which of the provisions of the Burgh Police Act 1892 . . . are to be adopted therein."

Sec. 99 of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55) enacts—"The commissioners shall make provision for lighting in a suitable manner all the streets and all other places within the burgh which in their judgment should be lighted at the public expense," and shall erect lamps, "and shall light, or shall enter into contracts for lighting, and cause to be lighted, such lamps by means of gas, or such other light of an improved kind, subject to the provisions of the Electric Lighting Act 1882, or any Act or Acts amending or superseding the same, as they may find expedient."

On 15th December 1896 the Lord Ordinary (STORMONTH DARLING) allowed the parties a proof of their averments.

The complainers reclaimed, and argued—The question here raised was this—Is the proposal to light with oil lamps legal? The respondents' statements as to the superior brilliancy of the oil lamps proposed to be used by them were irrelevant, for the decision must turn on the words of the statute. In section 99 of the Burgh Police Act the words "such other light of an improved kind" must mean "such other *illuminant* of an improved kind," or the sentence would not make sense. The section contemplated the use of gas or (as was plain from the reference to the Act of 1882) electric light, or possibly of some new illuminant which might be discovered in the future. But oil was excluded; it was not an illuminant of an "improved kind," for the standard by which it must be judged whether oil was an improvement or not was plainly gas. This view was confirmed by a consideration of section 126 of the Police Act of 1862, which empowered com-

missioners to light "by means of oil or gas, or such other light of an improved kind as they may find expedient." The word "oil" had been omitted in the Act of 1892. In any event, the proof granted by the Lord Ordinary was much too general, and should be restricted.

Argued for the respondents—The Burgh Police Act of 1892 did not exclude the use of oil. The word "improved" must not be too strictly interpreted as though it involved a definite standard of comparison. All it meant was good, superior, suitable for the locality, and of this suitability the district committee were to be the judges. It would be absurd to refuse to a country village the privilege of lighting except by gas or electricity, which would involve enormous expense.

LORD M'LAREN—This is a reclaiming-note against an interlocutor of the Lord Ordinary allowing proof, and under the reclaiming-note we have raised the question of the limitation of proof, and also the question of the relevancy of the defences. It is difficult to consider this question without considering also the relevancy of the note of suspension under which the question has been brought before us. The note craves an interdict against lighting the parish of Castleton "by lamps other than gas lamps, or lamps lit by means of light of an improved kind, subject to the provisions of the Electric Lighting Act 1882, or any Act or Acts amending the same," quoting the clause of the Burgh Police Act condescended on.

Now, the Court in general will not grant an interdict which is merely an echo of a statutory provision. An interdict must be directed against some specific act which is alleged to be in contravention of the statute, and not merely against doing anything which is contrary to the statute, and the reason is obvious. The party interdicted must be told plainly what are the acts which he is enjoined not to do in order that he may regulate his conduct in conformity with the interdict. I do not think that in any view we could grant interdict against lighting the streets of New Castleton otherwise than by gas or "other light of an improved kind."

But we are also moved to grant interdict against lighting this town or village by means of oil. The complainers' argument is rested on the 99th section of the Burgh Police Act 1892, as made applicable by the Local Government Act of 1894, and it proceeds on the narrative that the parish of Castleton has been formed into a lighting district under the provisions of this statute, and that the district authority has determined to put in force the powers of this 99th section. We are asked to find that the system of lighting which has been introduced is contrary to the powers conferred by this section. The provision of the statute is—"The commissioners (*i.e.*, the district committee) shall make provision for lighting in a suitable manner all the streets and all other places within the burgh" (*i.e.*, the parish or parishes) by erecting lamps, "and shall cause to be lighted such lamps by means of gas or such other light of an improved kind." I pause here to say that while only one illuminant is mentioned, other lights of an improved kind are permissible, and it is quite evident from the generality of the expression that it was not considered desirable to limit the powers of the administration of the district to any particular kind of light, but rather to give them a discretion to substitute any suitable equivalent. Then the statute proceeds, "subject to the provisions of the Electric Lighting Act, 1882, or any Act or Acts amending or superseding the same."

Now, this expression is perhaps somewhat elliptical, for electric lighting had not been mentioned in the antecedent part of the clause, but we must take it that if electric light were adopted it would be subject to the provisions of that Act of 1882. Then come the words, "as they may find expedient," which I cannot help thinking are words governing the construction of the whole antecedent part of the clause. There is a general reference to the question of expediency, and the decision of such questions is left to the governing body constituted by statute for the purpose. Of course it might happen that some antiquated or perverse system of illumination was adopted by a local authority, it might be, for the purpose of defeating the intention of the Act. In such a case I have no doubt that the Court has jurisdiction to say that the powers conferred by the clause had not been fairly exercised, and that the resolution was invalid. But before we can pronounce the resolution to light the streets of Castleton by oil lamps of the character described to be null, we must be satisfied that a radical case of excess or abuse of power is alleged, because if the necessary averments do not come up to an abuse of the power I am afraid the question whether oil is an improvement or not is a matter of opinion, and that is just the thing which is referred to the District Committee under the general reference of the expediency of the particular illumination.

It seems to me that in a measure of this kind, intended to apply to large towns and small, and even to mere villages, the District Committee would be taking a very inadequate view of its powers and duties if it merely approached the subject of lighting from the point of view, which is the best of all known illuminants? They have to consider which is the most suitable for the requirements of their district.

The argument was directed against the use of oil, and, as I understood it, was to the effect that oil light was not within the powers conferred by the statute because it could not be described as an improved method of illumination. Following up that argument, I suppose that gas and electric light, being the things mentioned in the statute, are what are intended to be universally introduced, or, at most, these two coupled with some unknown illuminant which may be hereafter invented. I am unable to agree with that construction of the statute. If, for example, it were

proposed to establish a system of electric lighting for a small community like this, it would be difficult to resist the argument that that was a perversion of the powers of the statute by the introduction of a light too expensive and unsuitable for the locality. That is not the subject of consideration, but I am unable to find anything in the words of the Act which prohibits the District Committee from illuminating by oil if they can find a system of oil illumination which satisfies the general words of the Act as being of an "improved kind."

I adopt the observation made by Mr Shaw that such expressions are not to be tested by rigid rules of criticism. The language is popular and "improved light" just means any good and efficient quality of light, of which the District Committe are to be the judges.

The chief difficulty in disposing of this case consists in the curious position in which the parties have been placed with reference to the question of proof. The ordinary case is that a proof is moved for by the pursuer, who has to establish his case by evidence, while the defender resists. But here the Lord Ordinary has allowed a proof, and the complainers have reclaimed against that order with a view to appealing to the Court either to restrict it or to give a judgment without any proof at all. I am not sure in what way it is sought to restrict the proof, for if the proof is to enable the Court to interpret the statute and find out what is an improved description of light, it would be very difficult to limit it at all. The defenders, again, while not expressing any enthusiasm for the proposed inquiry, have not directly moved us to disallow a proof.

It appears to me that as the complainer under his reclaiming-note has raised the whole question of proof, and as he has satisfied me that this is not a case in which the construction of the statute can be aided by evidence, the whole matter of proof or no proof is before us. My own opinion is that it is a very doubtful principle to allow a proof in order to construe a statute. It might be necessary where there is a patent ambiguity, but it is one which we are not familiar with, and which I should hesitate to pronounce competent at all. In the present case my view is that proof is entirely unnecessary, because upon the facts as stated the district authority has not exceeded its powers as defined by the statute. While the complainer has satisfied me upon his first proposition, he has failed to convince me that under no circumstances can oil be used as an illuminant within the meaning of the Act. It appears to me that it is entirely within the discretion of the committee to introduce a system of lighting by oil which in their opinion is an improvement, that is to say, a system of lighting as good as can be obtained consistently with economy and the requirements of the case. It follows in my opinion that the note should be dismissed.

LORD ADAM—The complainer here seeks to have the respondents interdicted from lighting the special district of the parish of Newcastleton "with oil lamps" and so on. As I read that interdict, it means an interdict against lighting with oil lamps of any kind whatever. There are observations of an unfavourable character made as to the oil lamps used or proposed to be used by the respondents in the lighting of Newcastleton. But this interdict does not strike at the use of any particular oil lamps. The real question is, Are the respondents entitled or not to use oil lamps, it may be of the best description, to light the village?

Mr Clyde maintained that they were not so entitled, because upon a construction of section 99 of the Burgh Police Act 1892 it was *ultra vires* of the respondents to use oil lamps at all. His construction was that the only competent light would be by means of gas or some kind of illuminant, such as electric light, of an improved kind as compared with gas. He says oil is not an illuminant of an improved kind, and therefore the respondents have no power to use it.

But I do not agree with that construction of the statute at all. I do not think that these words were meant to institute a comparison between gas and electric light on the one hand and oil light on the other. I think the words mean no more than light of an efficient kind, of a good kind, of a modern kind, it may be an improved kind, with reference to the use of oil itself—the use of an oil as compared with the oil used before the introduction of modern oils and methods of burning it.

Therefore I think that it was quite within the powers of the District Committee—and it is to them that discretion is given—to employ oil lamps if they thought proper, and it would be a very serious matter if we were to hold anything else. According to the complainers' view, no village can be lighted at all unless you are to establish a gas manufactory or an electric installation. How could a small village afford an expensive establishment of that sort upon pain of being left in total darkness?

I think therefore that the interdict ought to be refused.

But Mr Clyde went on to say that in any view he objected to the proof allowed here. He was quite right in that contention. But he did not say what proof he desired, or what the limitation should be. I quite agree with him that a proof at large is out of the question. But I go a step further than Mr Clyde, and I agree with Lord M'Laren that, the whole question being open, there should be no proof, and that we should decide this case upon the construction of the statute alone in favour of Mr Shaw's clients.

LORD KINNEAR — I am of the same opinion.

LORD PRESIDENT—I concur.

The Court recalled the interlocutor of the Lord Ordinary, and refused the note of suspension and interdict.

Counsel for the Complainer—Jameson—Clyde. Agents—Strathern & Blair, W.S.

Counsel for the Respondents — Shaw, Q.C.—Graham Stewart. Agents—Turnbull & Herdman, W.S.

Thursday, January 7.

SECOND DIVISION.

CARRUTHERS *v.* CARRUTHERS' TRUSTEES.

(NOTE for FINLAY & WILSON, S.S.C.)

(*Ante* vol. xxxii. p. 587, and 22 R. 775, and in the House of Lords, vol. xxxiii. p. 809.)

Agent and Client — Expenses — Charging Order—Law-Agents and Notaries Public (Scotland) Act 1891 (54 *and* 55 *Vict. cap.* 30), *sec.* 6.

The Law-Agents and Notaries Public (Scotland) Act 1891, section 6, enacts that where a law-agent has been employed to pursue or defend an action, the Court before whom such action has been heard may declare the law-agent entitled "to a charge upon and against, and to payment out of, the property . . . recovered or preserved on behalf of his client by such law-agent in such action . . . for his expenses."

In an action at the instance of a liferentrix against the trustees on a trust estate, the trustees were ordained to pay a certain sum into the trust-estate to replace the amount lost through their breach of trust. Owing to debts still outstanding, and preferable to her claim, the pursuer could not for some time, and possibly might never, take any benefit from the decree in the action. Her law-agents craved a charging order on the sum recovered in the action, for an extra-judicial account greater in amount than the whole sum decerned for. The Court *refused* to grant the order craved, (1) *per* the Lord Justice-Clerk, Lords Young and Trayner (Lord Moncreiff reserving his opinion), on the ground that the pursuer's interest in the fund recovered was not such as to bring the case within the terms of the statute; and (2) *per curiam*, on the ground that even if the statute applied, this was not a case where, in the exercise of their discretion, the Court ought to grant such an order.

This was a sequel to the case of *Carruthers* v. *Carruthers' Trustees*, reported *ante ut supra*.

The question raised by this note was, whether the pursuer's law-agents were entitled to a charging order under the Law-Agents and Notaries Public (Scotland) Act 1891, section 6, against the sum recovered in the action.

On 4th December 1896 the pursuer presented a petition to the Second Division of the Court of Session, praying the Court to apply the judgment of the House of Lords, whereupon the Court on 9th December pronounced the following interlocutor.—"Having considered the petition, 274 of process, apply the judgment of the House of Lords of date 13th July 1896, and in respect thereof decern against the defender William Carruthers and James Glegg as individuals, and Ann Forbes or Forbes as executrix of the deceased Hector Forbes, and as such representing him as an individual, and that all conjunctly and severally for payment to the defender William Carruthers as remaining trustee under the trust-disposition and deed of settlement of the deceased David Carruthers mentioned in the petition, that the same may be applied along with the rest of the trust-estate in terms and for the purposes of the said trust-disposition and deed of settlement, of the sum of £104, 2s. 7d., sterling with interest thereon at the rate of £4 per centum per annum from and after the 31st day of January 1891, and until payment: Find the petitioner (pursuer) entitled to the expenses incurred by her in the Inner House, and the expenses of the petition: Remit," &c.

Thereafter Messrs Finlay & Wilson, S.S.C., Edinburgh, the pursuer's agents, presented a note to the Lord Justice-Clerk in which the above interlocutor was set forth, and his Lordship was craved to move their Lordships of the Second Division to declare the said Finlay & Wilson entitled to a charge upon, and against, and a right to payment out of, said sum of £104, 2s. 7d. and interest, for the taxed expenses incurred by the pursuer to said Finlay & Wilson in connection with said action, in so far as the same should not be recovered under the award of expenses already made as aforesaid by his Lordship's Division, and to remit the account of their expenses so to be charged to the Auditor to tax and report, and thereafter to approve of said report, and to decern against the said William Carruthers as remaining trustee foresaid for payment to the said Finlay & Wilson of the said sum of £104, 2s. 7d. and interest thereon, so far as required for payment of the taxed amount of such expenses remaining after deduction of any sum recovered as aforesaid, the said sum of £104, 2s. 7d. and interest thereon being first received by the said William Carruthers as remaining trustee foresaid, or to do further or otherwise in the premises as to their Lordships should seem proper.

The Law-Agents and Notaries-Public (Scotland) Act 1891 (54 and 55 Vict. cap. 30), section 6, enacts as follows:—"In every case in which a law-agent shall be employed to pursue or defend any action or proceeding in any court, it shall be lawful for the court or judge before whom any such action or proceeding has been heard or shall be depending, to declare such law-agent entitled to a charge upon and against, and a right to payment out of, the property of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved on behalf of his client