was an undertaking—I mean in the legal sense of the term—to set aside the money and preserve it intact. But it now turns out that the words which I have quoted do not in any sense of the term constitute the contract between the lairholders and the company; on the contrary, this minute was never published or communicated to the lairholders with whose case we have to deal. The true contract between the company and the lairholders is set forth in the receipt, and the terms of that receipt do not import any undertaking to set aside the money so received and apply only the interest in the way of embellishing the graveyard.

Now, that element being absent, the thing comes to be of the simplest description. The company, for a sum down, undertake a perpetual obligation, and it seems to me that the case being thus entirely deprived of the semblance of trust, it resolves into this question only — Is income-tax chargeable where money is received and a perpetual obligation undertaken? We should be going against the theory of the cases which have already been decided, and against decisions which are well recognised, if we were to give countenance to that idea. The case is exactly the same as the ordinary one of money paid down with an obligation to provide for certain expenses in the future, and it seems to me that the judgment which was pronounced by the Commissioners was right and ought to be affirmed.

LORD M'LAREN and LORD KINNEAR concurred.

LORD ADAM was absent.

The Court affirmed the determination of the Commissioners, and found the Surveyor of Taxes entitled to expenses,

Counsel for the Appellants—Shaw, Q.C. —Cowan. Agent—F. J. Martin, W.S.

Counsel for the Respondent—Sol.-Gen. Dickson, Q.C.—A. J. Young. Agent—P. Hamilton Grierson, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Friday, May 20.

(Before the Lord Chancellor, and Lords Watson, Herschell, and Shand).

GLASGOW CORPORATION *v.* M'OMISH AND ARTHUR.

(*Ante*, June 26, 1896, 33 S.L.R. p. 675, and 23 R. p. 896).

Police — Burgh — Drainage of Dwelling-Houses — Glasgow Police (Amendment) Act 1890 (53 *and* 54 *Vict. c.* 221), *sec.* 16—*When Commissioners Justified in Executing Repairs at Their Own Hand.*

By section 16 of the Glasgow Police (Amendment) Act 1890 it is enacted that if drains in houses have been 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 of 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 expenses as damages from the owner."

The owner of certain tenements having failed to remedy defective drains in terms of an order under the above section, the police commissioners intervened, and executed certain operations to put the drainage into a proper and safe condition. In doing so they disregarded the existing drain, and laid down an entirely new drain in a different site and with a different outflow. They raised an action in the Sheriff Court to recover the expenses of the work from the owner.

In an appeal from the judgment of the Sheriff the Second Division *held* that the above section applied only to the case of structural repairs in existing drains, and did not authorise the construction of a new drain, and they accordingly assoilzied the owners.

On appeal the House of Lords, dealing with the question as one purely of fact, upon which the findings of the Court below were conclusive, *remitted* to the Second Division to pronounce a finding upon the question "whether the drainage works executed by the pursuers, or any, and if so, what part of the said works were requisite in the opinion of the pursuers, or in fact," and thereafter *affirmed* the judgment of the Second Division in so far as the work executed was found under the remit not to have been necessary in fact, and in so far as the investigations and inquiries made by the commissioners did not warrant the opinion that it was necessary.

This case is reported, *ante, ut supra.*

The pursuers appealed against the interlocutor of the Second Division, dated 26th June, and after counsel had been heard, the House of Lords, on 8th July, remitted the cause to the Second Division to pronounce a finding upon the following question:—"Whether the drainage works executed by the pursuers, or any, and if so, what part of the said works were requisite in the opinion of the pursuers, or in fact?"

On 1st December 1897 the Second Division pronounced the following interlocutor:—"The Lords having heard counsel and reconsidered the cause in conformity with the remit from the House of Lords, dated 8th July 1897, Find as matter of fact (1) that the work charged for in the account sued on, so far as it relates to the sink conductors, was, in the opinion of the pursuers and in fact necessary; (2) that *quoad ultra* the work charged for in said account was not in fact necessary; (3) that as regards the work last mentioned, (*a*) that it was not proved that the pursuers were of opinion

that it was necessary, and (*b*) that it is proved that the investigation and inquiries made by the pursuers did not warrant the opinion that said work was necessary, or afford reasonable ground for thinking that it was so."

On the case again coming up for hearing the appellants contended that these findings were inconsistent with those in the interlocutor of 26th June 1896 originally submitted to review; and (2) that they were not properly findings in fact, but mixed findings of fact and law, proceeding upon the interpretation of section 16 of the Act of 1890 adopted by the Court below, and which it was the object of this appeal to bring under review.

At delivering judgment—

LORD CHANCELLOR—In this case it appears to me that the findings of fact which are found and ascertained render it impossible to argue this question any longer except in respect of one small amount. It appears to me beyond all doubt that the commissioners were within their right in giving notice to repair, and that that notice ought to have been attended to, and the defects which undoubtedly did exist in some parts of the drainage ought to have been repaired, instead of which the occupier of this house thought fit to refuse to do anything. The result was that the commissioners had to intervene in the cause of the public health. They intervened in a sense which, as it appears to me, they had no authority for, because they did a great deal more than was necessary, more than those who were acting for them really thought was necessary; and in respect of their having done so much as that, they are not entitled to recover under the circumstances of this case. On the other hand, they have incurred expenses in doing that which was required, and was to my mind perfectly well included in the notice. Apart from the interpretation clause to which Mr Balfour has called our attention, I should have understood this notice as comprehending everything which is in the popular sense part of the drains of the house. It is new to be told that what are called here "sink conductors," that is to say, pipes by which the drainage is brought into the drains of the house, are not part of "the drainage system." In that respect it appears to me that it is clear that the pursuers were entitled to a decree for £16, 5s., which appears to be the undisputed amount which they have expended upon the various works they have executed for that purpose, and which ought to have been executed by the defender.

The only question which remains is the question of how the costs are to be dealt with here. On the one hand, the pursuers sued for £80, and they have been found entitled to only £16, 5s. On the other hand, the defender, instead of doing what he was bound to do, chose to do nothing, although he was aware that he was under an obligation to take proper precautions, and to make repairs that were requisite with regard to the public health. The result, as it appears to me, is that there ought to be a decree for £16, 5s. in favour of the pursuers, and that neither party is entitled to have any costs at all, either here or in the Court below. I move your Lordships accordingly.

LORD WATSON—I certainly concur in the judgment which has been moved by the Lord Chancellor, both as to the merits or demerits of the case, and as to costs.

LORD HERSCHELL—I am of the same opinion.

LORD SHAND—I also concur.

Ordered that "the said interlocutor of the Lords of Session in Scotland of the Second Division of the 26th of June 1896 complained of in the said appeal be, and the same is hereby varied by omitting the following words, viz., 'Therefore recal the interlocutor appealed against: Sustain the appeal: Assoilzie the defenders from the conclusions of the action: Find the defenders entitled to expenses in the Inferior Court and in this Court, and remit the accounts of said expenses when lodged to the Auditor to tax and report, and decern;' and in lieu thereof it is declared and adjudged that the appellants (pursuers) are entitled to a decree against the respondents (defenders) for payment of the sum of £16, 5s., and it is further ordered that subject to such variation the said interlocutor of the 26th of June 1896 be and the same is hereby affirmed; and it is further ordered that each party bear their own costs both here and in the Courts below; and it is also further ordered that the cause be and the same is hereby remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this variation, declaration, and judgment."

Counsel for the Appellant—Balfour, Q.C. — Lees. Agents — Martin & Leslie, for Campbell & Smith, S.S.C.

Counsel for the Respondents—Macmorran, Q.C.—Clyde. Agents—Wild & Wild, for Simpson & Marwick, W.S.

Monday, June 20.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Macnaghten, and Shand.)

NORTH BRITISH RAILWAY COMPANY *v.* PARK YARD COMPANY, LIMITED, AND OTHERS.

(*Ante* July 17, 1897, 34 S.L.R. 857, and 24 R. 1148.)

Servitude—Servitude of Passage for Goods—Tramway—Real Burden—Servient and Dominant Tenements.

An agreement entered into among (1) the proprietor of the unfeued and the superior of the feued portions of