proves that the debtor is not to be found in his own house; in short, that he cannot be found in Scotland, and that the messenger calls absconding. It is possible that it may be so, but it is not certain. I cannot say I am prepared to dismiss the action, or to ordain the pursuer to find caution for future expenses, and, failing his doing so, to dismiss on that ground alone. If I had been in the same position as the Lord Ordinary I should have done as he did.

But I am strengthened in that view by what has followed, namely, the tender of expenses made after the date of the reclaiming note. On the whole matter, I am for refusing the reclaiming note.

LORD DEAS—I think the Lord Ordinary is right. Two grounds are urged in support of this reclaiming note. One is, that when the case was put down for trial, it was postponed on condition of payment of expenses, and these have not been paid. I am not aware that it has ever been found that where there is an incidental decree for expenses, and payment of these expenses has not been made an express condition of going on with the case, their non-payment is a good ground for dismissing the action or ordering caution. The party may have a really good case, but he may be unable to pay these expenses in the meantime.

The other ground is the bankruptcy of the party, conjoined with the fact of his having gone to England. Now, it must be conceded that bankruptcy alone will not do. The principle of ordering caution in such cases is, that the party is divested of his estate. But even there the rule is not absolute. It is a question of discretion. In the case of *Samuel* the Court no doubt held, in respect of the party going to the sanctuary, that that was equivalent to being divested of his estate. But no other case went that length, and if the same case occurred again I should consider it very carefully, and look at the whole circumstances, going on no general rule derived from *Samuel*. The tendency of the law is not to widen the penalty of dismissing an action.

LORD ARDMILLAN and LORD KINLOCH concurred.

Agents for Pursuers—D. Crawford & J. Y. Guthrie, S.S.C.
Agent for Defender—James Webster, S.S.C.

Saturday, January, 23.

SECOND DIVISION.

TOD, PETITIONER.

General Police and Improvement (Scotland) Act 1862—Nobile officium—*Petition.* Circumstances in which the Court declined to exercise its *nobile officium* on the requisition of certain householders of a burgh, who desired to carry the General Police and Improvement Act into operation.

In the action of reduction and declarator at the instance of Anderson and Others against Widnell and Others, Commissioners under the Police Improvement (Scotland) Act for the burgh of Lasswade, the Second Division, on 6th Nov. last, pronounced the following interlocutor:—"The Lords having heard counsel on the reclaiming note for Henry Widnell and Others, recall the interlocutor reclaimed against: Repel the reasons of reduction in so far as regards the interlocutors and proceedings sought to be set aside from the commencement of the said proceedings in December 1862 up to and inclusive of the interlocutor of the Sheriff, of date the 30th May 1866, and assoilzies the defenders from the reasons of reduction in so far as regards said proceedings: Farther, assoilzies the defenders from the declaratory conclusions of the summons, in so far as regards the proceedings, and decern; *quoad ultra*, decern and declare in terms of the conclusions of the summons: Find the pursuers entitled to expenses, and remit to the auditor to tax and report, and modify the same to one-half of the taxed amount."

This was a petition presented by a number of householders of Lasswade, and it prayed the Court —"to grant warrant to and authorise and direct the Sheriff of the county of Mid-Lothian to call a meeting of the householders of the said burgh of Lasswade, as a populous place, to fix the number of commissioners to be elected by the householders to carry the said Act 25 and 26 Vict. c. 101, being 'The General Police and Improvement (Scotland) Act 1862,' into operation within the said burgh; and thereafter to convene a subsequent meeting of the householders in the said burgh for the election of commissioners for the purpose of executing the foresaid Act within the said burgh, such meetings to be presided over by the said Sheriff or any of his substitutes, and to be held after such notice, and to be subject to the like procedure as is provided for by the said Act in regard to the first meeting to be held with respect to the adoption of the said Act.

The respondents submitted that the petition ought to be refused upon three grounds—"*First*, That the Court has no jurisdiction to grant the prayer thereof; *Second*, That the petitioners are not entitled to represent either the other householders in, or the inhabitants of, the village or burgh of Lasswade to whom no notice of the petition has been given, or the applicants for the adoption of the Act, and have no title to present or insist on the present application; and *Third*, Even assuming that the Court has jurisdiction, and that the petitioners have a sufficient title to insist in the application, that your Lordships, in the exercise of your discretion, will deem it inexpedient, in the circumstances, to grant the authority craved."

GIFFORD and A. MONCRIEFF for petitioner.

CLARK and JOHNSTONE in answer.

At advising—

LORD JUSTICE-CLERK—We are asked in this case to appoint commissioners to act in Lasswade under the General Police Act. Two questions arise—(1) whether what is asked is within our competency? and (2) whether a case has been made out such as to render it proper for us to interfere? It is unnecessary to solve both, for if there is no propriety in our interfering, the question of jurisdiction is one more of interest than of use; but it is well to separate these two questions.

Our *nobile officium*, which we possess as a Court of Equity, and as succeeding to some extent to the powers of the Scotch Privy Council, entitles us to interfere in some cases. We have sometimes appointed managers to burghs when the charters have been lost, and the want of managers would have been injurious. In private matters, also, to a certain extent we have interfered, as in lapsed trusts, the appointment of curators to minors, or to take charge of lapsed property; but two things have been always necessary (1) a necessity; and (2) a

case of palpable and direct evil if we had refused to interfere.

Now, in this case, we have on the face of the petition no allegation of any special evil which we are called on to remedy. We have a narrative of facts, viz., an appointment by the Sheriff under the General Police Act of a place where that Act can be carried into execution, and then a meeting, and a resolution of that meeting, that the Act should be carried out; and the only evil which we can even imply from the statements in the petition is, that Lasswade may be without the benefit of this Act. That does not appear to me to be sufficient to authorise the exercise of our *nobile officium*. It certainly does not amount to a case of necessity.

The not improbable effect of our judgment, were we to grant this application, would indeed be to do violence to the spirit of the Act, which is—that the majority of the householders in any populous place shall determine whether the Act is to be adopted or not. Now, our order would not convoke the same body by any means that passed the resolution affirming the adoption of the Act, and we cannot say that the present electoral body would, like that in 1866, affirm the adoption of this Act at all. I do not say that parties are to be in every case excluded by delay from invoking the exercise of our *nobile officium*, for cases may arise where the public interest would clearly require that we should exercise it; but it is a circumstance of the greatest importance to be considered here, that we could not now place the determination of this question in the hands of the same parties as determined the adoption of this Act, and whose duty it was to have appointed the commissioners.

On the whole matter it seems to me we must refuse the prayer of this petition.

Lord Benholme—While I concur in the result, I cannot say that my opinion is rested on precisely the same grounds, viz., the length of time, the change of circumstances, and the possible injustice which may arise if we do not interfere.

One part of the inhabitants of Lasswade wish this Act of Parliament to be adopted, and the other do not. The majority at the meeting in 1866, who affirmed the adoption of the Act, make a blunder in not, at the same time, appointing commissioners, and they now come to us and wish us to exercise our *nobile officium* and correct that blunder. I do not think our *nobile officium* is intended to cover such a blunder as that. I think there must be something separate from blame to entitle us to interfere. If indeed the blunder had affected public interests we might have done so, but I do not think there is any public interest here, for the householders are divided as to the propriety of adopting this Act. Are we to assist one side merely because their opinion may happen to concur with our own? I do not think we should assist either party.

That is the ground on which I go. It is not so much the injustice done to one party as the inexpediency of assisting the other that weighs with me.

Lord Neaves concurred.

Agent for Petitioner—James Steuart, W.S.

Agents for Respondents—Millar, Allardice, & Robson, W.S.

Saturday, January 23.

CHISHOLM & OTHERS *v.* SCOTT-MONCRIEFF AND OTHERS (TRUSTEES OF TOWN OF DALKEITH).

Agreement — Assessment — Water Duty — Trustees. Circumstances in which *held* that statutory trustees appointed for the purpose of providing funds for supplying water in a certain town were entitled to make contracts with the inhabitants in respect of the *surplus* water.

This was an action of declarator, which sought to have it found and declared (1) that the defenders were not entitled to assess and levy from the inhabitants of Dalkeith any assessment in respect of water supplied by them to such inhabitants, or in respect of permission granted by them to such inhabitants to supply themselves with water by private pipes connected with the defenders' main pipes; or otherwise, that such assessment should be confined within certain limits; (2) That the inhabitants of Dalkeith were entitled, without payment of any water rate or duty, to supply their houses with water by means of private pipes furnished and laid at their own expense, and connected with the main pipes belonging to the defenders, subject always to reasonable control and regulation, and subject also to the condition of not interfering with the due supply of the public wells; or otherwise, that it was *ultra vires* of the defenders to grant to any inhabitant of the town of Dalkeith, either gratuitously or in consideration of the payment of any rate or duty, the privilege or right of supplying his house or premises with water by means of a private pipe.

It appeared from the statements of parties that the defenders were certain statutory trustees appointed under certain Acts of Parliament passed for the purpose of providing funds for paving, cleaning, and lighting the streets of Dalkeith, and supplying the town with water. The funds provided by the Acts for these purposes consisted of a duty of two pennies Scots upon every Scots pint of ale, porter, or beer brewed or vended in the town from the year 1805. However, the trustees have been in the habit of allowing private parties to supply themselves with water by means of private pipes at certain fixed charges, and latterly this charge has been 9d. in the pound on the rental. This was at first in addition to the beer tax above mentioned, which went to keep up the public supply; but in 1847 the power to levy the beer tax ceased, and since that year the whole revenue of the trustees has been derived from the charges made by them for private pipes.

The present pursuers maintained in this action that the power to levy the tax having ceased, the trustees had no power to raise revenue by any other means, and that they were entitled to a free supply from the public sources which had been already provided, so far as they did not interfere with the supply of the general public.

Solicitor-General and Clark for pursuers.

Lord Advocate and Fraser for defenders.

The Court dismissed the action, so far as regarded the first conclusion of the summons, and assoilzied the defenders from the second. Their Lordships held that what the trustees had done, and were doing, was not of the nature of levying a tax at all, but amounted only to making contracts with certain inhabitants for supplying them with the