duction of water at the end of one month from that date, it would be the duty of the petitioners to adopt legal proceedings under the statute, in order to compel them to do their duty.

On Monday, 13th April 1874, at a meeting of the Local Authority held at Galashiels, the following resolution was moved by Councillor M'Caig :—"That the town is in want of a supply of water for domestic and sanitary purposes; that a committee of seven be appointed with powers to investigate and report as to the best attainable source and cheapest mode of bringing it in, whether under the Public Health Act or under a bill, and to submit draft of same to another meeting of this Board." The motion was agreed to without discussion; but on Councillor M'Caig proposing to name a committee, the members of the Local Authority, one and all, declined to act. Since that date no steps whatever have been taken in the matter by the Local Authority.

Ample powers are conferred upon them for this purpose under the Act; and, in these circumstances, the Board of Supervision complained that the failure of the Local Authority to introduce a proper supply of water for domestic and sanitary purposes into Galashiels was a refusal or neglect to do what is required of them under the statute, and an obstruction in the execution of the Act.

The petitioners set forth at length the sections of the Acts bearing upon this matter, viz., § 3, § 73, § 89, § 94, § 97 of the Public Health Act, 30 and 31 Vict., cap. 101. and § 19 of the General Police and Improvement Act, 25 and 26 Vict., cap. 101.

With a view to enforcing this obligation, the Board of Supervision asked the Court to order such inquiry into the matter as their Lordships might think fit, and thereafter that the Local Authority should be ordained to execute such works as might be necessary to procure a sufficient and suitable supply of water for the burgh.

Counsel for the petitioners based their case upon the authority of "*The Board of Supervision* v. *Local Authority of Montrose*, 11 Macph. 170, 10 Scot. Law Rep. 98.

The Court followed the same course adopted in that case, and pronounced the following interlocutor :—

> "The Lords having heard counsel on the petition and complaint and answers, in respect the respondents judicially admit that it is their duty to take immediate steps for the introduction of an adequate supply of water to the burgh of Galashiels, Appoint the respondents to report to the Court on or before the first day of March next what steps they have taken for that purpose."

Counsel for the Petitioners—Dean of Faculty (Clark), Q.C., and Moncreiff. Agents—Murray & Falconer, W.S.

Counsel for Respondents—Maclean. Agents—Melville & Lindesay, W.S.

Saturday, December 5.

SECOND DIVISION.

[Lord Shand, Ordinary.

MRS HUTCHISON AND HUSBAND IN M.P. MISS MARY HILL AND OTHERS (TAIT'S TRUSTEES).

Settlement—Beneficiary—Powers of Settler—Agreement—Essential Condition.

Certain beneficiaries under a settlement maintained that its terms were *ultra vires* of the settler, and in violation of the terms of her marriage-contract, whereas the trustees under the settlement maintained that the action was excluded by an express agreement to accept of a fixed sum. *Held* that the agreement was proved by the correspondence, and that it was not an essential condition thereof that the trustees should admit that the other parties were making thereby a considerable concession.

This case came up by reclaiming note against an interlocutor pronounced by the Lord Ordinary (SHAND), in a multiplepoinding brought by the trustees of the late Mrs Margaret Hill or Tait, widow of the Rev. Adam Duncan Tait, minister of Kirkliston, to determine the question whether the late Mrs Tait's deed of settlement, in so far as regarded the provisions therein made in favour of her daughter Mrs Hutchison, wife of Mr Robert Hutchison, of Carlowrie, Linlithgowshire, was *ultra vires*, and in violation of the terms of the contract of marriage between Mrs Tait and her husband, Mrs Hutchison's father.

The trustees pleaded—"(1) The action is incompetent, in respect that the objectors have been divested of the estate sought to be brought *in medio* by the *bona fide* execution of the trust purposes of Mrs Tait's settlement. (2) The action is excluded by the agreement constituted by the letters of 29th October and 4th November 1873; and *separatim*, by the actings which have followed thereupon.

And the real raisers Mr and Mrs Hutchison put the following plea :—There having been no private settlement of the questions now submitted for judicial determination, the present action was competently brought, and the objections thereto ought to be repelled."

The Lord Ordinary (SHAND) pronounced the following interlocutor and note :—

"*Edinburgh, 14th July* 1874.—The Lord Ordinary having considered the cause—Finds that, by the letter dated 29th October 1873 from the agents of Mr and Mrs Hutchison, the real raisers, to the agents of the objectors, the Trustees of the late Mrs Tait, and the answer thereto of 4th November thereafter, and *separatim*, by these letters and the correspondence which followed, down to and including the letter of the objectors' agents of 17th December 1873, an agreement was entered into between the real raisers and the objectors, by which the former agreed, on the one hand, that they should not challenge the deed of settlement of the late Mrs Margaret Hill or Tait as being *ultra vires* and in violation of the terms of the contract of marriage between her and the Reverend Adam Duncan Tait; and, on the other hand, the objectors agreed that the sum of £3000, provided by said deed of settlement to Mrs Hutchison,

should be placed under the trust constituted by her marriage-contract with her husband: Finds that the present action is excluded by this agreement; therefore sustains the objections, dismisses the action, and decerns: Finds the objectors entitled to expenses, &c.

"*Note.*—The object of the present action, as stated in article 7 of the condescendence, is to obtain a decision on the question, Whether the late Mrs Tait's deed of settlement, in so far as regards the provisions thereby made in favour of her daughter Mrs Hutchison, was *ultra vires*, and in violation of the terms of the contract of marriage between Mrs Tait and her husband, Mrs Hutchison's father? If Mr and Mrs Hutchison have agreed, as the objectors allege they have agreed, not to raise this question, it follows that the action must be dismissed.

"The parties concurred in stating that the correspondence between the agents, which is produced and referred to by both parties, took place with the full authority of their respective clients.

"It is maintained by Mr and Mrs Hutchison that there was no concluded agreement between them and the objectors; because it was stipulated by them that the objectors should, as part of the proposed arrangement, admit that Mrs Hutchison was making a concession in favour of the other members of the family, while this admission has been refused. After consideration of the correspondence, I am unable to adopt this view. It is very clear that Mr and Mrs Hutchison were and are of opinion that in accepting £3000 from Mrs Tait's estate under any conditions, they consent to take a smaller amount than Mrs Hutchison was entitled to have; and the grounds of this view were very fully stated in the correspondence; but it appears to me that an agreement between the parties was concluded without its having been made a condition that Mrs Tait's trustees, who maintained an opposite view, should admit that Mrs Hutchison was in this respect in the right.

"(1) In the first place, the letter of 29th November 1873, making the proposal that the £3000 payable to Mrs Hutchison under her mother's deed of settlement should be placed under her own marriage-contract trust, expresses the hope that the trustees will see their way to do so, without asking any admission to the effect that the proposed arrangement is a concession to the other members of the family. The letter plainly states that Mrs Hutchison conceives she had right to an equal share of her mother's estate, and that under the settlement she had not got this; but it is explained, that while she desires to express her disappointment at the unequal division, she will not seek to reduce her mother's settlement, 'on condition that the £3000, appointed by Mrs Tait's 'settlement to be set aside for behoof of Mrs Hutchison and her children, shall be paid over to the trustees under her marriage contract.' No other qualification is made; and if the proposal so made was acceded to without any new condition being introduced, the arrangement was concluded. The letter of 4th November, in answer, appears to me to be an unconditional acceptance of Mrs Hutchison's terms. It is true the acceptance is accompanied by an intimation that the trustees did not admit Mr and Mrs Hutchison's view of their legal rights, and by a long statement, the purpose of which apparently was to satisfy Mrs Hutchison, if possible, that she was not right in thinking she was making a concession; but the letter expressly states, in that part of it which professes directly to reply to the proposal made, that the trustees 'will agree . . . . that the sum to be paid to Mrs Hutchison be placed under the marriage trust.' The expression 'will agree' does not appear to me to mean anything different from a present assent to Mrs Hutchison's proposal, or to suggest that any farther approval by Mrs Hutchison is required; but is explained by what follows, as to calling a meeting of the marriage-contract trustees, who are not said to make any difficulty about including the £3000 provision under the trust administered by them.

"(2) If, however, there were any sufficient ground for doubting whether an arrangement was concluded by the letter of 4th November, I am of opinion that the subsequent correspondence, ending with the letter of 17th December, constituted a binding agreement. It is true that in Mr Hutchison's letter of 26th November, sent as an enclosure in Messrs Melville & Lindesay's letter of 29th November, there are indications that he requires the trustees to adopt the views of Mrs Hutchison and himself; but it is not clear, even from his letter, that this observation is made except for the purpose of showing that unless this be done there would be an interruption of the 'former amicable relationships of the family;' and the view that his true purpose in writing was to remove a feeling of estrangement between the different members of the family, rather than to import a new condition into the agreement of the parties, acquires considerable weight from the fact that in his agents' letter of 29th November there is no statement that any agreement between the parties must now be subject to the condition that the trustees should admit the correctness of his and Mrs Hutchison's views. And even if Mr Hutchison's letter is to be read as admitting of that construction, or being to that effect, the letters of Messrs Cook of 3d December, the answer of 6th December, and Messrs Cook's letter of the same day, which appears to be a reply, but especially the letter of Messrs Melville & Lindesay of 6th December, seem sufficient to show that it was not stipulated so as to be an essential condition of the agreement that the trustees should admit that Mrs Hutchison was making a considerable concession in favour of the other members of the family.

"The minute of meeting, an excerpt from which was sent by the objectors' agents with their letter of 17th December, was founded on as showing that the proposed arrangement was not agreed to. If I could hold that matters were still open at that date, and that the proposal of Mr and Mrs Hutchison was made for acceptance only subject to the condition that the trustees should admit the correctness of their views, then I think it is clear that such an admission was refused. But I am of opinion that the trustees had closed with the proposal, as they were entitled to do, without making such an admission; and while the reiteration of the views of the Messrs Tait (previously so fully stated) in the excerpt from the minute appears to have been at once unnecessary and rather calculated to create a feeling of irritation on the part of Mr and Mrs Hutchison, I do not think it affected the concluded arrangement between the parties."

The Court adhered to this interlocutor.

Counsel for the Reclaimers—Solicitor-General (Watson), Q.C., and Trayner. Agents—Melville & Lindesay, W.S.

Counsel for the Respondents—Dean of Faculty (Clark), Q.C., and Kinnear. Agents—W. & J. Cook, W.S.

Friday, November 20.

FIRST DIVISION.

[Sheriff of Dumfriesshire.

GRAHAM *v.* BORTHWICK & CLAPPERTON.

Pauper—Settlement—Proof.

The Inspector of Poor in a parish brought an action against two other parishes for payment of the expense of maintaining a pauper, the grounds of action being that the pauper had a birth settlement in one or other of the said parishes. One of the defenders averred a residential settlement in the pursuer's parish, the other's averment was "not admitted." *Held* that the first defender should have been allowed a proof, and the pursuer a conjunct probation.

This was an appeal from the Sheriff Court of Dumfriesshire by the inspector of poor of the parish of Hoddam in an action at his instance against the inspectors of Middlebie and Annan, for recovery of £65, 17s. 8d., being the expense of maintaining a pauper from October 1868 to May 1873. The Sheriff-Substitute found for the defenders, and the Sheriff adhered.

The pursuer appealed.

At advising—

Lord President—The pursuer of this action is the inspector of poor of the parish of Hoddam, and he has called two defenders, the inspectors of poor of the parishes of Middlebie and Annan. The object of the action is to obtain relief for payments made for a pauper named Deans, and the ground of action was, as against Middlebie, that the pauper was born there; the same ground being stated alternatively against Annan. The pursuer did not aver that the pauper had a residential settlement in either of these parishes. The parish of Middlebie alleged that the pauper had a residential settlement in Hoddam, while the parish of Annan contents itself with a simple denial. The case came in that shape before the Sheriff-Substitute, and he pronounced the interlocutor to which the Sheriff adhered, and which is now before us. In this state of matters, the obvious course is to find out whether the pauper had or had not a residential settlement in Hoddam, and the way to do so was to allow Middlebie a proof and to Hoddam a conjunct probation. The Sheriff-Substitute, however, did not take that very obvious course. His interlocutor is as follows:—

"*Dumfries*, 14*th October* 1873.—Having considered the closed record, with the productions and whole process, Finds that the pursuer avers that the pauper was born in the parish of Middlebie, or, if not, in the parish of Annan; that the defender Middlebie avers that at the time when the pauper became chargeable he had a residential settlement in the parish of Hoddam; that the pursuer, although not admitting it, does not deny this statement; that by letter No. 10/2 of process, the pursuer, through his agent, admitted to the defender Middlebie that 'Deans, there is no doubt, had such a settlement, but he lost it by absence in Hoddam for more than four years:' Finds, in these circumstances, (1) that the pursuer having admitted that the pauper once had a residential settlement in his parish, the burden of proving that it was subsequently lost lies on him; and (2) that this matter falls to be decided before the question of the pauper's birth settlement requires to be entered upon: Therefore allows to the pursuer a proof as to the pauper having lost his residential settlement in the parish of Hoddam, and also of his averments as to the place of the pauper's birth, and to both defenders a conjunct probation; and appoints the pursuer to move for a diet of proof within seven days.

"*Note.*—The general rule is that the burden of proving a residential settlement elsewhere would lie on the birth parish, or the parish averred to be such, averring the acquisition of such a settlement, but the Sheriff-Substitute thinks that there are sufficient grounds in this case for shifting the burden of proof on to the pursuer.

"His letter clearly admits that the pauper once had a settlement in Hoddam, although a less certain sound is given out in the record. The truth of the admission is not repudiated distinctly in the record, and when the defender Middlebie (probably relying on the admission) avers the settlement in Hoddam, it is not denied that such was once acquired.

"To save the possible necessity for a second proof after a judgment on the question of residential settlement, the Sheriff-Substitute has allowed proof on both parts of the case together, but it will be in the pursuer's discretion whether or not he will require proof on the question of birth."

Now this seems to me a very strange course to follow. In the first place, as regards the averments on record, it is not at all improper on the part of Hoddam to meet the statement as to residence simply by non-admission. In a question not within the inspector's own personal knowledge he is quite entitled to say "not admitted." But the strangest part of all is the Sheriff-Substitute's importing into his interlocutor an admission said to be contained in a letter. An admission in a letter may be explained away, or this letter may not have been written by the instructions of the pursuer. In short, nothing can be more irregular than that a judge should take a letter in process as evidence before it is proved. I am not sure that Hoddam would have to prove the loss of a residential settlement by the pauper even if they admitted it originally, but anyhow, the first thing to be proved is that such a settlement was acquired. Nothing can put this case into shape but recalling the Sheriff-Substitute's interlocutor and all that followed on it. No doubt that may cause a good deal of difficulty, but the parties themselves may obviate that to a great extent by allowing the proof, so far as led, to form part of the proof in the action; it certainly is not a concluded proof. I hope that the counsel may be able to make some such arrangement.

The other Judges concurred.

The Court pronounced the following interlocutor:—