man has a right to call his debtor into Court and ask decree against him, and if he does so and follows out in good faith the ordinary forms of process he is not liable in damages, though he may be for costs, because he obtains a mistaken judgment in his favour. What is complained of here is that the defender obtained decree against the pursuer upon a mistaken ground. The defender is not liable in damages for that mistake any more than if he had obtained a mistaken decision upon the merits. The defender, no doubt, moved for decree in absence, and he was only entitled to do so if he proceeded on a formal and regular execution of citation showing that the defender had been called. Now, in making the motion, the defender did proceed on a regular return of execution from the sheriff officer, and I do not think that there was any duty on him to inquire further whether the sheriff officer had performed his duty rightly or not. The sheriff officer was not an agent or servant of his own selection, but the officer of the law appointed for the purpose of serving writs which the party interested can not effectually serve for himself. I think that in the circumstances he was warranted in proceeding to take a decree in absence.

I say this on the assumption that in doing so the defender acted in good faith. If he did not—if, knowing his summons had not been properly served, he nevertheless proceeded to ask for decree in absence—then that would be a totally different case. But if the pursuer in this action wished to have an issue on such a case as I have supposed, it was essential to aver malice on record. But not only has he abstained from averring malice, but he makes averments which exclude the possibility of malice, as he sets out the return of execution on which the defender acted, and does not suggest that he had any reason to distrust, or did in fact distrust, the truth and accuracy of that return, and that seems to imply that the defender's action was taken in good faith.

I therefore agree with your Lordships that there is no issuable matter in the case.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer and Respondent—Crabb Watt, K.C. — A. M. Anderson. Agents—Clark & Macdonald, S.S.C.

Counsel for Defender and Reclaimer—Orr, K.C.—J. Duncan Millar. Agents—Inglis, Orr, & Bruce, W.S.

Friday, November 17.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

BROWN *v.* MAGISTRATES OF KIRKCUDBRIGHT.

Public Health — Burgh — Formation of Sewer—Power Conferred by Two Statutes with Different Procedure—Procedure—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. c.* 38), *sec.* 103—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 219.

The Public Health (Scotland) Act 1897 confers powers on local authorities to construct sewers. The Burgh Police (Scotland) Act 1892 confers cognate powers. Objection having been taken to the proceedings of the local authority in a burgh with regard to the formation of a sewer in respect that it had not complied with the requirements of the latter statute. *Held* that the powers conferred by the Public Health Act were independent of those conferred by the Burgh Police Act, and consequently that it was sufficient for the local authority to have complied with the requirements of the former statute.

Opinion (*per* Lord M'Laren) that the safe course for the local authority was to follow the more recent statute.

Public Health—Burgh—Sewer—Construction of Sewer through Private Property—Procedure—Notice to Owner—Report of Surveyor—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 103 *and* 109.

The Public Health (Scotland) Act 1897, sec. 103, enacts—"The local authority shall have power to construct within their district . . . such sewers as they may think necessary for keeping their district properly cleansed and drained . . . and may carry such sewers . . . after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ." Section 109 provides that in the event of the owner of premises refusing access "the local authority may, after written notice to such owner, . . . apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant. . . ."

The owners of a close, under which a local authority proposed to construct a sewer, having brought a suspension on the ground that the requirements of the Act had not been complied with, *held* that written notice given 16 days before application to the Sheriff for warrant to enter, together with a report by the burgh surveyor, a retired sea captain, in which he stated that for the scheme of drainage proposed, which he considered best for the district, it was necessary to carry the sewer through the close in question, was sufficient compliance with the requirements of the Act.

Public Health—Burgh—Sheriff—Construction of Sewer through Private Ground—Discretion of Local Authority—Power of Sheriff to Order Inquiry if Course of Sewer be Necessary—Public Health (Scotland) Act 1897, *sec.* 109.

The Public Health (Scotland) Act 1897, sec, 103, confers power on a local authority to carry sewers, "after reasonable notice in writing (if upon the re-

port of a surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ."

Sec. 109 enacts—"In case it shall become necessary to enter . . . any lands or premises for the purpose of making plans . . . or other purposes ancillary to the powers herein given as to sewers, . . . and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority . . . to enter and do all or any of the works . . . at all reasonable times in the daytime."

Opinion (*per* Lord M'Laren) that in an application for authority to enter premises for the purpose of forming a sewer, the sheriff in a suitable case has power to allow a proof or to call for a report from an expert as to the proposed course of the sewer being necessary.

Opinion (*per* Lord Adam) that no inquiry as to that matter is competent, as all discretion or judgment as to the proper course of the sewer is left to the local authority.

Opinion of Lord President *reserved.*

The Public Health (Scotland) Act 1897 (60 and 61 Vict. cap. 38), enacts, section 103—"The local authority shall have power to construct within their district, and also when necessary for the purpose of outfall or distribution, or disposal or treatment of sewage, without their district, such sewers as they may think necessary for keeping their district properly cleansed and drained, and may carry such sewers through, across, or under any public or other road, or any street or place, or under any cellar or vault which may be under the foot-pavement or carriageway of any street or road, and after reasonable notice in writing—if upon the report of a surveyor it should appear to be necessary—into, through, or under any lands whatsoever. . . "

Section 109—"In case it shall become necessary to enter, examine, or lay open any lands or premises for the purpose of making plans, surveying, measuring, taking levels, examining works, ascertaining the course of sewers or drains, making or repairing, altering or enlarging sewers or drains, or other purposes ancillary to the powers herein given as to sewers and drains, and the owner or occupier of premises refuses or withholds access and leave to perform the said operations, the local authority may, after written notice to such owner and occupier, apply to the sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority, their officers and others thereby authorised, to enter and do all or any of the works or operations foresaid at all reasonable times in the daytime."

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), enacts, section 219—"The commissioners shall from time to time, subject to the restrictions herein contained as to notice to be given and the plans and estimates to be prepared, cause to be made, under the streets or elsewhere, such mains and other sewers as shall be necessary for the effectual draining of the burgh. . . ."

Section 220—"Twenty-eight days at the least before making any new sewer where none previously existed, or altering the course or level of or abandoning or stopping any sewer, the commissioners shall give notice of their intention, by posting a notice in a conspicuous place at each end of every such street through or in which such work is to be undertaken, which notice shall set forth the names of the streets and places through or near which it is intended that the new sewer shall pass, or the existing sewer be altered or stopped up, and also the places at the beginning and the end thereof, and shall refer to the plans of such intended work, and shall specify a place where such plans may be seen, and a time when and place where all persons interested in such intended work may be heard thereupon."

Section 221—"The commissioners shall meet at the time and place mentioned in the said notice, to consider, in the presence of the surveyor of the commissioners, any objections made against such intended work, and all persons interested therein, or likely to be aggrieved thereby, shall be entitled to be heard before the commissioners at such meeting, and thereupon the commissioners may, at their discretion, abandon or make such alterations in the said intended work as they judge fit, and no such work to which any objection is made at such meeting shall be executed unless the burgh surveyor, after the person making such objection, or his agent, has been heard, shall certify that the work ought to be executed, nor shall such work be begun until the end of seven days after an order for the execution thereof has been duly made by the commissioners, and entered in their books."

This was a note of suspension and interdict at the instance of Mrs Janet Brown, widow, 22 Leven Street, Pollokshields, and Elizabeth Jane Stark, 57 St Mary Street, Kirkcudbright, against the Provost, Magistrates, and Councillors of the burgh of Kirkcudbright, as Local Authority thereof, under the Public Health (Scotland) Act 1897, and John Gibson, town clerk of Kirkcudbright, as clerk to said Local Authority.

The complainers sought suspension of certain proceedings complained of, and also craved the Court to interdict the respondents, or those acting by their authority, from entering upon and interfering in any way with certain lands belonging to them in the burgh of Kirkcudbright, and from constructing a sewer therein; and further, to interdict the respondents or their servants from acting upon or carrying into execution (first) certain resolutions of the Town Council of Kirkcudbright with regard to the construction of the said sewer; (second) the

intention expressed in certain notices following upon these resolutions and served upon the complainers; and (third) the warrant granted by the Sheriff-Substitute authorising the respondents to construct the sewer.

In the statement of facts annexed to the note the complainers stated that they were respectively the proprietors of adjoining premises situated at 53 and 55 St Mary Street, Kircudbright; that in September 1904, the respondents instructed the Burgh Surveyor of Kirkcudbright, a retired sea captain, to prepare a plan with a report showing how the area in which the complainers' property was situated could be drained by means of sewers in the public streets; and that the said report referred to a sewer which could be laid through the complainers' property, but contained no recommendation thereanent. They averred—"The surveyor's report did not bear that it was either necessary or advisable to lay the sewer through the complainers' property, and no report to that effect was ever presented to the respondents by the said surveyor or any skilled adviser. At said meeting" (held on January 25) "the respondents decided to abandon the proposal to lay the main sewer in the public streets, and passed a resolution to lay it and a tributary sewer through the premises of the complainers. They instructed the surveyor to prepare a plan giving effect to their resolution and also a specification of work. Said plan, . . . and relative specification, were presented to the meeting of the respondents, held on 22nd February 1905, and approved, and the respondents decided to proceed with the work in accordance with their said resolution of 25th January 1905. Following on said approval, John Gibson, town clerk, on behalf of the respondents, served notices on the complainers, dated 6th March 1905, and intimating that the respondents, in terms of section 103 of the Public Health (Scotland) Act 1897, proposed to lay down a sewer from Millburn Street to St Mary Street, which would run through part of the complainers' property. . . . Said resolutions did not proceed upon the report of a surveyor, as required by section 103 of the Public Health Act. . . . Denied that the said Burgh Surveyor considered what was the best course in which to lay the new sewer, or decided in favour of the course complained of, or presented a report as stated in answer hereto. The respondents made the resolutions complained of without any such report, and the said surveyor merely carried out their instructions in the whole matter."

In answer the respondents stated—"Before preparing his report the Burgh Surveyor took levels of various routes for the new sewer, and after submitting it to the respondents he explained fully to a committee of their number upon the ground on January 24, 1905, the reasons which had led him to report as he had done, and his reasons for adopting the route now objected to by the complainers. Thereafter, at a meeting held upon 22nd February, the respondents again considered the question, and resolved to proceed with the new sewer along the line as laid down upon the plan by the surveyor, being of opinion, after full consideration, that that line would be the best in the interests of the public, least likely to cause inconvenience to private individuals, and necessary for keeping the district properly drained. Before reaching this conclusion the respondents considered an alternative scheme for draining the houses towards a main sewer to be laid in the street, but were satisfied that this would be impracticable and undesirable. . . ."

The complainers further stated that they had objected to the operations proposed, but thereafter on 22nd March 1905 the respondents had presented a petition to the Sheriff-Substitute at Kirkcudbright craving power to enter the complainers' premises and construct the sewer without having sent the reasonable written notice required by section 109 of the Public Health (Scotland) Act 1897; that the respondents had failed to conform to the procedure laid down in sections 220 and 221 of the Burgh Police (Scotland) Act 1892, with the result that the complainers had had no opportunity of stating and proving their objections to the proposed operations; that after the complainers' answers to the petition had been lodged, the respondents had lodged in process a report by the Burgh Surveyor relating to the said operations, which report was undated, and was believed and averred to have been obtained by the respondents after their meeting on 22nd February 1905.

The complainers further averred—"(Stat. 9) . . . The Burgh Surveyor of Kirkcudbright is not a trained and qualified surveyor in the sense of the statute. Moreover, his report does not bear that the sewage scheme of the respondents, including that part affecting the complainers' property, is necessary. This question was never submitted to him by the respondents or considered by him, and he was never asked by the respondents to advise them in regard to the drainage of the area in question or to recommend any scheme to them. Averred that it is usual and necessary for a local authority which wishes to exercise the powers conferred upon them by section 103 of the Public Health Act 1897, to get the report of a duly qualified surveyor to the effect that the proposed works are necessary. . . . (Stat. 10) . . . The said scheme of the respondents is neither necessary nor advisable. The existing track of the sewer is the one best fitted for the drainage of the district and would cause the least inconvenience and damage to private individuals. Moreover, the proposed track along the public streets is superior to the scheme now supported. The operations on the complainers' property are very prejudicial to their rights and interests. . . ." [The complainers specified in detail the injuries which they alleged, and objected that the respondents had failed to comply with the provisions of sections 145 of the Public Health (Scotland) Act 1897, and 57 of the Burgh Police

(Scotland) Act 1903, in regard to the acquisition of premises otherwise than by agreement.]

In answer the respondents averred that on 6th March 1905 notice was duly served on the complainers; that the respondents had all along proceeded under the powers conferred upon them by the Public Health (Scotland) Act 1897; that they were not bound to conform to the regulations referred to by the complainers; and that the complainers were entitled to full compensation for any damage which they might have sustained.

In regard to the procedure before the Sheriff-Substitute when the warrant was granted, and what had followed on the warrant being granted, the complainers averred as follows—"(Stat. 11) . . . The Sheriff-Substitute refused to reject the said surveyor's report or to allow the complainers a proof in regard to the said scheme and the unnecessary invasion of the complainer's rights, although required to hear evidence by the said statute [the Public Health Act], and decided the petition adversely to the complainers on the one-sided report of the respondents' surveyor, which the complainers never had an opportunity of answering or rebutting by evidence, as they were by law entitled to do. Reference is made to sections 154 and 155 of said Public Health (Scotland) Act 1897. (Stat. 12) On 3rd April 1905 the Sheriff-Substitute at Kirkcudbright granted warrant in terms of the respondents' petition. . . . Since said date the respondents have begun their operations in connection with the construction of the said sewer. By said operations the complainers' property will be irreparably and unnecessarily damaged. Denied that the operations in connection with said sewer are completed. . . . The respondents have made no offer of compensation for the injury proposed to be done to the complainers' property; nor have they offered to buy wayleave or property, as they are bound to do. The present note of suspension and interdict has thus been rendered necessary. Reference is made to section 219 of the Burgh Police (Scotland) Act 1892, and section 164 of the Public Health (Scotland) Act 1897."

In answer the respondents stated—"Explained that under section 157 of the said Act of 1897 the said interlocutor is final, that the sewer has been completed without injuring the fabric of the complainers' properties, and that the present note is incompetent. Delay in putting in the new sewer would have been prejudicial to the public health, and the respondents completed the work so as to permit of the new drainage system being in working order before the summer commenced."

The report by the Burgh Surveyor was in the following terms:—"I beg to report that I now produce a plan showing depths and levels for a new main and tributary sewer to Saint Mary Street through between Miss Gourlay's and Miss Stark's close or properties, and, as far as my experience goes, it seems the best and most practical way of taking it, with the tributary sewer, through the lane connecting the main at a certain point, to take all private drains within the area. To carry out this plan it is necessary that the sewer be carried through the above close. This way is a great saving of expense, as it leaves most of the existing private drains to remain the same. All the work must be carried out in accordance with the Burgh Police (Scotland) Act 1892, or any other Act in force.—Yours truly,

"R. E. M'CLEARE, *Burgh Surveyor.*"

The notice served on Mrs Brown was as follows:— "*Town Clerk's Office,*
"*Kirkcudbright*, 6*th March* 1905.

"Madam,—I am directed to intimate that the Provost, Magistrates, and Councillors of this burgh, in terms of section 103 of the Public Health (Scotland) Act 1897, propose to lay down a sewer from Millburn Street to St Mary Street, which will run through part of your property in St Mary Street occupied by Miss Gourlay. The plan and specification of the sewer can be seen at my office. The work will be proceeded with on the expiry of ten days from this date. The Town Council will make good any damage done to your property through their operations.

"I will be glad to hear that you have no objections to this work being carried out.—Yours truly, JOHN GIBSON, *Town Clerk.*"

The interlocutor granting the warrant was in the following terms:—"*Kirkcudbright, 3rd April* 1905.—The Sheriff-Substitute . . . finds that the answers lodged by the defenders do not contain any relevant defence to the petition, therefore grants warrant in terms of the prayer thereof, &c. LAWRENCE T. NAPIER."

The complainers pleaded, *inter alia*—"(1) The said proceedings ought to be suspended, in respect that (*a*) the said statutory enactments were not observed; (*b*) the said warrant of the Sheriff-Substitute proceeded on said *ex parte* report, but upon no evidence, as required by the said statute; (*c*) the prayer of said petition and warrant following thereon are not sufficiently specific. . . . (4) No report of a surveyor having been obtained in accordance with the requirements of the Public Health (Scotland) Act 1897, sec. 103, the complainers are entitled to interdict, with expenses. (5) The respondents having failed to comply with the provisions of the Burgh Police (Scotland) Act 1892, secs. 220 and 221, *et separatim*, of the Public Health (Scotland) Act 1897, sec. 109, interdict should be pronounced in terms of the prayer."

The respondents pleaded—"(2) The complainers' averments being irrelevant, the note should be refused. (3) The note should be refused in respect (*a*) that the whole proceedings have been regular and proper, and (*b*) that under section 157 of the Public Health Act 1897 the warrant of the Sheriff-Substitute is not subject to review."

On 8th April 1905 the Lord Ordinary officiating on the Bills (KINCAIRNEY) granted interim interdict. Thereafter on 25th April 1905 the Lord Ordinary on the Bills (STORMONTH DARLING) passed the note and recalled the interim interdict.

On 25th October 1905 the Lord Ordinary

(SALVESEN) pronounced this interlocutor:—"Before answer, allows to the parties a proof of their respective averments on the closed record, and to the complainers a conjunct probation, to proceed on a day to be afterwards fixed, and reserves the question of expenses."

Opinion.—"The complainers in this case are owners of premises situated at Nos. 53, 55, and 57 St Mary Street, Kirkcudbright, and they seek to interdict the respondents from acting on, or carrying into execution certain resolutions of the Town Council of Kirkcudbright with reference to the construction of a sewer through their property, and a warrant granted by the Sheriff-Substitute of Kirkcudbright, dated 3rd April 1905, authorising the respondents to construct a sewer through their land. The interim interdict originally granted was recalled on 25th April 1905 after a hearing, and it appears that the sewer has now been constructed. This, however, does not relieve me from deciding the questions which have been raised in the present suspension.

"The respondents asked that the note should be refused as incompetent, and they also argued that the complainers' averments were irrelevant. I heard a full and interesting debate, which has satisfied me in the end that it would not be desirable to decide this case without inquiry; and accordingly I refrain from expressing any opinion as to the points on the construction of the statute, or as to whether the procedure prescribed by section 220 of the Burgh Police Act applies where advantage is taken of the powers conferred by section 103 of the Public Health (Scotland) Act 1897. It is sufficient to say at present that the power to carry sewers through private property, which is conferred by section 103, is subject to two conditions—(1) that reasonable notice in writing shall have been given, and (2) that it shall appear, on the report of a surveyor, to be necessary to carry the sewers through such property. The complainers offer to prove that no such invasion of their property is in fact necessary, and that no surveyor has so reported. There is a good deal of argument in the pleadings as to the construction to be put on a report which has been produced by the respondents, but the report is undated, and I think it would be premature to pronounce any opinion as to its true construction until its history has been ascertained. It follows that if there is a relevant averment of a failure to comply with the conditions prescribed by the statute, as I think there is, the Sheriff-Substitute's warrant, although declared to be final and not subject to review, is not a bar to the present suspension. I shall accordingly allow a proof before answer."

The respondents reclaimed, and argued—Proof was unnecessary. The complainers' statements were irrelevant. *Esto* that the procedure set forth in the Burgh Police Act had not been followed, the local authority was entitled to act on the Public Health Act alone. A local authority had ample powers under the Public Health Act 1897 and the Burgh Sewerage and Drainage Act 1901. The terms of section 103 of the Act of 1897 were very wide. "Lands" included "buildings" (section 3). There was no appeal except in certain specified cases (section 157), of which this was not one. The Act provided for compensation (section 164), so that the complainers were not without a remedy. Under section 103 a local authority had power to make sewers where it pleased, and section 109 provided for the Sheriff's sanction being obtained. The Burgh Sewerage and Drainage Act 1901 extended the powers given by the Act of 1897. The Act of 1897 was meant to be drastic, otherwise the exemptions allowed by section 107 (railways, canals, &c.) would have been unnecessary. The Burgh Surveyor had duly reported, and the report was considered before the warrant was granted. That being so, the Court would not interfere—*Lewis* v. *Weston-Super-Mare Local Board*, August 8, 1888, L.R., 40 C.D. 55. It would have been impossible to proceed both under the Act of 1892 and the Act of 1897. These Acts were in many respects antagonistic, and did not form one code, as was maintained by the complainers. Reasonable notice was all that was required under the Act of 1897, and that had been given. There was nothing in the Act to declare that the report must be got before the local authority resolved to make a sewer. Appeal by way of suspension was incompetent without averments of a departure from the statutory forms. There was no appeal on the merits, for the decision of the Sheriff was final.

Argued for the complainers—The regulations laid down for the complainers' protection had not been complied with. The provisions of the Act of 1897 were not inconsistent with those of the Act of 1892, and therefore they fell to be read together. Section 5 of the Burgh Sewerage and Drainage Act of 1901 modified the provisions of the Act of 1897 so as to meet those of the Act of 1892—that showed that these statutes were to be read together. They were really one code, the essential provisions of which had not been followed. Further, the provisions of the Act of 1897 itself had not been duly complied with, *e.g.*, those of section 103. A report from a surveyor was essential before any resolution to make a sewer through private property could be effectual. No such report had been obtained here. What was acted upon here was not a report in the sense of the Act. What the Magistrates did was first to pass a resolution to make a sewer and then to get a report from the surveyor as to how it should be made. That was not in accordance with the procedure laid down in the Act. The case of *Lewis* v. *Weston-Super-Mare Local Board*, *cit. supra*, was different, the subject in question there being vacant ground. There was no "necessity" in the sense of the Act. The question of "necessity" was considered in *Hayward* v. *Lowndes*, February 16, 1859, 28 L.J., Ch. 400. The surveyor here was not a qualified surveyor in the sense of the Public Health Act. The notice required by section 109 had not been given. It

was not enough merely to give notice of the resolution to make the sewer, notice of intention to take proceedings was also necessary—*Campbell* v. *Leith Police Commissioners*, June 21, 1866, 4 Macph. 853, 2 S.L.R. 150, *rev.* February 28, 1870, 8 Macph. (H.L.) 31, 7 S.L.R. 441; *Taylor* v. *Corporation of Oldham* (1876), L.R., 4 C.D. 395. Section 157 was not final and did not exclude appeal—*Phillips* v. *Dunoon Police Commissioners*, November 21, 1884, 12 R. 159, 22 S.L.R. 127.

At advising—

LORD M'LAREN—This case comes before us on a reclaiming note against an interlocutor of the Lord Ordinary allowing a proof in an action of suspension and interdict, seeking to interdict the Magistrates and Council of the Burgh of Kirkcudbright from entering on the complainers' lands situated in St Mary Street, and from constructing therein a sewer or part thereof conform to notice, and plans and specifications there referred to.

The first objection to the action of the Magistrates is that they have not complied with the requirements of section 220 of the Burgh Police Scotland Act 1892, according to which, before making any new sewer or altering any existing sewer, the Burgh Commissioners shall give notice of their intention by posting a notice in a conspicuous place at each end of every street through or in which such work is to be undertaken. It is further provided by section 221 that all persons interested in or likely to be aggrieved by the work in question shall be entitled to be heard before the Commissioners.

It is admitted that notice by posting a description of the proposed diversion of the sewer was not given; but the answer is that the reclaimers did not proceed under the powers of the Burgh Police Act 1892, but under the powers of the Public Health Act 1897.

I think it is impossible, on a fair reading of the provisions of the Public Health Act 1897, to come to any other conclusion than that the procedure there authorised was intended to be complete in itself. In the case of non-burghal districts this is necessarily the case, because there is no other subsisting legislative authority for carrying through drainage operations except that of the Public Health Act itself. The Act applies to burghs as well as to landward districts, and I cannot conceive that in applying the powers of the Act to burghs the Legislature intended to put upon the administrators of the burgh the impossible task of carrying out constructive works under the provisions of two codes, each of which deals completely but in a different way from the other with the subject in hand. In availing themselves of the powers given by the Public Health Act 1897 I think that the Magistrates and Council are within their rights if they comply with the requirements of that statute, and that they are not required as part of their duty under that Act to refer to the provisions of previous Acts of Parliament under which cognate powers are conferred.

We may think that it would have been better when a new code was passed to repeal the provisions of the Burgh Police Act having reference to the same matter. But we cannot inquire into the reasons which influenced the Legislature in allowing the old code to stand without express and specific repealing words. Nor can we in the present case determine whether it was intended to give burgh authorities an option to proceed under the one Act or the other; or whether the provisions of the Burgh Police Act as to drain construction are to be taken to be repealed by implication.

In this case the local authority took the safe course of proceeding under the later statute, and having done so, it is not a good objection to the exercise of their powers that they have not also given notice to the public of their intentions in the manner prescribed by the Burgh Police Act 1892.

Passing now to the objections that have been stated to the procedure followed in the assumed exercise of the powers of the Public Health Act 1897, I observe that under section 103, which is the enabling section, the local authority is empowered to construct sewers within their district, and also when necessary, and subject to the approval of the Local Government Board, without their district. We are not in this case concerned with powers to be exercised without the district. The work in question is nothing more than the diversion of a street sewer to a line which was considered to be more convenient. I understand that the line of the new sewer passes between the houses of the two respondents. Each of them objected to the sewer as calculated to affect her property injuriously, and in consequence of their objections the reclaimers were under the necessity of applying to the Sheriff, in terms of saction 109, for authority to enter on the lands and to execute the work. The case was heard by the Sheriff-Substitute, and determined in favour of the Local Authority. As a matter of form it was determined on relevancy, and while I do not doubt that in a suitable case the sheriff has power to allow a proof, or to call for a report from an expert, it is evident from his note that the Sheriff-Substitute did not consider that the objectors had any substantial complaint, or any ground of complaint at all, except the general objection which any proprietor may take to a sewer being constructed through his land without his consent. This objection, in the view of the Sheriff-Substitute, was met by the statutory provision that the local authority must make good any damage they may do to the objectors' lands. On this part of the case I shall add nothing, because the judgment of the Sheriff Court is final.

The objections maintained in this process of suspension—other than those founded on the Burgh Police Act, which I have already considered—are founded on the terms of the 103rd section of the Public Health Act 1897, which empowers the local authority to construct and carry sewers through, across,

or under any public road or street, or under any cellar or vault which may be under the foot-pavement, &c., and also "after reasonable notice in writing—if upon the report of a surveyor it should appear to be necessary—into, through, or under any lands whatsoever." It is said that sufficient notice in writing was not given, and that the resolution to carry the sewer through the complainers' lands did not proceed on the report of a surveyor. The notices given seem to be quite sufficient, and the only objection that was pressed was that the scheme, so far as it affected the complainers' lands, did not proceed on the report of a qualified surveyor.

The local authority produce a report by the Burgh Surveyor which appears to me to be in terms of the statute, and nothing is said against it except that it is undated and that the Burgh Surveyor is not a person highly qualified for the discharge of this statutory duty. I am not sure whether the Lord Ordinary had this report before him or whether he considered that he was not entitled to look at it, because his Lordship in allowing a proof proceeds on the ground that the existence of a report by a surveyor is denied in the record. Now, if this were an ordinary action, it may be that on a strict view of the relation of pleading to proof the local authority might be called on to prove their report. But interdict to stop the execution of a work authorised by Parliament is an extraordinary remedy, and if inquiry were to be granted in every case as a matter of course, I do not see how works such as we are considering could be executed within reasonable limits of time and expense in face of an active opposition. Especially when jurisdiction is given to the Sheriff to control the proceedings of the local authority, I conceive that it is not consistent with the practice of this Court to institute an inquiry into matters of fact unless a *prima facie* case is made. So far from this being done we have a *prima facie* case in favour of the regularity of the proceedings, because the report of the Burgh Surveyor is before us, and it states that the work is necessary. We have no duty to inquire into the qualifications of the surveyor. I have already said that if the Sheriff were dissatisfied with the report he might have remitted to a neutral surveyor. But he was not dissatisfied, and we are not sitting as a Court of Review on his judgment. In all the circumstances I am of opinion that the note of suspension does not disclose any case for inquiry and that the application should be refused.

LORD ADAM—The proceedings in this case were taken by the Local Authority under the Public Health Act of 1897, and the powers conferred under that Act are, I agree with Lord M'Laren, entirely independent of any powers that may be granted under the Burgh Police Act or other Acts. Accordingly, I think this question depends upon what is the proper construction of section 103 of the Public Health Act of 1897, and it is to be observed in connection with that Act that the powers given to the local authority of constructing such sewers as they think necessary are conferred upon them by that Act in various circumstances. They have power by section 103 to construct sewers not only within their district, but also without their district, in respect of the matter of the outfall or distribution of the sewage. Then power is given to them to construct such sewers as they may think necessary under public roads and public streets and places, and finally there is given to them the power of entering on lands, "any lands whatsoever," upon complying with the conditions set forth in the Act.

Now, to return for a moment to the matter of the outfall or distribution of sewage, it will be seen that what I am going to state does not give the local authorities a free hand in the matter of constructing sewers. There are provisions in this Act by which, in section 104, they have to give three months' notice of their intention, with a description of the course of the sewers and the nature of the intended work, and of the parishes, roads, and streets through, across, or under which the works are to be made. Notice has to be given to the parties whose lands are to be affected, and these parties have three months within which to lodge objections. If objections are lodged, the Local Government Board may appoint an inspector to report on the matter, and it is only with the sanction of the Board that the work can proceed. Therefore when they go out of their own district they have not a free hand to construct sewers, though as the local authority they may consider them necessary.

But when we come to the next power given with regard to sewers within their own locality, they may carry such sewers through, across, or under any public road, street, or place, and so far as I see there is no restriction whatever upon the powers given by this clause to the local authority to construct such sewers as they may think necessary, and for the obvious reason that these very roads and public streets are under the local authority, and therefore it was not intended that in making such sewers they need consult anybody or require any authority.

Then we come to the clause which most concerns us, and as I said before it is a clause which entitles them to carry the sewers into, through, or under any lands whatsoever. Now, we are told, and it is so, that "any lands whatsoever" includes tenements, and therefore under this clause they are authorised to construct a sewer under the passage between these two houses, but that only on two conditions. These conditions are that "the local authority shall have power to construct such sewers as they think necessary"—that is, as the local authority and nobody else think necessary—"after reasonable notice in writing (if upon the report of a surveyor it should appear to be necessary) into, through, or under any lands whatsoever."

It appears to me that the question here arises, have the local authority in this matter complied with these two conditions? If they have complied with these two conditions, if it appears from the report of the surveyor that he considered such sewers to be necessary, if their own opinion is backed up by that of the surveyor, then if they give proper notice they may enter on any lands whatsoever for the purpose of making the drains. It seems a very drastic power, but there it is. But it is alleged here by the appellants that they have not complied with these two conditions because they have not given notice, and particularly not a notice in writing as provided for in the clause of the Act, and in the next place that they have not shewn that such sewers are necessary in terms of the Act.

Now, in reference to the first of these conditions, viz., the condition of reasonable notice, I think there was perfectly reasonable notice here, because the notices which the town clerk or burgh clerk served on each of these ladies were served on 6th March, and they did not apply to the Sheriff to grant authority to enter on the subjects for the purpose of carrying out the construction of the drains until 22nd March. That is more than a fortnight's notice, which I think is reasonable notice.

The next question is, did they get a report on the sewers, and does it appear from the report of a surveyor that these sewers were necessary? Now, from the way in which these words are put it appears to me to settle that that makes the surveyor the judge whether these things are necessary or not. Therefore if they had got a report from a surveyor, and if it appears from the report of that surveyor that he thinks that such sewers are necessary, I think the conditions on that matter as required by the statute are fulfilled, and if that is so, if the opinion of the local authority is backed up as to the necessity of these drains by the report of the surveyor to that effect, then they have fulfilled the conditions required by the statute and are entitled to form the drains.

But the appellants here say that the local authority have not got a report from a surveyor, in the first place, because they say the surveyor here is not a proper surveyor or a surveyor in the sense of the Act. Now, he is the burgh surveyor, duly appointed by the respondents the local authority, and in my opinion it is not the intention ofthe statute that we are to inquire into that matter, or that we are to inquire into the competency of this gentleman, and to say that because the report is by him it is not in the sense of the Act the report that is to be made. I think nothing need be said on that matter.

But the appellants further say it does not appear on the face of the report that these sewers or drains are necessary, and that the report does not bear that. Now, we have the report printed in the appendix, and there is no doubt that the report does not bear in so many words that the sewers are necessary; but then this word "necessary" is certainly subject to construction, because in one sense no sewer can be said to be necessary; it is no doubt always possible, though perhaps only by the expenditure of a great amount of money on engineering works, to take the sewer in another direction.

We have in the case of *Lewis* a statement of what appears to be a reasonable construction of the word "necessary" in such cases. In that case it is stated that "necessary may well mean necessary for the efficient discharge of the duty in the way which is most for the benefit of the public." I think these are the words used in the case of *Lewis;* and if you apply them here I think this report is sufficient, for the report distinctly says that what the local authority propose is, so far as his, the surveyor's, experience goes, the best and most practical way, and that is to take the sewer, "with the tributary sewer, through the lane connecting the main at a certain point, to take all private drains within the area." He says that is the best and most efficient way to take this drain; and he then says—"To carry out this plan it is necessary that the sewer be carried through the above close." It seems to me that, as the Act says that if upon the report of a surveyor it should appear to be necessary, the local authority shall have power to construct drains, then it does appear here that these drains or sewers are necessary in the sense of the Act. Therefore it seems to me that on the construction of the 103rd section, the respondents, the local authority, have power given to them to construct such drains as they think necessary, and that, having complied with the conditions, they have power to construct the sewers on the lands of the respondents.

If that be so, the next step is to apply under section 109 for authority to enter on the land for the purpose of constructing these sewers. Now, the Act says that, if it is necessary to enter upon any lands, they are to apply to the Sheriff, who, if no sufficient cause be shown to the contrary, shall grant warrant to the local authority to enter into all or any of the lands. Now, it appears to me that under the application it would have been quite competent for the Sheriff-Substitute to have inquired whether or not all the provisions necessary to give a right of entry on the part of the local authority had been complied with. I think that is a proposition he ought to have had before him, but I demur altogether to the view that it is the duty of the Sheriff to inquire whether or no this drain is necessary. If the local authority thinks it necessary, and if they are backed up by the report of their surveyor that it is necessary, then I think you cannot inquire before the Sheriff whether this is necessary or whether the drain might be made to follow some other course, which would be equally good or better. or anything of that sort. I think all discretion or judgment on the matter as to the proper course of the sewers is left to the local authority, but always under these conditions — that when they are

acting under the section that provides for the outfall and have to make the sewer on ground outside their own limits, they must have the authority of the Local Government Board, and when, as in this case, they are acting within their own limits, they must have as their authority the opinion of a surveyor, who must in his report state that the sewer which they think best is necessary.

The Sheriff here has taken the same view as I have taken, so that the question of the application of the finality clause of the Act does not arise, and it is unnecessary to say anything about it. I therefore concur with Lord M'Laren that the reclaiming note must be allowed, and the suspension be refused.

LORD KINNEAR concurred in the judgment proposed.

LORD PRESIDENT—I was so familiar with and so much engaged in the preparation of the Act at present under discussion that I confess I have considerable diffidence as to my power of putting a judicial interpretation upon it. I therefore content myself with saying that I agree with the judgment your Lordships propose. But I should like to reserve my opinion on that one matter, which I do not think is necessary for the disposal of this case, on which there has been a difference of judicial opinion between my two brethren on the bench who have given opinions.

I should like to add this also in regard to the drastic power conferred, and I do not hesitate to express an opinion upon it, because the section is not a new section; it will be found to be a repetition of a section in the old Act of 1867. It is, no doubt, very true that at first sight it looks against the practice of Parliament to give such a drastic right to local authorities, whether absolutely or with that modicum of control which Lord M'Laren thinks the clause possesses. In the one way or the other it is drastic to give this power of interfering with private rights without going through the ordinary proceedings for the compulsory acquisition of land. But I think if the subject comes to be examined, it is such a very exceptional case that there was good reason why Parliament should do it. We are dealing with sewers, and sewers of course do not mean house drains, but the general system by which the general drainage of a town or community is to be taken away, and, as Lord Adam has shewn, the power is in the section which begins by giving powers to go through streets. Now, it is scarcely conceivable that a local authority would ever wish to put a drain under a building instead of along a street, unless where it really could not be helped, because under a building is the most inconvenient place to put a sewer, there is such great difficulty in getting at it if anything goes wrong. So the use that would probably be made of this particular section, so far as going under people's houses, would be of a limited character; it would only be where you practically could not take the sewers along a street without in some place making a junction or cut between, one street and another. More than that, when it is done, from the very nature of a sewer which is put under ground, a man's property is not taken away altogether, though no doubt considerable injury and inconvenience is inflicted, for which, all the same, compensation is provided in the damages section.

I have thought it necessary to make these observations, for I have always been one of those who think that people's property should not be taken away by Act of Parliament without the very clearest indication that that is meant. But this power is not really so drastic an invasion of the rights of private parties as would at first sight appear.

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

Counsel for the Complainers and Respondents—Crabb Watt, K.C.—W. T. Watson. Agent—Alex. Stewart, S.S.C.

Counsel for the Respondents and Reclaimers—Crole, K.C.—Pitman. Agents—Tait & Crichton, W.S.

Tuesday, November 21.

FIRST DIVISION.

[Lord Dundas, Ordinary.

TYRRELL *v.* PATON & HENDRY.

Reparation—Negligence—Master and Servant—Ship—Defective Hatchway—Injuries Sustained by Falling Down a Hatchway—Defect Existing Prior to Voyage and not Obviously Reparable by Crew—Relevancy.

In an action of damages for personal injuries brought by a ship's engineer against the owners of the ship, the pursuer made averments to the effect that his injuries had been caused through the hatches not being on, which state of matters was due to the defective condition of the beam on which they should have rested, and that this defect had, unknown to him, existed prior to that voyage, and for a considerable period, and was or ought to have been known to the defenders.

Held that the action was relevant, inasmuch as the defect (1) was alleged to have existed prior to the commencement of the voyage, and (2) was not one which it was self-evident the crew could have repaired.

Gordon v. *Pyper*, November 22, 1892, 20 R. (H.L.) 23, *distinguished.*

This was an action at the instance of Samuel Tyrrell, engineer, 310 Baltic Street, Bridgeton, Glasgow, against Paton & Hendry, shipbrokers, 142 St Vincent Street, Glasgow, managers of the s.s. "Turtle," as representing her owners, in which he sued for the sum of £500 in name of damages for personal injury.