property according to our law; it is entirely in conformity with it, according to rules followed in a long series of authorities. But when one dwelling-house is multiplied into 1000, and 5000 persons are interested instead of one, the matters become very different. As the public interests grow larger the individual interests necessarily grow less. Here I think it has disappeared altogether, and instead of reflecting the patrimonial interest of the superior, represents only individual opinions, philanthropic and social on his part. On the merits of these views of course I say nothing, except that I have quite as much respect for those holding one set of views as for those holding the other. Our opinion on such matters is of no more value, in no respect better, than that of the parties in the case; but I think it is quite clear that we are now asked to enforce this restriction, not for the protection of any property right in the pursuer, but in order to benefit the moral and social well-being of the community of Grangemouth. But this is to enable the pursuer to use his power as superior for the purposes of a benevolent disposition leading directly to collision with the municipal authorities on one hand, and in effect putting it in the superior's power to create a trade monopoly on the other. Now, I think we are not bound to give effect to this clause looking to the admitted object and the necessary result of doing so. Lord Corehouse, in the following passages in his opinion in the case of *Coutts*, expresses the ground of my opinion in the present—"Thus," he says, "it was often a condition in a feu-charter that the vassal should bring all his malt to the superior's brewery to be made into ale, and to have all his iron-work manufactured at the superior's smiddy. These conditions have fallen into desuetude, but they have never been declared illegal by statute. The Court, however, at present refuses to enforce them, as being inconsistent with public policy, for it would be a plain injury to the community if the proprietor of a piece of land would not employ the brewer or the smith whose work he most approved"—(1 Rob. App. 318). Here circumstances have proved too strong for the superior, and the community which he and his predecessors have helped to create has outgrown bonds which might have been reasonable or useful when first imposed but which are unsuited to the times.

I have only to say, in conclusion, that I reserve my opinion on the question whether such cases would be effectual under a long lease. If the term were equivalent to a perpetuity the same result would probably follow.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for Reclaimer and Pursuer — D.F. Fraser, Q.C.—Hon. H. J. Moncreiff. Agents—H. G. & S. Dickson, W.S.

Counsel for Respondents and Defenders—Solicitor-General (Balfour, Q.C.)—R. V. Campbell. Agent—James Wilson, L.A.

Friday, March 18.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

MEIER & COMPANY *v.* KUECHENMEISTER.

Election—Agent and Principal—Suing to Judgment.

A firm of shipbrokers raised an action in Germany against a shipmaster upon certain bills granted by him for advances on behalf of the ship. This action having been dismissed, on the ground that by German law it had not been raised *tempestive*, the brokers raised an action for the amount of the advances against the owners of the ship. It was pleaded that the pursuers had elected to take the master for their debtor. Plea *repelled*, on the ground that there had been no suing to judgment.

In November 1878 the vessel "Jacob Rothenburg," of Rostock, Germany, stranded near Shields. Captain Wilde, the master and one of the owners of the vessel, appointed the pursuers of this action, who are shipbrokers and shipowners in Newcastle-on-Tyne, as brokers, and through them a contract of salvage was entered into under which the vessel was ultimately brought off the ground and taken into Shields in a damaged condition. Various claims for salvage, &c., were settled by the pursuers on the authority of Captain Wilde, and were repaid to them by the owners in December 1878. After that date certain other disbursements on behalf of the ship were made by the pursuers, and for these they received from the captain two bills drawn by him in their favour upon the firm of Küchenmeister & Völling, Rostock, for £200 and £26, 4s. 6d. respectively, both dated 23d January 1879, and both payable at three months after date. Küchenmeister & Völling were the managing owners of the vessel. The firm has since been dissolved, and the defender in this action was one of the partners of the firm. The said bills were duly presented to the drawees, who refused acceptance, and the bills were thereupon presented at the pursuers' instance against the drawer and drawees for non-acceptance and the drawer for non-payment. On 11th February 1880 the pursuers arrested the ship and took proceedings in Admiralty against the shipowners, which were unopposed. Under these proceedings the ship was sold in May 1879, and the pursuers placed to the credit of their account £85, 4s. 11d. derived from the proceeds of the sale. The said bills having matured and been dishonoured on 23d April 1879, the pursuers intimated to Captain Wilde their intention of holding him liable for the amount, and in July 1879 they received from him a payment of £60 to account. The pursuers thereafter raised an action against Captain Wilde, as drawer of the bills, in the German Court of his domicile, for the balance thereon, and obtained judgment against him in the lower Court; but on appeal the judgment was reversed and the action dismissed, on the ground that by German law the suit against the drawer should have been brought within three months from the date of the bills falling due.

The pursuers thereupon raised an action in the

Court of Session against Küchenmeister for the amount unpaid of their account, on the ground that the disbursements above referred to were made on his employment and behalf. The defender was subjected to the jurisdiction of the Court of Session by arrestments used for that purpose.

One of the pleas-in-law for the defender was that the pursuers by their proceedings in Germany against Captain Wilde had elected to take him as their debtor, and could not now raise another action. The case was sent to the procedure roll for the consideration of this plea.

The Lord Ordinary pronounced an interlocutor assoilzieing the defender, and added this note:—"The parties requested that the case should be sent to the procedure roll in order to a decision on the defender's second plea-in-law. They stated that the first plea for the defender involved an inquiry into German law, which they were both desirous to avoid until the question raised by the second should be determined.

"The Lord Ordinary heard the defenders, but no appearance was made by the pursuers. He has, nevertheless, thought it better to decide the case rather than give decree by default.

"In the opinion of the Lord Ordinary, the pursuers elected to take the master as their debtor. They sued him to judgment on the bills which he had granted, and which were binding on him alone. It does not matter that they were ultimately unsuccessful. They took judgment in a question with him, and though they were defeated on a plea which seems to resemble our plea of prescription, they may still sue him for the debt. The principles recognised in the case of *Priestley*, 34 L.J. Exch. 172, seem to the Lord Ordinary to sustain the plea of the defender."

The pursuers reclaimed, and argued that there was no election. They contended that to sustain the plea of election there must have been a suing to judgment, and that an unsuccessful claim is not enough.

For the defender it was replied that election is a question of intention, and that the circumstances of this case indicated an intention on the part of the pursuers to take the captain as their debtor and to discharge the owners.

Authorities—for Reclaimer—*Priestley*, 34 L.J. Exch. 172; *Curbis* v. *Williamson*, 10 L.R. Q.B. 57. For Respondent—Bell's Comm. i. 536; M'Lachlan on Merchant Shipping, 131; *Ferrier* v. *Dodds*, 3 Macph. 562; *Young* v. *Smart*, 10 S. 130.

At advising—

Lord Justice-Clerk—The stake here is not large, but the questions raised are large enough. It is pleaded by the owners of this vessel that there cannot be an action against them and the master both, and that the pursuers having elected to take the master cannot now go against the owners. The Lord Ordinary has sustained that plea on the authority of the case of *Priestley*. Now, the doctrine of election is recognised in our law. In the case of a shipmaster and a shipowner, where the former is sued on his own obligation and decree is taken against him, he having relief against his owners, they cannot be sued also. That is common sense. But where there has not been a suing to judgment, or still stronger, where the action has failed altogether, it cannot be held that there has been election. Having sued the wrong man will not prevent the claimant from suing the right one. That seems to have been clearly laid down in the case of *Curbis*. I apprehend Justice Quain to mean, then, that for election there must have been successful judgment. On the whole matter it appears to me that no case of election has been made out. I must say that I think the German law should have been applied here. But that has not been pleaded.

Lord Young—I concur. Indeed, the only difficulty I had was whether the pursuers should not be left to their remedy in Germany. We have no natural connection with the parties here. However, we must obey the law, which gives an action in the Scotch Courts. I pointed out that according to the pursuers' averment their ground of action implies no liability against the master. The facts may be such that the master was liable as well as the owners, and that the pursuers were in a position to select either. But according to the case as stated I cannot see any case against the master at all. The averment in the condescendence is this—"In the end of 1878 and beginning of 1879 the pursuers made on the defenders' employment and behalf various disbursements." Now, that is a very good ground of action, that on the employment of the owners of the ship the pursuers made disbursement. It may turn out that the master ordered them, but that does not appear, and I cannot assume it. It is said and admitted that the master drew a bill. But the bill is only an order by the master on the owner to pay a debt he knew they were due. He may incur liability by putting his name to that document. But that is perfectly consistent with there being no original liability on his part. The pursuer sued him upon the bill, but too late according to the law of Germany. They now sue upon their debt. The general rule of law in reference to agents is that if the agent acts as principal without saying anything about his principal he is liable. But if the party with whom he dealt finds out that he was an agent he may go against the real principal. But he cannot regard them both as principals; he cannot have the double remedy. The only other rule is that the agent, acting as such, merely does not bind himself at all. But the case of a shipmaster is an exception. He is an agent acting for a known and registered owner, but is himself liable. Now, I am not prepared to consent to the doctrine that the party who furnishes supplies to a ship on the order of the master must take either the master or the owner. I was under the impression that there is a joint liability—that the creditors could sue both. But assuming it to be otherwise, in this case there has been no proceeding to judgment. I think the Lord Ordinary's view of suing to judgment is erroneous, and I do not think the judges in the case of *Priestley* meant any judgment on a mere technical plea, for example. There must be a judgment debt.

Lord Craighill concurred.

The interlocutor of the Lord Ordinary was recalled, and the case remitted to the Lord Ordinary for further procedure.

Counsel for Reclaimers — Trayner — Taylor Innes. Agents—Boyd, Macdonald, & Co., S.S.C.

Counsel for Respondents—Salvesen. Agents —Beveridge, Sutherland, & Smith, S.S.C.

Friday, March 18.

OUTER HOUSE.

[Lord Fraser.

PATTISON (SIME'S JUDICIAL FACTOR) PETITIONER.

Judicial Factor—Special Powers—Nobile officium —*Husband and Wife*—Jus mariti—*Aliment.*

Authority granted to a judicial factor on a small moveable estate to which a woman in poor circumstances had succeeded, her husband having been absent from her without making any provision for her support, and not having been heard of for a period of eight years, to pay over the estate to the wife on obtaining a discharge from a man of business whom she and her children had previously appointed to be their factor and commissioner.

In 1869 Mrs Helen Fraser or Sime became entitled on the death of her uncle James Ross to a share of his estate *ab intestato*. Shortly thereafter, and before Mr Ross' estate was wound up, Mrs Sime and her husband went to America, leaving a factory and commission in favour of Mr James Ross, solicitor, Montrose, with full power to uplift the sums due to them out of the executry estate of Mrs Sime's uncle.

In 1873 Mr Sime disappeared, and had not been heard of since that time. He had made no provision for his wife's support. She was in poor circumstances, and unable to support herself.

On 5th July 1880 Mrs Sime and her three children granted a factory and commission in favour of Mr Purves, W.S., and presented a petition for the appointment of a judicial factor on the sum that might be found due by Mr Ross as the balance of his intromissions with the executry estate before mentioned. Mr Pattison, accountant in Edinburgh, was appointed factor on 16th September 1880, and received a balance amounting to £60, 14s. 9d.

Mr Pattison now made application to the Court in the circumstances set forth—of the truth of which he stated he was satisfied—for authority to make payment to Mrs Sime of the balance remaining due in his hands; or otherwise, for authority to make payment to Mrs Sime of the sum of £15 yearly. The application was made with concurrence of her three children, two of whom were settled in America, and the third, a daughter, was married.

The Lord Ordinary, after remitting to a man of business to investigate the facts and circumstances set forth, pronounced this interlocutor—"Grants authority to the petitioner Mr Gilchrist Gray Pattison, as judicial factor mentioned in the petition, to make payment to the petitioner Mrs Helen Fraser or Sime of the free balance remaining due in his hands on a discharge to be granted by A. P. Purves, W.S., factor and commissioner for said Mrs Helen Fraser or Sime and her children, after deducting the expenses incurred and to be incurred by the judicial factor prior to his discharge; and decerns."

Counsel for Petitioner—D. Robertson. Agent —A. P. Purves, W.S.

Friday, March 18.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

HALL (COLLECTOR OF POOR'S ASSESSMENTS FOR THE CITY PARISH OF GLASGOW) *v.* THE CITY OF GLASGOW UNION RAILWAY COMPANY.

Poor—Assessments and Recovery—Lands Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 127—*Deficiency in Assessments.*

In a claim for deficiency in assessments for poor-rates made against a railway company by reason of certain lands having been taken for the purposes of the railway's undertaking —*held* that the whole subjects taken for that purpose must be taken together in order to ascertain whether or not any deficiency actually existed, and that as the assessment for the whole subjects so taken showed no deficiency, no claim could be made against the company even although certain portions of them could be shown to be deficient.

This was an action at the instance of the collector of the assessment for relief of the poor in the City parish of Glasgow, to recover a sum of £158, 3s. 8d. from the City of Glasgow Union Railway Company, which was alleged to be due by the company under the 127th section of the Lands Clauses Consolidation Act 1845, in respect of deficiency in the assessment for the poor upon lands taken by the company for the purposes of their undertaking, as for the years 1878–9 and 1879–80. By virtue of an Act of Parliament passed in 1864 the defenders had become possessed of certain lands in the City Parish of Glasgow, which they entered upon and held for the purposes of their undertaking; upon the lands so acquired they proceeded to construct part of their railway lines, their station, and the various accesses and approaches thereto. The undertaking was a large and complex one, and by the terms of their Acts of Parliament the company were authorised to construct seven different railways or branch railways. In order to carry out the various parts of their scheme they had to acquire, and did acquire, various different parcels of lands in different streets, but all, as far as regarded this action, situated in the City Parish. Besides the railway undertaking proper, shops, an hotel, and arches which served as warehouses were erected upon the lands so taken. The 127th section of the Lands Clauses Consolidation Act, under which the claim was made, provides "that if the promoters of the undertaking become possessed, by virtue of this or the Special Act, or any Act incorporated therewith, of any lands charged with the land tax, or liable to be assessed with the poor-rate or prison assessment, they