mas last of the one-half of £165, but before the next term of payment arrived Mr Imrie had died, the exact date of his death being I think 29th April 1887.

Now the effect of Mr Imrie's death was this, that no stipend belonged to him after Martinmas 1886, while the stipend from Martinmas to Whitsunday 1887 passed to his next of kin, and belonged to them, not as his executors, but in their own right. That half year's stipend never belonged to Mr Imrie at all, in consequence of his death in April 1887, and Mr Dow's contention is that although this stipend never belonged to Mr Imrie, yet his executor is liable to him in payment of a sum equal to the half of £165, as stipend since Martinmas. I can quite see that there is a great deal of hardship in the case of Mr Dow, because he has performed the work, and, if effect is not given to his contention, is to receive no remuneration; but it is impossible to get over the words of the agreement. The sum of £165 is surrendered by Mr Imrie to Mr Dow. That means, or rather it assumes, that Mr Imrie has himself to draw the stipend before he can pay any share of it to Mr Dow. Mr Dow has no title to uplift the stipend from the heritors, and the heritors would not have paid him because he has no assignation to the stipend or any part of it. It is therefore clear that before any part of that sum could go to Mr Dow it must be uplifted by the minister; then there undoubtedly is an obligation on the minister to pay over the stipulated portion of the stipend, but of course the obligation to pay the £165 can never come into operation until the £314 or some proportion of it is actually uplifted.

It appears to me that the terms of this agreement entirely preclude Mr Dow's claim, which is that the executor shall pay over to him what is equivalent to one half of the £165 for the term of his services after Martinmas 1886, meaning of course to construe the agreement as imposing a personal obligation upon Mr Imrie. As I can find no such personal obligation in this agreement, I think the present question falls to be answered in the negative.

Lords Mure, Shand, and Adam concurred.

The Court answered the question in the negative.

Counsel for the First Party—Ure. Agent—Lindsay Mackersy, W.S.

Counsel for the Second Party — Pearson. Agent—H. W. Cornillon, S.S.C.

Friday, July 15.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

HOULDSWORTH *v.* POLICE COMMISSIONERS OF WISHAW.

Property — Interdict — Nuisance — Contract — Acquiescence.

The proprietor of an estate brought an action against the police commissioners of an adjoining burgh, as the local authority, to have it declared that the defenders were not entitled to discharge upon his lands any sewage from the pipes under their control, and for interdict.

The facts of the case were that between 1850 and 1864 the pursuer's predecessor had constructed sewers for carrying off the sewage from houses built upon part of his property which at the date of this action was within the burgh, and held on feu or long lease from him; that under the terms of the feus and leases the proprietor was, on certain conditions, entitled to the whole sewage; and that he had constructed settling ponds for collecting the sewage and irrigating his lands. In 1868, after the pursuer succeeded to the estate, the defenders constructed a new system of drainage, and connected new drainage pipes with certain of the pursuer's existing drains. The result was that a greater quantity of sewage was thereafter discharged upon the pursuer's lands. After 1874 the settling ponds were disused, having proved a failure, and the nuisance first began to be offensive in 1877, when the attention of the local authority was called to the matter. The defenders maintained (1) that the pursuer not only allowed the use of his drains without objection, but took part in setting up the sewage system, and that the facts implied an agreement for the mutual advantage of the parties, by which the defenders were allowed to get rid of their sewage, and the pursuer was allowed to utilise it for the benefit of his land; and (2) that the pursuer was barred by acquiesence from complaining of a nuisance which he ought to have prevented before any cost was incurred if he did not intend to submit to it, and which could only be altered at great expense. *Held* that the pursuer had not bound himself to submit to the continuance of the nuisance in perpetuity, and that he was not barred from maintaining the action by acquiescence.

This was an action by James Houldsworth, Esquire, heritable proprietor of the entailed estate of Coltness in the county of Lanark, against the Police Commissioners for the Burgh of Wishaw, acting under the General Police Improvement (Scotland) Act 1862, and as such Commissioners being the local authority of the burgh under the provisions of the Public Health (Scotland) Act 1867, and John Logan, their clerk.

The conclusions of the summons were these—"That the defenders are not entitled to emit or discharge from the sewers or pipes under their control any sewage or drainage matter on to or upon the lands of the pursuer; and further, the defenders ought and should be interdicted and discharged, by decree foresaid, from emitting or discharging any sewage or drainage matter from the said pipes on to or upon the said lands."

The pursuer averred that the defenders as the local authority were vested in and possessed of a system of sewers and drains, and that although the principal main sewer of their system had a properly constructed outfall upon lands which did not belong to him, still part of the sewage of the burgh was discharged upon the pursuer's property by means of five outfalls

which were described, and that the quantity of sewage discharged on to his land had become so great, and the character so offensive, that it was now creating a serious and ever increasing nuisance on his lands.

The estate of Coltness was situated partly within the burgh of Wishaw, and the pursuer and his predecessors had feued or let on long leases a portion of the estate which included Anderson Street, Cambusnethan Street, Kirk Road, Campbell Street, Graham Street, Shand Street, Stewarton Street, and Young Street, all within the burgh of Wishaw. The deceased Henry Houldsworth of Coltness, who was the predecessor of the pursuer in the estate had from 1856 to 1864 constructed five sewers from the feus belonging to him in the burgh of Wishaw which discharged themselves upon the estate of Coltness. He had also constructed two settling ponds upon farms on the lands of Coltness to be used for irrigating the lands of Coltness. The defenders averred—"The sewage drains before referred to were constructed for his benefit and advantage, for the purpose of draining and carrying away the sewage from the properties in Cambusnethan Street, Young Street, and Campbell Street foresaid, and also from a part of the said Kirk Road, which properties are all or nearly all on land feued or taken on long lease from the pursuer or his predecessors; and the long leases granted, since the said Henry Houldsworth constructed said drains, in favour of the building tenant or feuar contain a clause binding the tenant or feuar to drain the subjects feued or let, and to lay drains for discharging the sewage from the dwelling-house or dwelling-houses to be erected thereon to the main sewer in the street or roadway; and the said building leases further stipulate that 'where the main drain is constructed at the expense of the first party,' that is, the pursuer, 'he and his foresaids shall be entitled to the whole sewage discharged thereby.'"

In the beginning of the year 1868 the Commissioners of Police of Wishaw proceeded to carry out a drainage system for the burgh as it then existed, and connected their drainage pipes for carrying off the sewage of a considerable part of the burgh of Wishaw with the drainage pipes laid by Mr Houldsworth, and so carried the sewage to the settling ponds. In the year 1868, the pursuer succeeded to the estate of Coltness, and in or about the year 1873 the settling ponds ceased to be used as such, and the sewage which was carried therefrom was thereafter carried or diverted by the pursuer into the Templegill Burn, which passed through the lands and estate of Coltness. The defenders further averred—"The Commissioners understood and believed, and the fact is, that the pursuer's predecessor had, by what he had done with respect to the drainage arrangements aforesaid, a vested interest in the sewage in the streets referred to, and as that, at the time when the Commissioners' sewers were being constructed, he was anxious to obtain the sewage for irrigation, they were not entitled to divert it from the destinations to which he had provided as aforesaid for its being conducted." "The pursuer did not object to the discharge of the sewage until recently, and not until he thought that the irrigation of his lands by sewage did not benefit him. . . . The sewage in the districts which drain on to his lands has probably increased, but the increase, if any, has been caused wholly, or almost wholly, by the pursuer feuing or letting on long leases for building purposes his lands of Coltness in those parts of the burgh. If the sewage is now creating a nuisance, it was and is by the actings of the pursuer and his predecessor above-mentioned that the sewage has been and is being conducted on to his lands; and he and not the Commissioners are bound to remove any nuisance which may be thereby caused upon his lands."

The pursuer pleaded—"(1) The defenders having no right to discharge sewage on to the the lands of the pursuer, decree should be pronounced in terms of the conclusions of the summons. (2) The discharge of said sewage being to such an extent as to create a nuisance, and injuriously to affect the lands of the pursuer, the defenders should be interdicted from continuing to discharge the same."

The defenders pleaded—"(3) The defenders having a right to discharge the sewage of the burgh on to the pursuer's lands as set out in the defenders' statement, they ought to be assoilzied with expenses."

The Lord Ordinary allowed a proof, the result of which is stated in his note.

At the close of the proof the defenders added this plea—"(5) The pursuer is barred from maintaining the present action because (1) he and his predecessor in the lands of Coltness took part in setting up the sewage system of which he complains, acquiesced therein, and took benefit therefrom; and (2) the alleged nuisance is due to his own actings in disusing his irrigation works and feuing or leasing his lands within the burgh."

On 28th March the Lord Ordinary (KINNEAR) pronounced this interlocutor—"Finds that the defenders, as the Local Authority of the burgh of Wishaw, have provided a system of drains and sewers for the said burgh, by the use of which, in accordance with the purpose and design of the works, sewage or drainage of a grossly polluting kind has been discharged upon the lands of Coltness, belonging to the pursuer, and into the streams called the Templegill Burn and the Whinnie Burn, running through the said lands, to the injury of the pursuer, and in violation of his legal rights: Finds that the pursuer is entitled to interdict against the continuance of the nuisance caused by the said discharge of sewage; but supersedes consideration of the cause for two months, to allow the defenders an opportunity of stating what means, if any, they are prepared to adopt for the abatement of the said nuisance: Finds the pursuer entitled to expenses.

"*Opinion.*—The pursuer has proved that by a system of drains and sewers provided for that purpose the defenders have for many years discharged, and are still discharging, a considerable portion of the sewage of the town of Wishaw upon his property of Coltness, and have thereby created a nuisance of a very injurious character. I do not think it is seriously disputed, and at all events it is very clearly proved, that this discharge of sewage is in fact a nuisance. It is suggested, indeed, that the injury to the pursuer might be materially diminished if the whole of the water of a burn, called the Meadow Burn, which is now impounded for the use of a dis-

tillery, were allowed to flow in its natural course into the Templegill Burn, the pollution of which forms the chief ground of complaint. But if the pursuer is responsible, which is not proved, for the impounding of the Meadow Burn, it must be assumed that he has a right to divert the water, or to sanction its being diverted, for the benefit of the distillery. And he cannot be restricted in the exercise of his proprietary rights in order to diminish the nuisance created by a discharge of drainage which he complains of as a wrong. It is equally clear that but for the special defence relied upon by the defenders the discharge of sewage upon the pursuer's property would be in violation of his legal right. It makes no difference that the defenders are a body of magistrates charged with a public duty, because the Act of Parliament gives them no right, which the common law refuses, to throw the sewage of the town upon the pursuer's property.

"The only question of difficulty therefore is, whether the defenders have acquired from the pursuer or his predecessors a right, which they would not have otherwise, to make this use of his property? The ground in law on which they maintain their right is not very clearly set forth in their pleas as originally stated. They do not allege any antecedent agreement, by virtue of which they became entitled to discharge sewage on the pursuer's lands, or to execute the drainage works which they use for that purpose. But by a plea which was added after the close of the proof they plead that the pursuer is barred from maintaining the action—(1) because he and his predecessors in the lands of Coltness took part in setting up the sewage system of which he complains, acquiesced therein, and took benefit therefrom; (2) because the alleged nuisance is due to his own actings in disusing his irrigation works, and feuing or leasing his lands within the burgh.

"The question therefore is, whether the facts which have been proved are sufficient to support this plea in either of its branches?

"It appears that before the passing of the Public Health Act 1867, and before the adoption of the Police Act of 1862 by the burgh of Wishaw, the late Mr Henry Houldsworth, the father of the pursuer, had constructed sewers for carrying off the drainage of houses built on his property within the present boundaries of the burgh, and held on feu rights or long leases under him. The sewage of these houses was discharged by the drains so constructed upon Mr Houldsworth's lands of Coltness, and many, although not all, of the leases contained clauses by which the tenant was taken bound to drain his lands and houses into the main sewer, if any, in the street or roadway in front, or to discharge his sewage at any point the proprietor might direct, and by which the proprietor, if he constructed the main drain, became entitled to the whole sewage thereby discharged. The defenders took advantage to a certain extent of the sewers constructed by Mr Houldsworth when they executed their own works in 1868. They connected new drains with certain of Mr Houldsworth's existing drains, they lifted and relaid others, and they cut off the drainage from a third class and conveyed it in a different direction. The result of their operations is, that they now discharge a much greater quantity of sewage upon the pursuer's lands than was conveyed to these lands by Mr Houldsworth's drains in 1868. The list shows the number of houses draining into Coltness before the drainage scheme of 1868, immediately after the execution of the scheme, and at the present time. It shows a great increase of drainage at all the outlets, and particularly at the outlets Nos. 1 and 2 on the pursuer's plan, which afford the most serious ground of complaint, and it appears that the total number of houses draining on to the lands of Coltness, which before 1868 was 324, is now 757. I did not understand it to be maintained in argument, although it appears to be suggested on record, that the construction of Mr Houldsworth's drains implied a right to the defenders to make use of them as parts of a larger system of drainage than Mr Houldsworth had contemplated, and for the purpose of discharging upon the lands a greater quantity of sewage than they were originally intended to carry. But it is said that the pursuer and his predecessor not only allowed this use to be made of their drains without objection, but took part in setting up the system of which he now complains. It is to be kept in view, in considering the facts on which this plea is founded, that the pursuer succeeded to the estate of Coltness on his father's death in January 1868, and that the defenders' operations were not begun till sometime after the 27th of April in that year. The conduct, therefore, upon which the defenders found their plea of acquiescence, must be the conduct of the pursuer himself, since he was proprietor of the estate at the date of the construction of the works, to the use of which it is said that he is barred from objecting. But still it may be necessary to consider what was done before his succession, since the defenders' case is, that he adopted and carried on a system which had been begun by his father. The facts which are said to be material in this point of view are, that before the defenders had undertaken the duty of draining the burgh, Mr Houldsworth and his tenants had made some use of the sewage, which was discharged into open ditches on his property, from the drains he had himself constructed, for the purpose of manuring their land, and that in 1867, and presumably in anticipation of the defenders' operations, he had constructed a settling pond for the purpose of collecting the sewage on his farm of Thrashbush. This appears to have been all that was done in the late Mr Houldsworth's lifetime. When the defenders' works were executed in 1868, this settling pond was connected with one of their sewers, by a continuation of the sewers extending for about 60 yards into Mr Houldsworth's lands beyond the burgh boundary, and leading into an open ditch. Another settling pond was made in the summer of 1868, at a place called Murray's Acre, for collecting the sewage discharged at another outlet of the defenders' system. And both these ponds were used for some years for the purpose of irrigating the pursuer's lands, the solid matter being allowed to settle in the ponds, and the liquid manure being carried partly by open cuts and partly by pipes through the fields. This system was pursued, and apparently with some success, for two or three years, when it was found to be mischievous, and in 1873 or 1874 it was discontinued. The settling ponds, however, were not destroyed,

but they were no longer allowed to act as receptacles of solid matter; and the sewage from the burgh now passes through them in the same way as through any other channel, no part of it being interrupted for the purpose of manuring the land.

"These are the material facts; and they appear to me to be insufficient of themselves to establish either a grant of servitude or any binding contract between the pursuer and the defenders. The operations, so far as they were conducted on the pursuer's land, are said to have been executed by the late land steward Mr Fair, who had no authority to make any agreement for subjecting his employer's land to a permanent burden; and the pursuer himself does not appear to have been consulted as to any arrangement for taking sewage from the burgh. The defenders, indeed, as already observed, do not allege that there was any actual agreement, either with the pursuer himself or with any person authorised to bind him. But they say that, independently of any antecedent bargain, the facts imply an agreement for the mutual advantage of the parties by which the defenders are allowed to get rid of their sewage, and the pursuer is allowed to utilise it for the benefit of his land. But an agreement for mutual advantage must be binding on both parties; and it is not suggested that the defenders are under obligation to the pursuer to give him the sewage of the burgh in perpetuity, even although they should be able hereafter to dispose of it otherwise to greater advantage. The pursuer must, no doubt, be held to have accepted the sewage which he tried to make use of for his own benefit. But the question is, whether he has bound himself to submit to the continuance of the nuisance in perpetuity; it is not alleged that he has agreed to do so, and I am unable to see anything in his conduct which should bar him from denying that he has so agreed.

"But it is said that, apart from any agreement, express or implied, he is barred by acquiescence from complaining of a nuisance which he ought to have prevented before any cost had been incurred if he did not intend to submit to it. The pursuer himself was not much at Coltness during the year 1868; and no communication was made to him on the part of the burgh, either verbally or by letter, as to their drainage scheme. Nor does he appear to have been fully informed as to the operations which were going on, either within the burgh boundaries or on his own estate. But he knew, on the one hand, that the Local Authority was executing works for the drainage of the burgh, and, on the other, that his land steward was executing works for the irrigation of his land. He must be held, in a question with the burgh, to have assented to what was done by the persons to whom he left the management of his property; and acquiescence will therefore be pleadable against him to the same effect as if the operations upon his estate had been executed by his direct instructions. But assuming that to be so, all that is proved is, that he allowed the burgh to discharge a quantity of sewage upon his land, endeavoured to make use of it for his own benefit, and made no complaint until it turned out to be a nuisance. It appears from the evidence of Mr Bain, the factor, that the nuisance first began to be seriously offensive in 1877. The attention of the Local Authority was called to it in that year, and it has been growing worse and worse every year since then. Acquiescence in a nuisance, so long as it is not serious, will not deprive a proprietor of his right to object to it when it is materially increased. Nor does it appear to me to make any difference that he has endeavoured in the meantime to neutralise it by operations upon his own land, or even to turn it to advantage. Assuming that the pursuer must be held to have assented to the discharge of sewage, to which he submitted in 1868, or even until 1877, it does not follow that he has also assented to the greatly increased discharge of which he now complains. It is said that he has permitted a drainage system to be carried out, which cannot now be altered without great cost. But there is no evidence that the system was carried out in reliance on any conduct on the pursuer's part, from which the Local Authority was entitled to infer that he was willing to accept the sewage of the whole drainage district which they now discharge upon his lands. The evidence of Mr Reid shows that the system which they adopted in 1868 was the cheapest and most convenient for the burgh at the time, and that there will be no difficulty in sending the sewage in a different direction now if it should be found that the pursuer is not bound to submit to the nuisance. It is true that about £78 of the original cost of constructing the present drains will be lost to the burgh if their drains are made useless. But, on the other hand, the burgh saved £105 by adopting the drains which had been already constructed by the late Mr Houldsworth; and in the meantime they have had the benefit of the cheaper system for upwards of eighteen years.

"The second branch of the defenders' plea cannot be sustained if the plea is not well founded in its first branch. If the pursuer is not bound to accept whatever amount of sewage the defenders may think fit to discharge upon his estate, he is under no obligation to them to continue his irrigation works when irrigation by sewage has proved to be injurious to the land. That he has feued or leased his land within the burgh can give no right to the burgh authorities to discharge sewage upon his estate beyond the burgh to his nuisance."

The defenders reclaimed, and argued—The Police Commissioners of Wishaw and Mr Houldsworth had entered into a contract. This contract was that the Police Commissioners were bound in perpetuity to discharge all the drainage from a certain area of the burgh of Wishaw on to Mr Houldsworth's lands, and that he was bound to receive all the sewage so sent. That there was this contract was proved by the actings of the parties in 1868, although there was no written contract to that effect. Mr Houldsworth constructed drains and settling ponds upon his own estate for the purpose of utilising the sewage from his own feus on the estate of Wishaw for the good of his estate of Coltness. When the burgh included the houses on his feus in their system of drainage, he stipulated that all the drainage should be sent on to his estate, and the burgh drain-pipes and the pipes on the estate of Coltness were joined for that purpose. One great element in judging whether a perpetual contract had been entered into or not was the perman-

ency of the works erected to carry out that contract Here the works were permanent works ; the burgh would not have constructed these expensive structures except on the understanding that Mr Houldsworth was always to take the drainage of this particular part of the burgh. The pursuer had destroyed the settling ponds which the late Mr Houldsworth had made for utilising the sewage, and that really had caused all the nuisance of which he complained. (2) In this case acquiescence ending in bar had taken place. The late Mr Houldsworth had seen the drainage works being made in 1868, and the pursuer knew of them also. They must have known for what purpose these works were being erected, and they ought to have complained then. The sanction of a particular class of works implied the sanction of the proper and continuous use of these works. No complaint was made at the time, and therefore the pursuer was barred by his predecessor's acquiescence from objecting to the sewage being discharged upon his lands—*Cairncross* v. *Lorimer*, August 9, 1860, 3 Macq. 827 ; *Aytoun* v. *Melville*, May 19, 1801, F.C., M. App. *voce* Property, No. 6.

The respondent's counsel were not called upon.

At advising—

Lord Justice-Clerk—In this case we heard a very able speech from Mr Balfour for the defenders, but we did not think it necessary to have a reply, as I think the Lord Ordinary's interlocutor against which he spoke is founded upon sound principles. I need not resume the nature of the contention, which indeed has now been narrowed down, even by the admission of the defenders, to a very narrow compass. The action is one of interdict to prevent the Police Commissioners of the burgh of Wishaw discharging the sewage of the burgh upon the lands of the pursuer Mr Houldsworth. There were a variety of questions raised, but substantially the one to which the defenders addressed their argument was that stated in their third plea-in-law, which is—"The defenders having a right to discharge the sewage of the burgh on to the pursuer's lands as set out in the defenders' statement, they ought to be assoilzied with expenses." And upon that question I have come to the very clearest conclusion that they have no right to do so. Truly the question is this, Had Mr Houldsworth bound himself to permit the use of his land in perpetuity for the discharge of the sewage of the burgh, and in what manner had that permission been expressed?

It appears that before 1868 the late Mr Henry Houldsworth, who had a strong belief in the efficacy of sewage irrigation, and who practised the use of it upon his own land in connection with the sewage works in the burgh of Wishaw, agreed to construct considerable works for the purpose of getting the sewage of the burgh for the use of his own land. No doubt the burgh went to considerable expense in fitting up works in the burgh, which communicated with drains already made, or which were in process of being made, upon the estate of Coltness. The result was that the sewage was carried off by these works from the burgh, and used on Mr Houldsworth's land in the form of sewage irrigation. That system continued to be extensively used till the year 1874, and was continued by the present Mr Houldsworth until he found that it was not doing his land any good. The question now is, whether the present Mr Houldsworth, being dissatisfied with the existing state of matters, and not being prepared to continue the present system any longer, is under an obligation to do so? The counsel for the defenders put his case in this manner—that they had a right unreservedly to put the sewage of the burgh upon the pursuer's lands because a contract in perpetuity had been concluded between Mr Houldsworth and the burgh authorities to that effect; that the burgh authorities were bound to discharge the sewage upon Mr Houldsworth's land, and, on the other hand, that he was bound to take whatever sewage they so put upon his lands. There is nothing to that effect in the shape of writing, but it was said that there were actings which amounted to an agreement of that kind. Mr Houldsworth denies that he ever made any such agreement. The mode in which the agreement was sought to be supported was, that by a tacit sort of encouragement Mr Houldsworth had induced the burgh to lay out large sums of money upon structural work for carrying off the sewage which they would not otherwise have done. They did spend the money upon these works, hoping that the proprietor of the lands of Coltness would always continue in the same mind that he was at that time, and allow the use of his land for discharging the sewage. But he certainly was not bound so to continue the use of his land. It was a matter of mutual convenience, terminable at any time by either party. There is nothing to prevent the burgh authorities disposing of the sewage in the way that is best for the burgh. Indeed I doubt if they had any right to bind themselves to dispose of the sewage in any one particular manner. But I am clearly of opinion with the Lord Ordinary that the pursuer did not bind himself to permit the discharge of sewage upon his lands in perpetuity, and therefore I think we should adhere to his interlocutor.

Lord Young—I am of the same opinion, and I have arrived at that result without any difficulty. The conclusion of the summons is for declarator "that the defenders are not entitled to emit or discharge from the sewers or pipes under their control any sewage or drainage matter on to or upon the lands of the pursuer." The only other conclusion is one for interdict, and the Lord Ordinary has given decree in terms of the conclusions of the summons, but for very good reasons has superseded the interdict for two months. Now, it was admitted in Mr Balfour's very clear and able speech that the Police Commissioners for the burgh, who are the defenders in this cause, are not to be allowed to put the sewage of the burgh upon the pursuer's lands unless they can show a contract to that effect—otherwise they cannot defend the practice at all. There was also an alternative plea of acquiescence—that is, the defenders say that the pursuer or his predecessor saw what they were doing when they constructed the drains, and must have known that these were constructed for the purpose of discharging the sewage upon his lands, and that as he did not object to their construction at that time he is now barred by acquiescence from objecting. I do not think that in such a case I would even have allowed a proof. I should have

thought it clear when the pursuer had stated his case, and the defenders had not been able to make any relevant defence to it, and would not have allowed any evidence as to such a matter. The defenders attempted to say that there was a contract to that effect between the parties. But clearly there was no contract established by the evidence which alone could be a defence to the action. It would be rather an anomalous but still perfectly stateable contract, that the one party was entitled and bound to discharge the sewage of the burgh upon these lands, and that the other party was entitled and bound to receive it. Such a contract would need very distinct expression indeed, and there is no relevant allegation of such a contract upon record, and no support of it in the evidence. As to the plea of acquiescence, the proposition is this—that as the pursuer did not object to the drainage works when they were being constructed, therefore he is barred from objecting for all time to the sewage being sent upon his lands. I think that is an extravagant proposition. I think there is no evidence of any agreement between Mr Houldsworth and the Police Commissioners, and that being so, I think we ought to adhere to the Lord Ordinary's interlocutor.

Lord Craighill and Lord Rutherfurd Clark concurred.

The Court refused the reclaiming-note, adhered to the Lord Ordinary's interlocutor, and superseded consideration of the interdict till the first sederunt day of the following session.

Counsel for the Reclaimers—Balfour, Q.C.—Darling—M'Kechnie. Agent—D. Hill Murray, Solicitor.

Counsel for the Respondent—Graham Murray—Ure. Agents—Murray, Beith, & Murray, W.S.

Friday, July 15.

FIRST DIVISION.

[Lord Lee, Ordinary.

SMITH *v.* LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY.

Arbitration — Objections to Decree — Oversman chosen by Lot—Oversman Shareholder in an Unincorporated Company.

In an action of reduction of the nomination of an oversman, and of the decree-arbitral pronounced by him in a submission between an insurance company and a person insured, on these grounds—(1) that the oversman was chosen by lot; and (2) that the oversman was a shareholder in the company—it was proved that each arbiter nominated one person as oversman, but that each regarded the other's nominee as fit for the office, and they accordingly chose the oversman by lot. The oversman accepted, and when the proceedings in the arbitration were nearly concluded, recollected that he was a shareholder in the company. He at once informed the arbiters, who approved of his continuing to act. The oversman's interest in the matter in dispute was very trifling. *Held* (1) that as the arbiters had concurred in thinking the oversman a fit person for the office, the fact that he had been chosen by lot did not invalidate his nomination; but (2) that the decree-arbitral should be reduced, as the oversman, being a shareholder in the company which was a party to the submission, had acted as judge in his own cause.

Declinature—Arbiter—Court of Session Act 1868 (31 *and* 32 *Vict. cap.* 100), *sec.* 103—*A.S., Feb.* 1, 1820.

Held that the 103d section of the Court of Session Act 1868, which provides that it shall not be a ground of declinature that the judge (whether in the Court of Session or in any of the inferior courts) is a partner in any joint-stock company carrying on the business of life or fire insurance, does not apply to arbiters; and that the A.S., Feb. 1, 1820, which provides that the fact of a judge holding shares in a chartered bank is not a ground of disqualification, had no bearing on the case, as the company in question was unincorporated.

By policy of insurance dated 17th November 1884, the Liverpool and London and Globe Insurance Company (which was unincorporated) insured the stock and utensils in trade of John Smith, shoemaker, Stenton, East Lothian, against loss by fire to the extent of £300. On 9th May 1885 the subjects insured were destroyed by fire. It was provided in the policy that differences between the company and the insured should be referred to arbitration. A deed of submission was accordingly entered into, in which Smith's claims were referred to the decision of Messrs James Brand, auctioneer, Dunbar, and John Stewart Mair, merchant, Glasgow. They accepted office, and nominated Mr William Lyon, auctioneer, Edinburgh, to be oversman, and he accepted office.

After having been nominated, Mr Lyon heard the proof in the arbitration along with the other arbiters, and the arguments of parties upon it. The proof occupied two days. Evidence was fully led and considered by the arbiters and oversman. The arbiters having differed in opinion as to the amount to which the pursuer was entitled, it was arranged that they should meet with the oversman in Edinburgh, and give in written reasons in support of their respective opinions. The day before this meeting it had been by accident recalled to Mr Lyon's memory that he was a shareholder in the defenders' company, and at the meeting on the following day, viz., 26th April 1886, he stated to the arbiters and the clerk that he held stock in the company. Both arbiters requested him to continue to act.

On Mr Lyon issuing notes of his proposed award, Smith raised objections to the competency of his acting as oversman. On 7th July 1886 Mr Lyon pronounced a decree-arbitral in the submission, awarding Smith £70 in full of his claims (£326, 2s. 9d.), finding him liable in one-half the expenses of the reference (£63, 4s. 10d.), and in his own expenses.

Smith raised an action of reduction of Mr Lyon's nomination, and of his decree-arbitral. He averred that Mr Lyon had been chosen by lot, and, secondly, that he was a shareholder in the