Counsel for the Defenders, Paterson's Trustees — C. K. Mackenzie. Agents — Graham, Johnston, & Fleming, W.S.

Counsel for the Defender Daniel Paterson—Watt — Guy. Agent — Walter C. B. Christie, W.S.

Friday, February 5.

FIRST DIVISION.

THE SOCIETY OF SOLICITORS IN ABERDEEN *v.* SIM.

Process—Law Agent—Petition and Complaint — Proof — Law-Agents (Scotland) Act 1873 (36 *and* 37 *Vict. cap.* 63).

In an application presented under the Law-Agents Act 1873 at the instance of a local society of solicitors, to have the name of S, one of their number, struck off the roll of enrolled law-agents for fraud and embezzlement, *held* that before the prayer of the petition was granted, the petitioners must prove their averments, S having been neither convicted nor fugitated.

This was a petition and complaint presented by the Society of Solicitors in Aberdeen, craving to have the name of William Sim struck off the roll of enrolled law-agents.

The petitioners averred that William Sim was a law-agent who up to October 1896 practised as a solicitor and law-agent in Aberdeen, but that on or about the 9th of that month, his affairs having become embarrassed, he disappeared, "having, it is believed, left the country."

The petition continued—"Since the disappearance of the said William Sim, it has transpired that while practising in Aberdeen he had been guilty of conduct unbecoming a solicitor, and in fact fraudulent. In course of the years 1893-95 and 1896, when he was in financial difficulties, he borrowed money from clients on the security of properties belonging to him, on representations that the properties were unencumbered, and that these loans would constitute first charges on the properties, whereas he well knew that the properties were heavily burdened and altogether inadequate as security for the loans. He also received money from clients upon the assurance that he would invest it upon first-class securities, which moneys he made no attempt to invest, but appropriated to his own uses." Certain specific instances of such fraudulent conduct on Sim's part were then condescended on.

It was further averred that Sim's estate was wholly insufficient to meet these liabilities, that he had fled the country, that a warrant had been issued for his apprehension, and that his estates had been sequestrated.

The petitioners founded upon section 22 of the Law-Agents (Scotland) Act 1873 (36 and 37 Vict. cap. 63), which enacts that "Every enrolled law-agent shall be subject to the jurisdiction of the Court in any complaint which may be made against him for misconduct as a law-agent, and it shall be lawful for the Court, in either Division thereof, to deal summarily with any such complaint, and to do therein as shall be just."

They also founded upon the enactment of section 14 of that Act, that "the name of any person shall be struck off the said rolls —(1) in obedience to the order of the Court, upon application duly made and after hearing parties, or giving them an opportunity of being heard."

The Court ordered service upon Sim, and appointed answers to be lodged by him, if so advised, within six weeks.

The petition having been served edictally upon Sim, and no answers having been lodged within that period, counsel for the petitioners moved that the prayer of the petition be granted.

At advising—

The LORD PRESIDENT delivered the judgment of the Court to the following effect:—This is an application to have the name of William Sim struck off the roll of enrolled law-agents on the ground that he has been guilty of fraud and embezzlement. The petitioners' motion is that the prayer be granted.

The Court consider the application premature. The accused person has neither been convicted nor fugitated. Unless the petitioners are prepared to prove their averments, it is for their consideration whether they should not in the meantime withdraw their petition.

Counsel for the petitioners having thereupon moved for a proof, the Court allowed the petitioners a proof of their averments.

Counsel for the Petitioners—W. Brown. Agents—Henry & Scott, W.S.

Friday, February 5.

FIRST DIVISION.

THE LOCAL GOVERNMENT BOARD FOR SCOTLAND *v.* COUNTY COUNCIL OF ELGIN.

Local Government—Public Health—Water Supply—Cost Exceeding Limit of Assessment.

The Local Government Board for Scotland presented a petition and complaint under section 97 of the Public Health Act 1867, against the County Council of E, craving to have them ordained to procure a suitable water supply for the district of H. The petitioners averred that the present sources of supply for H were inadequate and dangerous; that the County Council had delayed for a long period to deal with the matter, and had no present intention of trying to remedy the evil; that the Board had frequently called upon the County Council to do their

duty, and that the County Council had refused or neglected to do it, and had caused an obstruction in the execution of the Public Health Acts.

The County Council lodged answers, in which they averred that they were taking steps to improve the existing sources of the supply, and that the cost of any scheme for introducing water into the district by gravitation would necessarily exceed the limit of the assessment on the district (2s. 6d. in the pound) authorised by section 1 of the Public Health Act 1871.

The petitioners in the first instance moved for a remit to a man of skill to report on the facts.

Held that the petition must be refused, on the ground that the statutory limit of assessment on the district was absolutely binding on the local authority, and that consequently their refusal to introduce a supply of water by gravitation was not a refusal to do their duty under the Public Health Act, the petitioners having made no attempt to contradict or disprove the respondents' averment that the cost of such a scheme would necessarily exceed the said limit.

Tolmie v. *Parochial Board of Urray*, June 21, 1890, 17 R. 1027, *distinguished.*

This was a petition and complaint under section 97 of the Public Health (Scotland) Act 1867, at the instance of the Local Government Board for Scotland, to have the County Council of the County of Elgin ordained to take the necessary steps for procuring a sufficient supply of water for domestic use for the Hopeman Special Water Supply District.

The petitioners' averments were to the following effect—In 1876 Hopeman and the neighbourhood were formed into a special water supply district. No action having been taken by the Local Authority to improve the water supply of Hopeman, the Board of Supervision in 1878 called upon the Local Authority of the Parish of Duffus (in which Hopeman is situated) to provide an adequate water supply for Hopeman "Since that date the Board of Supervision and the Local Government Board have, as hereinafter more particularly set forth, repeatedly called upon the Local Authority to introduce a sufficient and wholesome water supply into Hopeman, but the Local Authority have refused or delayed to do so. The existing supply is so inadequate and dangerous to the health of the inhabitants of the district that the Board have found it necessary to present this petition and complaint to your Lordships in order that the Local Authority may be ordained to take such steps to remedy the evil as may to your Lordships seem proper. . . . The inhabitants have also repeatedly complained to the petitioners of the discomfort and danger caused by the neglect of the Local Authority to take any steps to introduce a new supply, and on 8th March 1895 a complaint, signed by 186 inhabitants of the village, was transmitted to the Board, bringing under their notice 'the deplorable state of Hopeman for want of a water supply.' This complaint was transmitted to the County Council of Elginshire, but at a meeting, held on April 1st 1895, of the committee of that body appointed to endeavour to procure a water supply for the village of Hopeman, no resolution to take steps in the matter was come to, and the committee adjourned."

From 1892 to 1895 annually the county medical officer reported very unfavourably on the Hopeman water supply, and expressed regret that no steps were being taken to improve it.

In April 1895 the Local Government Board sent one of their inspectors to report on the existing water supply of the village. He reported unfavourably upon the state of the four wells which supplied it with water, and samples from each were sent to Sir Henry Littlejohn for analysis. The analyst, Dr Falconer King, reported that the use of Nos. 2, 3, and 4 of these waters for dietetic purposes should be discontinued, while the suitability of No. 1 for domestic purposes was at least open to question. He further reported generally that the results of his examination showed almost certainly "that there exists in the near neighbourhood of the sources of supply matter of a suspicious nature, which it is not too much to suppose may at times find its way into the waters, and thereby render them dangerously impure." The reports of the inspector and the analyst were transmitted by the Board to the County Council.

After sundry proceedings and correspondence, the Public Health Committee of the County Council adopted a resolution to put two of the wells at Hopeman into proper condition, and to sink a third. They further adopted a statement detailing all the circumstances of the Hopeman Water Supply, and containing a declaration that "The County Council consider that 'it is not their duty to provide water for Hopeman if the cost exceeds the above limit' of 2s. 6d. per £, leviable within the special water supply district of Hopeman, 'and they decline to do so.'"

At a special meeting of the County Council this minute of the Public Health Committee was approved of and adopted.

The petitioners maintained that "in the circumstances above set forth, the failure of the Local Authority to introduce a proper supply of water for domestic and sanitary purposes is a refusal or neglect to do what is required of them by the Public Health (Scotland) Act 1867, or otherwise by law, and an obstruction in the execution of the Act."

The County Council lodged answers, in which they averred that the nett assessable rental of the special water supply district in question was only £1200, so that an assessment of 2s. 6d. per £ would only yield £150 per annum, the difference between which and the present assessment, at the rate of 6d. in the £1, would meet the annual instalment of principal and interest on the sum of £2215 only.

They further averred that they had appointed an engineer to inquire into certain schemes for improving the water supply of Hopeman, viz.—(1) A scheme to introduce a supply from the river Lossie, estimated cost £4719. (2) A scheme to combine with Lossiemouth and Branderburgh in introducing a supply from the Lennock Burn. The proportion of the cost payable by Hopeman was estimated at £4720. (3) A scheme for arranging with the adjacent village of Burghead to derive a supply from the pipes supplying Burghead. This scheme fell through owing to the action of the Burghead Water Committee.

The respondents proceeded to aver that having thus found it impracticable to procure an increased supply of water for Hopeman from outside sources, they turned their attention to the existing sources of supply with the view of seeing whether these could not be made available. They further had the water from the wells analysed, with the result that it was reported to be fairly pure, and they averred that no care was taken by the inhabitants of Hopeman to keep these sources of supply free from contamination.

"The respondents accordingly submit that no further step should be taken in the petition until the scheme which they have adopted for bringing a supply of water to the special district in question has been completed and tested. They maintain that they are entitled to provide such a supply by digging wells, or by availing themselves of existing sources of supply, and that they are not bound, at an expenditure which is entirely out of proportion to the means of the district or the objects to be attained, to introduce a gravitation supply. They understand that a section of the inhabitants, at whose instigation the present proceedings have been taken, desire to have a gravitation supply, the cost of which would have to be mainly borne by the county, and which will require to be immediately followed by extensive drainage and sewage works, the whole cost of which (the maximum assessment being already exhausted by the cost of the water supply) would necessarily be thrown entirely upon the county. The respondents submit that they are the judges of how a supply of water for the domestic use of the inhabitants of Hopeman should be obtained, and they have resolved that it should be from wells, as being the only practicable mode in the circumstances already narrated. Owing to a section of the inhabitants desiring a scheme of a different nature, they have not assisted the respondents in providing a supply of water by the means in question, but, on the contrary, have obstructed them in every possible way. If the respondents are bound to provide a supply of water by gravitation, whatever the expense, other villages will no doubt seek to obtain the same advantages at the cost of the ratepayers in the county, who derive no benefit from the expenditure upon such works.

"The respondents would further add that the health of the village of Hopeman has always been good, and no epidemic of any kind has ever been traceable to the water supply. An outbreak of diphtheria which occurred some years ago was investigated, but was found to be unconnected with the water supply of the villages. The death-rate of Hopeman has been in the same ratio as in other fishing villages of the same class.

"In the whole circumstances the respondents maintain that the petition should be refused, with expenses, in respect (1) that it is not competent under section 97 of the statute; (2) that there are no relevant averments of the respondents having refused or neglected to do any duty imposed upon them by the law or by the Public Health Act 1867; (3) that the scheme which the respondents are in course of carrying out will give a supply of water sufficient and suitable for the domestic uses of the inhabitants of Hopeman, and for the sanitary and other purposes thereof. In any event, the respondents maintain that the proceedings should be sisted for six months until the scheme which they are in the course of carrying out has been completed and tested."

Sec. 89 of the Public Health (Scotland) Act 1867 (30 and 31 Vict. c. 101) empowers the local authority, "if they think it expedient to do so, to provide a water supply for any burgh having a population of less than ten thousand, and not having a local Act for police purposes, and for any parish, and to borrow for that purpose on the security of certain special water assessments.

Sec. 94 (1) enacts—"*Special Water Supply Assessment.*—Where any special water supply district has been formed, as hereinbefore provided, the expense incurred for the water supply within the same, or for the purposes thereof, and the sum necessary for payment, as before mentioned, of any money borrowed for water supply purposes, as hereinbefore provided, shall be paid out of a special assessment, which the local authority shall raise and levy on or within such special district, in the same manner and with the same remedies and modes of recovery as are herein provided for the district of the local authority." Subsection (2)—"*Assessment for general purposes incurred in executing this Act.*—All charges and expenses incurred by the local authority in executing this Act, or any of the Acts hereby repealed, and not recovered as hereinbefore or after provided, may be defrayed out of an assessment to be levied by the local authority along with, but as a separate assessment from, any one of the assessments hereinbefore mentioned in this section—that is to say, the said assessment shall be assessed, levied, and recovered in like manner and under like powers . . . as the prison assessment or police assessment, . . . the assessment for the relief of the poor where the local authority is a parochial board, or where there is no such assessment, by an assessment levied in such manner as an assessment might have been levied for the relief of the poor."

Section 1 of the Public Health Amend-

ment Act 1871 (34 and 35 Vict. c. 38), fixes the maximum assessment for all purposes under the Public Health Act 1867 at 2s. 6d. per pound of rental.

By sec. 97 of the Act of 1867 it is enacted that "In case any local authority shall refuse or neglect to do what is herein or otherwise by law required of them, or in case any obstruction shall arise in the execution of this Act, it shall be lawful for the board, with the approval of the Lord Advocate, to apply by summary petition to either Division of the Court of Session, or during vacation or recess to the Lord Ordinary on the Bills, which Division or Lord Ordinary are hereby authorised and directed to do therein, and to dispose of the expenses of the proceedings as to the said Division or Lord Ordinary shall appear to be just."

After answers had been lodged the petitioners moved the Court to order inquiry by remit to a man of skill, and argued—The application was competent. Similar applications had been favourably entertained by the Court in the *Board of Supervision* v. *Local Authority of Montrose*, December 3, 1872, 11 Macph. 170; *Board of Supervision* v. *Local Authority of Pittenweem*, July 8, 1874, 1 R. 1124; *Board of Supervision* v. *Local Authority of Galashiels*, December 5, 1874, 12 S.L.R. 111; *Board of Supervision* v. *Local Authority of Lochmaben*, February 28, 1893, 20 R. 434. The local authority were empowered, under the Public Health Act 1867, to provide a proper water supply, and it was a well-recognised canon of construction that where such power was given it was incumbent on the authority on whom it was conferred to exercise it—*Walkinshaw* v. *Orr*, January 28, 1860, 22 D. 627; *Julius* v. *Bishop of Oxford*, 1880, L.R., 5 A.C. 214; *The Queen* v. *Bishop of Oxford*, 1879, L.R., 4 Q.B.D. 245. It was urged that to provide a proper supply for Hopeman, the statutory limitation of assessment must be exceeded. But that was not a conclusive argument, for the case of *Tolmie* v. *Parochial Board of Urray*, June 21, 1890, 17 R. 1027, proved that where a local authority had exhausted the resources of the special supply district it might fall back upon the general county assessment. The real question, however, was, not whether the statutory assessment would be exceeded, but whether the Local Authority had done their duty, or whether they had refused or neglected to do it. For twenty years they had done nothing, and a remit should be made to a man of skill to report upon the existing state of matters, in order that the Local Authority might if necessary be compelled to take action.

Argued for the respondents—The application was incompetent. The Local Authority were in terms of the statute the judges of the expediency of the introduction of a water supply. If they declined absolutely to consider the question, the Local Government Board would be entitled to present a petition and complaint against them, but if, having duly considered it, they rejected a particular scheme, the Local Government Board could not interfere. The Local Authority here were performing precisely their duty under the Act, and the nature of that duty was not affected by the fact that twenty years ago a special water supply district had been formed. What the Local Government Board apparently contended was that the Local Authority were bound to introduce a gravitation supply, but they were quite within their rights in rejecting such a proposal, and formulating a scheme for turning the present sources to the best account. *Tolmie, ut sup.*, was no authority for the proposition that in adopting a scheme the local authority were entitled to rely upon the possibility of falling back upon the general assessment when their statutory resources were exhausted. There was no precedent for such a remit as the petitioners craved.

At advising—

LORD PRESIDENT—The jurisdiction conferred on the Court of Session by the 97th section of the Public Health Act, like the corresponding jurisdiction conferred in identical terms by the Poor Law Act, has been found, I believe, to operate beneficially in furthering the execution of statutory duties. On each occasion, however, on which it is invoked we must be satisfied that the Local Authority convened has refused or neglected to do what is by law required of them, or that an obstruction has arisen in the execution of the Act.

In the present case the failure of the Local Authority to introduce a proper supply of water is what is alleged to constitute a refusal or neglect and an obstruction.

When the case is sifted the true question is this, Is the refusal of the Local Authority to provide a water supply by gravitation for the Hopeman Special District a refusal to do their duty under the Act? and is the Court to compel them to provide a water supply by gravitation?

Now, I do not dwell on the fact that the duty of the Local Authority under the statute is, "if they think it expedient" to provide a water supply for the inhabitants (and this is the governing direction applicable to special districts as well as individual areas). The primary duty of the Local Authority is to consider the question, but I make no doubt that any recalcitrancy or perversity in deciding it might be dealt with under this section.

The position of this Local Authority, however, is a definite one. Under the statutes which we administer, say they, we have an assessing power limited to 2s. 6d. per £; we have considered and calculated the cost of bringing water by gravitation to this district, and no scheme could be devised the cost of which will not greatly exceed our assessing powers. They go on to say that this more ambitious plan being beyond their powers, they are busy improving the existing supply, which is got from certain wells, and they feel pretty sure that when their improvements have been made the supply, if not affluent, will be adequate for the somewhat homely requirements of the district. This primary answer, however,

to the demand of the Local Government Board that they shall provide water by gravitation is *non possumus*.

Now, the possible answers of the Local Government Board to this position would seem to be two. They might say, Your calculations of the cost of a gravitation supply as compared with the yield of a 2s. 6d. rate over your assessable area are wrong; you overrate the one, or you underrate the other; they might have thought out some gravitation scheme and tabled it in detail, which is within the financial ability of the Local Authority. And they might have challenged the Local Authority to carry out this scheme or be held as contumacious. They have no such case at all.

Or they might say, You are wrong in your law as to your financial ability; your assessing power is not circumscribed by the 2s. 6d. limit. This they have said, and as this is a question about the administration of a statute directly within their province, and as the present application has no other ground to rest on, I listened and read in the confident expectation that there was something to overcome what seemed the clear limitation to 2s. 6d. imposed by the statutes. In this, however, I have been disappointed. The learned counsel for the Local Government Board, so long as they had only the statutes before them, did not offer any analysis or construction which would evade or alter the apparently clear terms of the statutes, and they relied solely on the case of *Tolmie*. Now, I am willing, because I am bound, to treat *Tolmie's* case as having been well decided. But the theory of *Tolmie's* case is, that if money has been borrowed for the construction of a water supply for a district, and if, owing to miscalculation, the actual cost exceeds the 2s. 6d. limit, then a ratepayer outside the district cannot refuse payment of an assessment levied to relieve the Local Authority of a loan which had been made for the purposes of the district supply, but not the less was a debt of the Local Authority. The difference between that case and the present case is so clear that one is not more than tempted to appreciate the difficulty of Lord Rutherfurd Clark or the dissent of Lord Lee. *Tolmie's* case does not throw the smallest doubt on this, that whatever means of extrication may be open for those who outrun it, the legitimate administration of the Local Authority of a special district is bounded by the 2s. 6d. limit, and any Local Authority which announced its intention of undertaking a scheme which avowedly transcended that limit would be liable to interdict at the instance of a ratepayer.

Yet the present complaint against this Local Authority is simply that they decline to take this adventurous course. I say so, because, as already pointed out, the petitioners do not table any gravitation scheme as possible of execution within the 2s. 6d. limit.

Nothing that I have said implies any optimist views of the scheme in which the Local Authority are engaged, and the immense delay which has taken place in getting any amendment of a very defective condition of things makes it natural that some pressure should be thought wholesome. But on the question whether by refusing to introduce a supply of water by gravitation the Local Authority have refused to do what is required by law, I cannot withhold my judgment in their favour, and no other question is before us. I am therefore for refusing the petition. It is unnecessary to say that a decree to this effect would confer no indemnity for any delay for the future in improving the water supply according to the measure of the Local Authority's powers, or debar the Local Government Board from resorting to this Court should the occasion arise. It is fair to say that I add this for greater clearness and for no other reason.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court refused the petition.

Counsel for the Petitioners—Sol.-Gen. Dickson, Q.C.—Pitman. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Respondents—Salvesen—Clyde. Agents—John C. Brodie & Sons, W.S.

Thursday, January 28.

SECOND DIVISION.

JOHN & JAMES WHITE AND OTHERS, PETITIONERS (RUTHERGLEN BURGH BOUNDARIES).

Burgh—Extension of Boundaries—Competency of Partial or Conditional Confirmation—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 56), *sec.* 12.

By section 12 of the Burgh Police (Scotland) Act 1892 it is provided that in the case of a burgh whose police boundary is within its municipal boundary or royalty, or within its parliamentary boundary, it shall be lawful for the council or the commissioners of the burgh, "to resolve to extend such police boundary to the municipal boundary, or the royalty, or the parliamentary boundary respectively, for police purposes. . . . . Upon any such resolution being adopted, the council or the commissioners of the burgh may present a petition to the Sheriff praying him to confirm the same, and the Sheriff, after such intimation and service as he thinks proper, and after hearing all parties interested, shall dispose of the application, and upon any final judgment confirming the resolution being pronounced, it shall be recorded in the Sheriff Court Books, and said resolution shall come into force from the date of such recording or such later date or dates as may be specified in the resolution."

A petition having been presented in