full age, still confine the power of applying for authority to disentail to heirs of entail who are of full age. And in the sphere of strict entails disentailing forms the analogue of proceedings to acquire in fee-simple in the case of a liferenter under the Act of 1848.

I am of opinion that the petition falls to be refused.

LORD PRESIDENT—Lord Ormidale, who is absent on circuit, authorises me to say that he concurs in the opinion which I have read.

The Court refused the petition.

Counsel for the Petitioner — Hon. W. Watson, K.C.—Patrick. Agents—J. & F. Anderson, W.S.

Friday, July 8.

SECOND DIVISION.

[Sheriff Court at Glasgow.

ST GEORGE CO-OPERATIVE SOCIETY, LIMITED *v.* CORPORATION OF GLASGOW.

Burgh — Drainage — Excessive Rainfall — Flooding of Cellars by Regurgitation from Sewers—Responsibility of Corporation — Negligence — Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*), *secs.* 328, 335, 364, 367—*Glasgow Buildings Regulations Act* 1900 (63 *and* 64 *Vict. cap. cl*), *secs.* 16, 43, 44, 45, 47—*Public Health (Scotland) Act* 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 77—*Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict. cap.* 38), *secs.* 101, 103.

The Glasgow Police Act 1866 enacts —Section 328—"The Corporation shall make provision for draining in a suitable manner . . . the public streets, and may with that object construct . . . in or under any of the said streets one or more ordinary or special public sewers. . . . By section 335 it is, *inter alia*, provided that the Master of Works may require a proprietor of land adjoining a public street to construct sewers on his land in a suitable manner and to connect them with the public sewers and by these means effectually drain the said lands to the entire satisfaction of the Master of Works."

In an action by the owners of property in Glasgow against the Corporation for damages in respect of the flooding of their cellars with sewage owing to regurgitation of one of the defenders' main sewers due to a heavy rainfall, it was proved that the pursuers' service drains had been constructed and connected with the public sewer to the satisfaction of the Master of Works, and so laid as to admit of complete drainage into the adjoining public sewer; that on previous occasions when the rainfall had been excessive the public sewer had failed to carry off effectually the rain water and sewage; and that on the present occasion the rainfall, though unusually heavy, was not unprecedented. *Held* that the defenders were under statutory obligation to provide a suitable and efficient drainage system, and such as would effectually dispose of all sewage which lawfully found its way into the main sewers, and that having failed to do so they were liable, as for statutory default, for the resulting damage.

Opinion per Lord Salvesen that the defenders were also liable at common law.

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii) enacts — Section 328—"The Corporation shall make provision for draining in a suitable manner the portions of the turnpike roads within the city and the public streets, and may with that object construct or continue, in or under any of the said roads or streets, one or more ordinary or special public sewers, and may from time to time alter, renew, or add to such sewers as to them shall seem proper, and may carry or continue the said sewers into or through any lands or heritages within the city, and may repair, maintain, and cleanse the said sewers. . . ." Section 335—"The Master of Works may, by notice given in manner hereinafter provided to the proprietor of every land or heritage adjoining or near to any turnpike road within the city, or to any public or private street or court, require him, as far as not already done, to construct on such land or heritage in a suitable manner, and from time to time to alter, renew, add to, repair, and maintain, one or more private sewers for the purpose of draining such land or heritage. . . . and may also by such notice require any proprietor of a land or heritage adjoining any such road, street or court to connect such private sewer or sewers with the common or public sewers, and by these means, so far as consistent with the levels, effectually to drain the said lands and heritages to the entire satisfaction of the Master of Works." Section 364 provides for application being made to the Dean of Guild before any building is erected or altered, and provides, *inter alia*, that along with such application there must be produced "a plan and sections of the land on which such building is or is intended to be situated, and of any turnpike road within the city, or any public or private street or court adjoining thereto, and of the sewers in such road, street, or court, and of the private sewers formed or intended to be formed and connected therewith. . . ." Section 367—"The Dean of Guild shall not grant a warrant to erect or alter any building unless or until he is satisfied that the plan and sections which are signed with reference to such warrant . . . make satisfactory provision with respect to the several matters specified in this section, viz., . . . that the level of the lowest storey in the building is such as to admit of complete drainage into an adjoining public or common sewer. . . ."

The St George Co-operative Society, Limited, 40 Gladstone Street, Glasgow, brought an action of damages against the Corporation of the City of Glasgow in respect of the flooding of their premises with sewage,

owing, as they alleged, to the fault of the Corporation in failing to provide a sufficient sewage system.

The *facts* are given in the interlocutor *infra* of the Sheriff-Substitute.

The pursuers *pleaded, inter alia*—"2. The defenders being bound to provide for the efficient draining of the city, and having failed to do so, and the pursuers having thereby suffered loss and damage, the defenders are liable for same. 3. The defenders being owners of said sewers are bound to prevent the contents thereof from escaping into and damaging the property of the pursuers, and having negligently failed to do so are liable to them for the loss and damage sustained. 6. The connection of the pursuers' drains with the defenders' sewers having been sanctioned by the Dean of Guild in proceedings to which the defenders' Master of Works was a party, the defenders are liable for damage caused by regurgitation from the sewers through the said drains, and are barred from pleading that the level of the drains is insufficient."

The defenders pleaded, *inter alia*—"3. The flooding complained of not having been caused by the negligence of the defenders, decree of absolvitor should be granted. 4. The defenders having complied with their statutory duty, and having provided thereunder a suitable system of drainage as condescended upon, are not responsible for the flooding complained of and should be assoilzied. 5. The said floodings being due to the levels at which the pursuers have laid their said drains, the defenders should be assoilzied. 6. *Separatim*, the flooding complained of having been due to abnormal and unprecedented rainfall, as condescended upon, was the result of *vis major*, and the pursuers' alleged loss arising therefrom being a *damnum fatale*, the defenders should be assoilzied."

On 21st October 1920 the Sheriff-Substitute (THOMSON) pronounced the following interlocutor:—"Finds in fact (1) that the pursuers are proprietors of a four-storey tenement with basement at the corner of St George's Road and Gladstone Street, Glasgow, and lessees of a tenement at 274 St George's Road, Glasgow; (2) that the streets are public streets, and that the said properties drain into the north and south public sewers which are vested in the defenders the Corporation of the City of Glasgow; (3) that on 12th July 1919, during a heavy rainfall, the said sewers were inadequate to carry away to their proper outflow into the river Kelvin the rain water and sewage which they had received in their course, and in consequence great quantities of foul sewage matter regurgitated from said sewers into the drains and thence into the basements of said properties, flooding the basements and causing great inconvenience, and also loss and damage to the extent of the sum sued for, viz., £1082, 17s.; (4) that similar floodings from the same sewers, and due to the same cause, had taken place in the said premises in June 1911 and November 1912 and in May and July 1917, and that pursuers duly advised defenders thereof on all these occasions and claimed compensation, but that defenders repudiated liability and refused to make compensation; (5) that the said rainfall on 12th June 1919 was not unprecedented either in intensity over a short period of minutes or in quantity over a period of hours, but had been occasionally exceeded in Glasgow as well as in other parts of Scotland, and that it might and ought to have been anticipated by the Corporation as not unlikely to occur at any time: (6) Finds further in fact that pursuers' said buildings at the corner of St George's Road and Gladstone Street were reconstructed in 1896, and that a petition for leave to proceed with and complete the work was lodged in the Dean of Guild Court with the relative plans, and was served upon the Master of Works (who is an official in the service of defenders) conform to statute; that the plan showed the present connections of the drains from the basement with the north public sewer; that the Master of Works stated no objections to any part of the work; that the Dean of Guild Court granted its decree of lining sanctioning the proposed works, and that in due course the connections were made with the sewers and have since been maintained; that the premises at 274 St George's Road were connected with the said south sewer before the pursuers had taken them on lease: (7) Finds that said north sewer was constructed by the defenders in or about 1875 and said south sewer in or about 1868 and are vested in the Corporation, who are charged by statute, and in particular by the Glasgow Police Act 1866 and section 328 thereof, to 'make provision for draining in a suitable manner the portions of the turnpike road within the city and the public streets,' and are given the requisite powers therefor, and by the said statute the said Master of Works can compel proprietors to drain their buildings by connecting them with the public sewers: Finds in law that defenders by failing to make due and adequate provision for carrying away through the sewers the contents thereof, and by allowing the foul contents thereof to regurgitate into and to flood the pursuers' said properties committed an actionable wrong for which they are liable to make reparation, and in respect the defenders admit that assuming their liability the sum sued for is reasonable, decerns against defenders for payment to the pursuers as craved: Finds the defenders liable in expenses. . . ."

Note.—"The salient facts are not, I think, in dispute. The pursuers' premises were on the occasion complained of, as they had been on previous occasions, badly flooded by foul sewage which had regurgitated from the public sewers.

"The regurgitation was a result of an unusually heavy rainfall, which, however, was by no means unprecedented either in Glasgow or in other places in Scotland and England. This is amply proved by the tables of rainfalls spoken to in evidence. Such a rainfall might and ought to have been anticipated by defenders, who are charged with the duty of draining the roads, and are bound to provide adequate means to carry off even unusually heavy

rains. The rainfall in question, although heavy, was by no means catastrophic.

"The sewers had failed the defenders before in heavy rains, and of this they had received many complaints—repeated complaints—from proprietors of flooded premises. They contented themselves with doing nothing except repudiating liability.

"They say (but it is not common sense) that the street surfaces were sufficiently drained, and they had therefore discharged the only duty laid upon them. They certainly had an express statutory duty to drain the streets, and they made their sewage system the vehicle for the discharge of this duty, but to tolerate a defective system which through its inadequacy had repeatedly flooded and damaged other people's properties with a mixture of rain water and sewage was a legal wrong sounding in damages. It would have been a wrong to pour their sewage upon the property of others deliberately and intentionally. It seems equally wrong to have allowed the same thing to happen through their continuance of a defective system which had been found in the past to produce, and was likely in future to produce, the same result.

"It was argued that the pursuers by connecting their drains with the public sewers in 1897 agreed to the risk of regurgitation and its consequences. This argument is unconvincing. The pursuers were bound to drain their property. The Corporation's servant the Master of Works could compel them to drain into the public sewers. The Dean of Guild sanctioned their doing so, and did so without objection from the Master of Works, who saw and was satisfied that the connection of their drains to the sewers had been properly executed. They had at the time no means indeed of knowing whether there was any risk at all, and with adequate provision against quite probable contingencies there would have been no risk to them or to the other proprietors in this extensive and populous district who like them have connected their drains to the sewers in question.

"Accordingly I think the pursuers' claim is good, and I give decree for the sum sued for, the amount if the claim is well founded in law not being now in dispute."

The defenders appealed, and argued—*Esto* that there was an imperative duty on the Corporation to drain sufficiently the public streets—Glasgow Police Act 1866, section 328—there was no such duty with regard to adjoining property drained by private sewers—Act of 1866, sections 332-335. The obligation to drain the streets sufficiently had reference to surface drainage merely, and did not apply to private sewers below the street level. Where a statutory duty was laid upon a body such as the Corporation, that body could not be held answerable for damage arising through its performance unless negligence had been proved—*Geddes* v. *Proprietors of Bann Reservoir*, 1878, L.R., 3 App. Cas. 430, *per* Lord Blackburn at p. 455-6. In the present case the streets were sufficiently drained, and if a proprietor who had connected his property with the public sewers suffered, it was because he had constructed his drains at a wrong level, or used insufficient pipes. The admitted fact of there having been previous floodings on the pursuers' premises raised a presumption of acquiescence on their part in the existing arrangements. They had taken no action, though they might easily have done so, because they recognised they had no right to claim damages. An analogous case would have been the influx of noxious gases from the sewers, but in such circumstances the Corporation could not be held liable if the owner failed to provide proper preventive appliances. Where, as here, the Corporation had carried out a statutory undertaking, and a member of the public had availed himself of it and suffered damage, the Corporation was not liable unless the statute had either expressly or by implication imposed liability for such damage—*Canadian Pacific Railway Company* v. *Parke*, [1899] A.C. 535, *per* Lord Watson at pp. 545-6; *Stretton's Derby Brewery Company* v. *Mayor of Derby*, [1894] 1 Ch. 431, *per* Justice Romer at p. 441; Bevan on Negligence, vol. i, page 317-18. The respondents' argument based on the Public Health (Scotland) Act 1897, section 103, was countered by the terms of section 101 of the same Act. Reference was also made to *Hawthorne Corporation* v. *Kannuluik*, [1906] A.C. 105; *Hanley* v. *Magistrates of Edinburgh*, 1913 S.C. (H.L.) 27, *per* Lord Shaw at pp. 29, 30, 33 and 34, 50 S.L.R. 521.

Argued for the respondents—The Corporation had failed to provide suitable arrangements for drainage and was therefore liable in respect of both initial and subsequent negligence. The Glasgow Police Act 1866 imposed upon the Corporation an obligation to effectually drain the pursuer's property, and further there was a common law obligation not to cause a nuisance by the overflow of drainage. To allege that the respondents had acted at their own risk in connecting their private sewers, as they were entitled to do, with the public sewers was equivalent to asserting that the Corporation had immunity from liability in every case in which a citizen connected his drains with the public sewers. Every citizen was entitled to have his property efficiently drained. Where, as here, the powers conferred by statute were for the public benefit the word "may" in sections 334 and 335 was imperative — *Walkinshaw* v. *Orr*, 1860, 22 D. 627, *per* Lord Justice-Clerk Inglis; *Gray* v. *St Andrews and Cupar District Committees of Fifeshire County Council*, 1911 S.C. 266, 48 S.L.R. 409. Reference was also made to sections 342, 364, and 367 of the Act. The Act imposed upon the Corporation a duty to effectually drain the city and it had failed to do so. The evidence showed that no opposition had been offered by the Master of Works at the time when application was made to the Dean of Guild Court. It had also been proved that the rainfall on this occasion was not unprecedented. The Glasgow Buildings Regulations Act 1900 vested sewers in the Corporation (section 16), and section 43 of the same Act showed that a lining for a private house could not be obtained unless provision was made for con-

necting the drainage with the public sewer. The provision of section 44 that buildings must be of a proper height for drainage had been complied with. The Corporation were also liable under the Public Health (Scotland) Act 1897, sections 12 (2), 103, under which a general obligation rested on the Corporation as local authority to provide a sewage system. The respondents had done nothing to bring the sewage upon their premises. They had done only what they were bound to do, and it could not be reasonably argued that in connecting under the local Act their sewers with the sewer system of the city they had given up their common law rights under which the Corporation were likewise liable—*Hanley* v. *Magistrates of Edinburgh* (*cit.*), *per* Lord Shaw at p. 30; *Fletcher* v. *Rylands*, 1866 L.R., 1 Ex. 265, 1868 L.R., 3 E. & I. App. 330.

At advising—

LORD JUSTICE-CLERK—The pursuers in these two actions claim damages from the Corporation of Glasgow in respect of the flooding of their cellars owing to regurgitation of one of the defenders' main sewers. The Sheriff-Substitute has granted decree for the sums sued for. If damages are due no question is raised as to the amount. There is no dispute between the parties as to the facts as found by the Sheriff, but important questions of law depending not only on the common law but also on the provisions especially of the Glasgow Police Act 1866 and of the Public Health Acts are raised. The pursuers in 1896 reconstructed their buildings. They got a decree of lining in that year from the Dean of Guild Court in a process to which the Master of Works, as required by the Statute of 1866 "for the public interest," was duly called as a party. The plans submitted to the Dean of Guild showed full details of the buildings and of the drains thereof, including the main drain which was shown as extending across the whole breadth of the building. It is trapped near the front of the building and then runs downward at a moderate gradient till it joins the egg-shaped main sewer of the defenders. That sewer has existed since before 1896, and there was apparently no complaint as to its sufficiency until about 1911. The floodings complained of in these actions were due to the heavy rainfall, which surcharged the main sewer and forced the contents thereof through the pursuers' service drains into the cellars of their building which are below the street level and so caused the damage complained of. The defenders have an elaborate sewage system, the law of which is regulated partly by their own municipal statutes beginning with that of 1866, and partly by the Public Health Statutes beginning with that of 1867.

In my opinion the statutory provisions which regulate the rights of the parties in the matter at issue require the defenders to provide a sufficient and efficient system of drainage by main sewers into which the pursuers had and have a statutory right to discharge the sewage from their whole buildings, including the cellars, unless the levels made this impossible. It was not contended that the levels were such as to prevent the pursuers from exercising their legal right and connecting their drains with the defenders' sewer. That sewer, down to 1911, as I have indicated, seemed to have been quite sufficient to accommodate all the sewage and drainage which found access to it without causing damage to anyone. But since then, on several occasions and especially on the two occasions complained of in the two actions we are now dealing with, the defenders' sewer has become surcharged—its contents have regurgitated and have found access by the pursuers' drains to their cellars and caused damage. It is not now contended that the rainfall on the occasions in question was so excessive as to be an act of God or *damnum fatale*. In my opinion the defenders were bound to provide a sewer of sufficient capacity to accommodate, without such surcharges and regurgitation as occurred on the two occasions referred to, all the sewage and drainage which found access to it. I am further of opinion that the pursuers in connecting their drains with the defenders' sewer did nothing beyond what they were legally entitled to. In the process of lining authorising the reconstruction of the pursuers' buildings in 1896 the Dean of Guild pronounced a decree of lining, certainly without any objection being offered to his doing so by the Master of Works as representing the defenders—indeed, in my opinion with the consent of the Master of Works—under which the pursuers were entitled to connect their drains as they did with the defenders' sewer. In my opinion, further, the defenders were bound, both under their municipal statutes and under the Public Health Acts, to receive the pursuers' drainage and the other sewage and drainage of the street in question and the buildings abutting thereon into their sewer, and were liable if their sewer was insufficient to do so on the two occasions complained of. Having failed to receive and retain the sewage and drainage they are in my opinion liable for the resulting damage so far as statute law is concerned. I refer in particular to sections 335, 364, and 367 of the Glasgow Police Act 1866. Section 77 of the Public Health Act 1867 and section 110 of the Public Health Act 1897 may also be referred to. Though the local statutes concerned in this case are different from those which had to be considered in the case of *Hanley* (1913 S.C. (H.L.) 27), much of the reasoning in Lord Shaw's judgment appears to me applicable in the circumstances of this case. The Sheriff-Substitute's findings, both in fact and in law, seem to me to be sound. In my opinion we should refuse the appeal and affirm the Sheriff-Substitute's judgment.

LORD DUNDAS—In my judgment this appeal fails. I think the defenders are, as local authority, under statutory obligation, by Acts both general and special, to provide a suitable and efficient drainage system for their area, such as will effectually dispose of all sewage, &c., which lawfully finds its

way into their main sewers. Now the pursuers' property has been flooded by a regurgitation of sewage emanating from the defenders' sewer by means of the drain laid thence into the pursuers' premises about five and twenty years ago. By section 335 of the Glasgow Police Act 1866, it is, *inter alia*, provided that the Master of Works "may"—and I think that the word is rather mandatory than merely permissive—require a proprietor of land adjoining a public street to construct sewers on his land in a suitable manner, and to connect them with the public sewers, and by these means, so far as consistent with the levels, effectually to drain the said lands to the entire satisfaction of the Master of Works. It is true that this particular section was not actually put in motion by the Master of Works in connection with the operations here in question, but the fact is immaterial; the work was carried out under another of the statutory methods provided by which such things are to be done to his satisfaction, viz., a petition at the pursuers' instance to the Dean of Guild, the Master of Works being duly called, as he was bound to be called, to the proceedings, and appearing therein, though not as an objector thereto. It was a statutory condition of the lining being granted that the pursuers' plans and sections should make satisfactory provision, *inter alia*, that the level of the lowest storey of the building was such as to admit of complete drainage into an adjoining public or common sewer. The plans showed provision for that purpose, and the lining was granted. I am not disposed to attribute blame either to the Dean of Guild or to either of the parties in connection with the warrant of the lining. But events have shown that the drainage system at this point is not adequate to prevent in abnormal but not unprecedented circumstances flooding the pursuers' premises. It seems to me that the risk of such flooding lay with the defenders, and not—as their counsel strenuously maintained—with the pursuers. The connection was lawfully made and the work became an integral part of the drainage system which it was the duty of the defenders, as Local Authority and in terms of the statutes, to provide. In my judgment therefore they are liable as for statutory default in respect of the pursuers' injury and damage.

If this view be correct, it is unnecessary to decide whether the pursuers' claim could, or could not, alternatively have been sustained at common law.

LORD SALVESEN—I agree with both your Lordships. I think there was a statutory obligation on the part of the defenders effectually to drain the streets in the area in question, and impliedly the houses abutting on the streets in so far as the drains of these houses had been legally and properly connected with the sewage system. Apart from this statutory duty I think there may also be ground for holding the defenders responsible for negligence at common law, although, as your Lordships have pointed out, the sewer in the first instance appears to have been adequate to serve its purpose. With the increasing number of connections that were made it has gradually become inadequate, but the defenders had ample warning of that fact by the floodings that have taken place since 1911. The attitude of the defenders was that the pursuers must take means to prevent regurgitation in their own premises. I am unable to accede to that view. The pursuers had obtained connection with the sewer after going through all the necessary formalities and satisfying the Master of Works that they were connecting with the sewer at a proper level. It therefore seems to me that the argument that they continued to be connected with the sewer at their own risk is not one that can be sustained. It was the defenders' duty to take any measures that might be necessary in order to prevent regurgitation into the pursuers' premises, and without any large expenditure of public money in enlarging the whole sewer it seems probable that quite simple means might have been effective, such as valves to prevent the back-flow of the sewage, or raising the level of the closets and the sinks through which the sewage found its way into the pursuers' premises. I rather think that the defenders have it in their power to direct such alterations on an existing system as will make it free from danger. I do not, however, go further into that matter, for I am quite satisfied that the pursuers did not in connecting their drain take the risk of such floods as occurred occasionally from 1911 down to the date when this action was brought, but that the risk was laid on the defenders, whose duty it was to see that the premises of all the residents in the street whose drains they had permitted or compelled to be connected with their system, were secured from regurgitation of sewage from the sewer.

On these grounds, in addition to the grounds which your Lordships have mainly founded on and which I entirely accept, I think the appeal must fail.

LORD ORMIDALE concurred.

The Court dismissed the appeal, and found in fact and in law in terms of the Sheriff-Substitute's interlocutor.

Counsel for the Defenders (Appellants) — Sandeman, K.C. — Russell. Agents — Campbell & Smith, S.S.C.

Counsel for the Pursuers (Respondents) —The Dean of Faculty (Constable, K.C.)— R. M. Mitchell. Agents—J. Miller Thomson & Company, W.S.