the nature of the bequest and on the part it plays in carrying out the general scheme of the settlement—in short, on the evidence derived from the deed as a whole. The testator had six sisters and one brother, so he broke up his estate into seven shares of one-seventh each. Two of his sisters had predeceased him, and he gave their two one-seventh shares to the families they had left behind them. Of the children of his sister Margaret three survived, but one had died leaving children. So he directed the division of his sister Margaret's share to be among her surviving children and the children of the predeceaser. He did not in terms make the division stirpital, but he did what appears to me to be—so far as evidence of intention goes—the same thing—that is to say, he indicated in a parenthesis the reason for including the three survivors (viz., because they were the surviving children of his sister), and went on to include the children of the predeceasing child—again indicating his reason (viz., because their mother was also a child of his sister). I think that in these circumstances if the testator had had any intention of giving the family of grandchildren more than he gave to each surviving child he would have said so. In my opinion he meant to give the grandchildren just what he gave to their uncle and aunts. The case is not unlike *Galloway's Trustees* v. *Galloway*, (1897) 25 R. 28.

LORD MACKENZIE—I am entirely of the same opinion. The natural reading of this will would lead one to the conclusion which your Lordship has reached, but it was pressed upon us that there were difficulties created in consequence of certain decisions which were quoted. I have read those cases since the argument, and I am glad to find that they do not prevent us reaching this conclusion. I think that the opinions of Lord Adam and Lord M'Laren in the case of *Galloway's Trustees* ((1897) 25 R. 28) afford ample authority—if authority were needed—for saying that the intention of the testator—which seems to me to shine with clearness through the general scheme of this deed—should prevail. It appears to me to be clear that the objects of his bounty, in the clause under consideration, were the children of his deceased sister Margaret Horne. He calls three by name, and, one being dead, he says that the children of the deceased daughter of Margaret are to stand in place of their parent. That results in one-seventh being divided among them *per stirpes*.

LORD CULLEN — I agree. I think the general character of the scheme of distribution affords a sufficient indication of the testator's intention that the division here should be *per stirpes* in accordance with the contention of the second parties.

LORD SKERRINGTON did not hear the case.

The Court answered the first question of law in the affirmative and the second question in the negative.

Counsel for the First Parties—Gilchrist. Agents—Cunningham & Lawson, Solicitors.

Counsel for the Second Parties — W. T. Watson. Agents—Wallace & Begg, W.S.

Counsel for the Third Parties — Maconochie. Agents—H. & H. Tod, W.S.

Wednesday, July 6.

SECOND DIVISION.

(Before Seven Judges.)

RAMSAY (CRICHTON-STUART'S TUTRIX), PETITIONER.

Fee and Liferent—Liferent Interest—Party Born after Post-1848 Deed—Application by Tutrix of Pupil Beneficiary for Declarator that Property was Held in Fee-simple—Nobile Officium—Entail Amendment Act 1848 (11 *and* 12 *Vict. cap.* 36), *sec.* 48.

Under a trust settlement dated subsequent to 1848, certain heritable estate was conveyed to a liferenter with power to settle it by *mortis causa* deed upon any one of the heirs of his body under such conditions as he should see fit. The liferenter died leaving a pupil son born in 1915, upon whom in 1907, in accordance with the said power, he had settled the estate in liferent. Thereafter, upon the narrative that it was desirable in the interests of the holder of the settled estate that certain parts thereof should be sold, a petition was presented to the Court by the widow of the liferenter, as tutrix for her pupil son, for declarator that in virtue of section 48 of the Entail Amendment Act 1848 her son was fee-simple proprietor. *Held* that the power conferred upon liferenters by section 48 of the Entail Amendment Act 1848 to apply to the Court to be deemed to be fee-simple proprietors was confined to persons of full age; that the *nobile officium* of the Court could not be invoked to contravene an express statutory condition; and petition *refused*.

The Entail Amendment Act 1848 (11 and 12 Vict. cap. 36) enacts—Section 48—"And be it enacted that from and after the passing of this Act it shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant; and where any land or estate in Scotland shall, by virtue of any deed dated on or after the said first day of August One thousand eight hundred and forty-eight, be held in liferent by a party of full age, born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the fee-simple proprietor of such estate, and it shall be lawful to such party to obtain and record an act and decree of the Court of Session in the like form and manner, and in the like terms, and with the like operation and effect as is hereinbefore provided with reference to an

act and decree of the said Court in the case of deeds of trust."

The Honourable Mrs Ismay Lucretia Mary Maule Ramsay, formerly Crichton-Stuart, tutrix to her pupil son Michael Duncan David Crichton-Stuart of Falkland in the county of Fife, presented a petition in which she craved the Court to declare that in virtue of the provisions of section 48 of the Entail Amendment Act 1848 he was fee-simple proprietor of the estate of Falkland and others therein mentioned.

The petition, after referring to sections 47 and 48 of the said statute, and to the application presented by the petitioner under the Trusts Act for authority to sell, then pending before Lord Blackburn, proceeded as follows:—"The provisions of the statute before referred to providing that a party holding in liferent may make application to the Court of Session for declarator that he or she is a fee-simple proprietor only apply to parties of full age, but no provision seems to have been made for cases like the present where the party in possession is in pupillarity, and where it is advisable in the event of the party in possession being a pupil or minor that declarator be obtained from your Lordships that the said party is a fee-simple proprietor. The petitioner is accordingly under the necessity of applying to your Lordships in exercise of the *nobile officium* of the Court to pronounce an act and decree declaring the said Michael Duncan David Crichton-Stuart to be fee-simple proprietor of said estate of Falkland and said subjects called The Priory, St Andrews, and that all prior to the prosecution of any further procedure under the said petition for power to sell now pending before the Honourable Lord Blackburn."

No answers were lodged.

The circumstances in which the petition was presented sufficiently appear from the report (*infra*) by Mr J. H. Guild, W.S., to whom on 7th June 1921 the Court remitted the application.

In his report Mr Guild, *inter alia*, stated—"The petition is presented by the Honourable Mrs Ismay Lucretia Mary Maule Ramsay, formerly Crichton-Stuart, mother and tutrix of Michael Duncan David Crichton-Stuart, only surviving son of the late Lord Ninian Edward Crichton-Stuart, who was the second son of the late Most Honourable John Patrick Crichton-Stuart, Marquess of Bute, K.T.

"The late Marquess of Bute died on 9th October 1900.

"At the date of the death of the Marquess Lord Ninian Edward Crichton-Stuart was a minor. On 15th May 1904 he attained majority. In 1906 he married the petitioner, and on 2nd October 1915 he was killed in action. Two sons and two daughters were born of the marriage, viz.—1. The eldest son, Ninian Patrick Crichton-Stuart, who predeceased his father on 4th February 1910 in infancy; 2. the pupil the said Michael Duncan David Crichton-Stuart, who was born on 14th March 1915; 3. Ismay Catherine Crichton-Stuart; and 4. Claudia Miriam Crichton-Stuart.

"By his trust-disposition and settlement dated the 13th day of July 1894, and with various codicils thereto registered in the Books of Council and Session on the 17th day of October 1900, the late Marquess of Bute conveyed his whole heritable and moveable estate to certain trustees therein named, and directed them, *inter alia*, to free and disencumber his estate of Falkland and any subjects adjacent thereto, situated in the parishes of Falkland, Auchtermuchty, and Strathmiglo in the county of Fife, and also the subjects in St Andrews in the said county called 'The Priory,' of all debts which might at the time of his death affect them, and to hold the same for the liferent use allenarly of the said Lord Ninian Edward Crichton-Stuart, his second son, whom failing the heirs-male of his body according to the rules of heritable succession in Scotland, whom failing the heirs-female of his body according to seniority. . . . He further directed his trustees on his said son or other beneficiary attaining majority . . . to settle the said whole lands and estate of Falkland and others, and the said subjects called 'The Priory' and pertinents thereof, on his said second son or other beneficiary as aforesaid in liferent, subject to the provision therein and hereinafter mentioned, whom failing on the heirs-male of his body according to the rules of heritable succession in Scotland . . . in fee; and he provided that his trustees should in settling the said estate and others under the said direction confer on his said second son or other beneficiary who should take the liferent—(*Primo*) the entire beneficial enjoyment of the said estate of Falkland and others and whole rents, &c., thereof, and full and exclusive powers of administration and management, and not only all the powers of a liferenter but all the powers of an absolute fee-simple proprietor, excepting always the power to burden or sell, and (*secundo*) power to settle the said estate and others by *mortis causa* deed on any one of the heirs of his body, and that on such conditions and under such limitations as regards the liferent and succession as to him should seem fit, and failing such settlement the said Marquess directed that the Falkland estate should descend in fee to the heir next substituted to his said second son or other beneficiary in liferent.

"In implement of the above directions the trustees of the said Marquess, by disposition dated 6th and 7th March 1914, and duly registered in the appropriate Registers of Sasines, disponed and conveyed the abovementioned estate and others to the said Lord Ninian Edward Crichton-Stuart in liferent, with power to him to settle the same by *mortis causa* deed, all as provided in the said trust-disposition and settlement of the said Marquess.

"By deed of settlement and trust-disposition and settlement dated 12th July 1907, and together with relative codicils registered in the Books of Council and Session 1st November 1915, the said Lord Ninian Edward Crichton-Stuart, on the narrative that he was desirous of exercising the power to settle the said estate and others by *mortis causa* deed as provided by the said trust-disposition and settlement of the said Mar-

quess, disponed the said estate and others to his eldest son Ninian Patrick Crichton-Stuart in liferent and the heirs-male of his body in fee, whom failing to any other sons who might be borne to him, the said Lord Ninian Edward Crichton-Stuart, in their order of seniority in liferent and the heirs-male of their bodies respectively in fee, subject to the conditions contained in said deed of settlement and trust-disposition and settlement.

"It will be observed that the interest conferred by the said Marquess upon the late Lord Ninian Edward Crichton-Stuart was restricted to a liferent, together with a power to settle the estate upon one member of a limited class, and that the liferenter Lord Ninian Edward Crichton-Stuart in making the settlement upon his eldest son in liferent (whom failing, then as above mentioned) exercised a power conferred upon him by the trust-disposition and settlement of his father, but subject to the restrictions of that deed.

"In these circumstances the question has arisen whether the restriction of the interest of the said Michael Duncan David Crichton-Stuart to a liferent, which was so made in virtue of the power above referred to, was effective in view of the fact that he was not in life at the date of the death of the Marquess of Bute, and also in view of the fact that the original destination contained in Lord Bute's settlement in favour of Lord Ninian Edward Crichton-Stuart was 'whom failing on the heirs-male of his body, according to the rules of heritable succession in Scotland, in fee."

"The effect of sections 47 and 48 of the Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), which are referred to in the petition, is that from and after the passing of that Act it was no longer competent to limit the interest of any person in an heritable estate in Scotland to a liferent, provided that person was born after the date of the deed conferring the interest in his favour. It was further provided by these sections that such person should be deemed and taken to be a fee-simple proprietor, and that if of full age he should have right to make application by way of petition to the Court of Session setting forth the facts and referring to the Act, and craving the Court to pronounce an act and decree declaring him fee-simple proprietor of such land or estate and unaffected by any conditions, provisions, restrictions, or limitations of the deed.

"The effect of these sections appears to be that no limitations of the nature of a liferent can be effective against a beneficiary unless that beneficiary was in life at the date of the deed under which he takes benefit, but the right to apply to the Court for an act and decree declaring the beneficiary to be a fee-simple proprietor was thereby limited to a party of full age born after the date of the grant in his favour.

"By section 17 of the Entail Amendment Act 1868 (31 and 32 Vict. cap. 84) the above-mentioned provisions of the Entail Amendment Act 1848 were extended to moveable and personal estates and so became universal in their application.

"By section 11 of the Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53) it was provided that in every case where it was competent for an heir *in possession of an entailed estate*, being of full age, and not subject to any legal incapacity, to make an application to the Court under the Entail Acts, it should thereafter be competent for the tutors of an heir in possession to make such application, provided only that such application was not for authority to disentail the entailed estates.

"The petitioner has presented a petition under the Trust Acts for authority to sell part of the Falkland estate and 'The Priory,' St Andrews, and this petition is at present in dependence before the Honourable Lord Blackburn, but she has been advised that such petition cannot be proceeded with until it is determined whether her pupil son has the status of a proprietor in fee or not. The question of the expediency of granting the power of sale sought will, in the reporter's opinion, fall to be dealt with under that petition, but it may be mentioned that it is intended that the price of any subjects sold should be invested in the names of trustees to be appointed by the Court.

"It would appear that had the Falkland estates been held under a deed containing the usual restrictions of an entail, the petitioner, as tutrix, could have presented an application founding upon section 11 of the 1882 Act and section 47 of the 1848 Act for authority to sell the said part of the Falkland estate and 'The Priory,' St Andrews, but inasmuch as the Falkland estates are held under a deed which is not of the nature of an entail, there is no express statutory provision upon which the petitioner can found.

The present petition is an application to your Lordships to exercise the *nobile officium* of the Court and to grant relief from a position which appears to arise from an omission in the Entail Statute of 1882 to extend its provisions to fee-simple proprietors of lands in Scotland or proprietors under limitation by way of liferent trust or otherwise. . . .

"The reporter is satisfied that the facts and circumstances are accurately set forth in the petition, and having carefully considered the prayer thereof he humbly begs to submit the view that the said sections of the Entail Act of 1848 ought to be made applicable to the present case, and that it would be contrary to public policy that a right to have the said Michael Duncan David Crichton-Stuart declared a fee-simple proprietor (which would have been competent had he been of full age, or had he, being a pupil, held the estates under the fetters and restrictions of a strict entail) should not be available to him when he takes his right under a deed which does not contain these fetters and restrictions, more especially as this position arises from what is obviously an unintentional defect in a public statute."

The petition was heard by the Second

Division on 19th June 1921, and was remitted for further hearing to a Court of Seven Judges, by whom it was heard on 27th June 1921.

Argued for the petitioner—Under section 48 of the Entail Amendment Act 1848 the pupil was at present fee-simple proprietor of the estate. An application for a declarator to that effect could undoubtedly have been made by him if he had been of full age; the question was whether his tutrix could now make the application on his behalf. The Entail Amendment Act 1848 went out of its way to deal with matters which did not relate to entails, but the subsequent Entail Acts had omitted to deal with these matters, and had regard to entails alone. The deeds referred to in the present petition did not constitute an entail within the meaning of the Entail Acts, but sections 47 and 48 of the Act of 1848 were not limited to entails. Section 48 rendered ineffective the restrictions to a liferent contained in any deed dated after the Act and limiting the interest of a person born after the date of the deed. The following statutes were referred to—Entail Amendment Act 1848 (11 and 12 Vict. cap. 36), sections 47 and 48; Entail Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 84), section 17; Entail Amendment (Scotland) Act 1875 (38 and 39 Vict. cap. 61), section 12 (2); Entail (Scotland) Act 1882 (45 and 46 Vict. cap. 53), section 11. The *nobile officium* of the Court was sufficient to enable the Court to supply an omission in a statute in furtherance of the objects of the statute. In the present petition the pupil had the estate of right as a fee-simple proprietor, though not of title, and the exercise of the *nobile officium* of the Court could competently be invoked in order to give him the title—Stair's Inst., iv, 3, 1; Act 1540, cap. 93; More's Notes on Stair, ccclxxiv; Erskine's Inst., i, 3, 22; Bankton's Inst., iv, 7, 24; Mackay's Practice, i, pp. 209, 214-15; *Finlay* v. *Magistrates of Linlithgow*, 1782, M. 7390; *Gordon* v. *Grant*, 1765, M. 7356; *Fife*, 1844, 6 D. 686; *Thomson*, 1863, 2 Macph. 325, *per* Lord Justice-Clerk Inglis; *Stewart* v. *Chalmers*, 1864, 2 Macph. 1216, *per* Lord Justice-Clerk Inglis at p. 1219; *Tod, &c.* v. *Anderson, &c.*, 1869, 7 Macph. 412, *per* Lord Justice-Clerk Patton, 6 S.L.R. 265.

LORD PRESIDENT—This petition is an appeal to the *nobile officium*. Its purpose is to obtain the benefit of section 48 of the Rutherfurd Act 1848 for a pupil born after the date of a *post*-1848 deed, by which deed a liferent is conferred upon him.

Section 48 deals solely with the effect of *post*-1848 deeds. It is in three parts closely related to each other. (1) It confines the theretofore unrestricted power of a settlor effectually to limit the grant of an estate to a liferent to cases in which the selected liferenter is a person living at the date of the grant. (2) It liberates a person of full age who (*a*) holds an estate (under a *post*-1848 deed) limited to a liferent, and (*b*) was born after the date of the grant from the limitation; endows him with the rights and powers of a fee-simple owner; and allows him to establish the fact of his liberation from the limitation by a declarator on petition. (3) It saves the rights of superiors and security holders and all other rights derived otherwise than from the deed conferring the liferent.

It will be observed that this enactment in none of its parts makes the grant (by a *post*-1848 deed) of an estate limited to a liferent interest unlawful or void. Nor is there in any of them anything to prevent the grantee (under a *post*-1848 deed) of an estate so limited from adopting the course of refraining from availing himself of the rights and powers of a fee-simple owner which the statute places within his reach, or from applying for declarator. The object of the enactment indeed is not to make such liferent interests null and void—it is only to disable settlors from making such limitations irremediably effectual against the grantees. If the grantee is content with his limited estate, and prefers that the settlement should take its course, he is free to act accordingly. The enactment is that "it shall be *competent* to grant an estate . . . limited to a liferent interest in favour *only*" of a particular class of persons. This is a different thing from saying that "it shall be *lawful* to grant a limited estate in favour *only*" of that particular class, and it may be accurately paraphrased thus—"it shall be in the rightful power (competency) of a settlor effectually to restrict the grantee of an estate to a liferent interest in the case only of grantees belonging to the particular class." Any inconsistency which might at first sight appear to exist between the first and restrictive part of the clause and the reference in the second part to an estate "held in liferent" under a *post*-1848 deed thus disappears. In short, the Act deals with liferenters on lines parallel to those on which it deals with heirs of entail. It makes neither settlements in liferent nor settlements in entail illegal or void, nor does it make either of them necessarily inoperative. It only provides means by which the liferenter and the heir of entail alike can get relief from the limitations of their titles. Not unnaturally, these means of relief were given—both in the case of entails and in that of liferenters—to majors, and not to minors nor to their tutors and curators. As regards entails the benefit of these means was subsequently extended to minors through their tutors and curators except for purposes of disentail—1875 Act, section 12 (2), and 1882 Act, section 11. There is no similar provision in regard to liferents, and it may well be that the reasons of public policy which required the exclusion of minors from the benefit of disentail was considered equally to require the exclusion of minors from the analogous benefit of breaking a liferent limitation.

The petitioner maintained that the true intendment of section 48 was to make all liferenters under *post*-1848 deeds into fiars, and in one part of it the argument was carried so far as to claim this as the actual effect of the first part of the clause. This latter contention if sound would point to

the petitioner having to abandon her present application in favour of an ordinary declarator of fee-simple property in the minor. But if what has been said is correct neither of these contentions can be supported.

It is in my view clear that the *nobile officium* — available as it sometimes is even in the case of statutory enactment when supplemental machinery is required to effectuate the enactment itself—cannot be appealed to in order to communicate a special statutory right to persons or classes of persons other than those for whom the statutory right is created. "Certainly," said Lord Justice-Clerk Patton in *Tod* v. *Anderson*, 1869, 7 Macph. 412, at p. 413, "the substitution of different provisions from those in a statute or dispensing with statutory powers is no part of our proper province." The rights created by section 48 are expressly conceived in favour of majors, and the prayer of this petition, which asks that we should authorise the communication of them to a minor through his tutrix, cannot in my opinion be granted. Since the debate the petitioner has submitted to us a copy of the Falkland and Pluscarden Estates Act 1914 (4 and 5 Geo. V, Local and Private Acts, cap. 2), but the provisions of that Act do not affect the merits of the present petition.

LORD JUSTICE-CLERK — I have had an opportunity of reading the Lord President's opinion and I concur in it.

LORD DUNDAS—After the first hearing of this case I thought the petition must be refused. The second hearing confirmed me in that view. I cannot understand how, as an exercise of our *nobile officium*, we could extend to a pupil provisions conceived by the legislature in favour of majors only; and the reporter's view that the "position arises from what is obvious an unintentional defect in a public statute" is to my mind clearly untenable. What I have stated affords, if well founded, sufficient ground for throwing out this petition, but I ought to add that having had an opportunity of reading the Lord President's opinion I concur in the wider observations therein contained.

LORD SALVESEN — On the assumption that the petitioner is not entitled to declarator that he is the fiar of the Falkland estates, I concur in the judgment to the effect that the *nobile officium* cannot be exercised here. The basis of the petition was that it was plain from the Acts of Parliament quoted that this pupil, though nominally a liferenter, was entitled to be declared fiar just in the same way as a major under the fetters of a strict entail would have been entitled to such a declarator. If, however, the matter is not clear but is in doubt, and still more if the right does not exist, it seems to me plain that we cannot under an application to the *nobile officium* grant a right which depends upon statute and which the statute has not conferred. Personally I entertain more doubt than the rest of your Lordships as to whether in a proper action of declarator the pupil might not have succeeded in obtaining a decree such as that sought in the petition, but it is needless for me to give the reasons for which I entertain that impression, seeing it is not the opinion of the Court as a whole.

I would only add that having had my attention called to the private Act of Parliament I am unable to understand why this application was ever presented seeing that the private Act of Parliament seems to authorise the liferenter of the Falkland estates for the time being, with the consent of the trustees, to do exactly what the petitioner seeks power from us to do. Of course we have not had the matter argued, and therefore I indicate no considered opinion as to the proper construction of sections 3 and 4 of this Act of Parliament, but it is gratifying to believe that in this case where the obvious expediency of having the estate sold is so great the petitioner is not without a remedy.

LORD MACKENZIE—I concur in the opinion of the Lord President.

LORD CULLEN—The jurisdiction of the Court in granting such a declarator as this petition craves is entirely statutory and can only be exercised in accordance with the statutory conditions. One of these conditions is that the petitioner shall be of full age. As this petition is presented by the tutrix of a pupil it follows that it is without statutory warrant and that the Court has no power to grant it.

The petition appeals in terms to the *nobile officium*. This simply means that the Court is invited under the guise of an exercise of its *nobile officium* to contravene an express condition of its statutory jurisdiction. It is difficult to understand why it should have been thought useful to propose such a course. The petitioner, with encouragement from the reporter, offers the conjecture that the retention of the foresaid statutory condition requiring a petioner to be of full age, occurring in the Act of 1848 (11 and 12 Vict. cap. 36, sec. 48), is what the reporter styles "obviously an unintentional defect" in legislation. This of course is entirely irrelevant, seeing that the *nobile officium* does not include a legislative power to alter statutes in the way the petition proposes. But a consideration of the enactments brought under our notice shows that in the legislation subsequent to 1848 the distinction between the powers of a liferenter or an heir of entail of full age and those of a liferenter or heir of entail under full age has continued to be well marked. Thus the Entail Amendment Act of 1868 (31 and 32 Vict. cap. 84), which by section 17 extends in effect the provisions of section 48 of the Rutherfurd Act to liferents of personal estate, repeats the condition of full age on the part of a liferenter occurring in section 48. Again, the Entail Amendment Acts of 1875 (38 and 39 Vict. cap. 61, sec. 12) and 1882 (45 and 46 Vict. cap. 53, sec. 11), while they enable certain powers within the sphere of necessary administration to be exercised with the authority of the Court in the case of heirs of entail under

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,