bal contract, confirmed, as the purchaser says, by a letter written on the same day by the seller to the purchaser. The defence is that there was no concluded sale. The defender says that he, by the letter libelled, proposed to conclude a sale, which the pursuer refused or at least failed to do. Then, when the purchaser asked for performance, he was informed by the defender that there was no contract between the parties. Looking to the evidence of Robertson, one of the pursuers, on the one hand, and of Martin, one of the defenders, on the other hand, it appears impossible to doubt that a verbal contract was entered into on 7th July. The defender's account is, not only in substantials, but in almost every detail, the same as the pursuer's—(*reads evidence of Hugh Martin junior, given above*). If the case had stood upon this evidence alone, I think it would have been conclusive, but the seller writes a letter—(*reads letter of 7th July*). This letter was not answered by the purchaser. He did not comply with the request contained in the letter, and the reason he gives is that he considered the bargain already concluded, and did not think it of the least consequence whether he answered the letter. I confess I agree with him. It might have been as well to have written "All right," but his failure to do so cannot annul the bargain. Certainly it is not the right of the seller, after concluding a verbal bargain, in which there was no stipulation that it should be reduced to writing, afterwards to insist on converting it into a written contract. So that this letter was either a matter of mere surplusage, or an attempt to do what the seller had no right to do. It might be used as a piece of evidence as to the precise terms of the verbal contract, if there was any dispute about them; but there is none.

There remains the question Whether the Sheriff-Substitute's interlocutor is well founded?—He "finds in law that in contracts of this kind time is of the very essence of the bargain, and that the pursuers, by their failure to answer defenders' letter, and to forward specifications of the kind of iron wanted, enabled the defenders to cancel the contract in question if they saw fit; finds that the defenders having cancelled the bargain, were justified in doing so, and in refusing to manufacture the iron referred to in the specification of 19th August." The first objection to this finding is that it sustains a defence not pleaded. The defender says there was no contract to cancel. That objection alone would be sufficient. But further, assuming that there was a contract, I find no ground for holding that the defender did cancel the contract, or that he was justified in doing so. He certainly did not cancel the contract, because he believed there was no contract, But further, on what ground would he have been justified in cancelling it? Because the purchaser did not answer this unnecessary letter, and because he delayed to send a specification? Now, it must be remembered that both parties had an equal right and interest to push on the contract. If the purchasers were delaying to send a specification, it was the duty of the seller to remind them of the contract, and to insist on them sending a specification.

I agree with the Sheriff in the main ground of his judgment, that there was a concluded contract between the parties, and nothing to derogate from that concluded contract.

LORD DEAS—I do not differ from your Lordship, but I regard it as a very narrow question.

LORD ARDMILLAN—I admit that it is a narrow question, but I agree with the Sheriff. It certainly would have been better if the pursuers had answered the defenders' letter, but they might naturally think that in mercantile dealings not to answer a letter is taken to mean acquiescence in its contents.

LORD KINLOCH concurred.

The Court refused the appeal.

Agent for Pursuers—R. P. Stevenson, S.S.C. Agents for Defenders—Adamson & Gulland, W.S.

## *Wednesday, July 10.*

### PITCAIRN *v.* SMITH.

*Bastard—Proof of Paternity.*

Admission by the defender of intercourse with the pursuer 237 days before the birth of the child, coupled with medical evidence that the child was small, *held* sufficient to prove the paternity.

In an action of filiation and aliment, the defender admitted intercourse with the pursuer on one occasion, 237 days before the birth of the child, but averred that the pursuer had intercourse with other men corresponding to the time of conception of the child. This averment he failed to prove. On the other hand, there was no proof of previous intercourse by the defender during that year. The medical man who attended the pursuer at the birth of the child was called as a witness for the defender, and deponed that there was nothing to indicate that it was a premature child, although it was a very small child.

The Sheriff-Substitute (LAWRIE) assoilzied the defender.

The Sheriff (GLASSFORD BELL), on appeal, found the paternity proved, to which the Court adhered.

Counsel for Pursuer—Guthrie Smith and Lang. Agents—Muir & Fleming, S.S.C.

Counsel for Defender—Millar, Q.C., and M'Kechnie. Agent—James Campbell Irons, S.S.C.

## *Thursday, July 11.*

### WILLIAM STEEL AND OTHERS *v.* COMMISSIONERS OF THE BURGH OF GOUROCK.

*Process — Interdict — Nuisance — Public Health (Scotland) Act, 1867 (30 and 31 Vict. c. 101).*

Three proprietors within a burgh presented a petition to the Sheriff to interdict the Local Authority of the burgh, acting under the Public Health Act, 1867, from carrying out a system of drainage for the burgh, on which they had determined. The petitioners averred, incidentally, that the intended operations would be injurious to their persons and properties, but their allegations consisted chiefly of statements that the intended system of drainage was a bad one for the interests of the burgh generally. Petition *dismissed*, as containing no relevant averments to justify the interference of the Sheriff, and as being an attempt to control the resolutions of the Local Authority, contrary to the provisions of the Act.

This was a petition presented to the Sheriff of Renfrewshire by three persons, who described themselves as inhabitants, proprietors and ratepayers in Gourock, against the Commissioners of the burgh of Gourock, and Local Authority of said burgh, under the Public Health (Scotland) Act, 1867, for interdict against the respondents carrying out a system of drainage for the burgh on which they had resolved.

The averments of the petitioners were of the following kind:—"That the system of drainage adopted by the respondents, the said Commissioners, and the works proposed to be carried out by them, are defective in many important points, and quite insufficient for the present and prospective wants of the burgh, and, in particular, the same are defective in regard to the fall or inclination of the sewer, the number and position of the proposed outlets, the size or diameter of the sewer, and the means of ventilation. That owing to the very slight fall or inclination in many parts of the proposed sewer, and especially at or near to the property belonging to the petitioner, the said William Steel, the heavy matter contained in the sewage will accumulate in the sewer; that foul air and noxious gases will in consequence generate and find their way by the side drains into the houses of the petitioners and others, and be the means of propagating fever and other pestilential diseases. That the principal outlet for the sewage from the village being at Church Street (as shown on the plan), between the Steamboat Quay and the Quarry Quay, and almost in the centre of a bay, the sewage from this outlet will in a great measure be deprived of the force of the tidal flow, and cannot be properly carried away, but will, especially when the wind is from the east, north-east, or south-east, be driven back upon the shore and into the centre of the bay, and thus injure the bay as a place for mooring yachts and other vessels, and prove a nuisance to the petitioners and other inhabitants of the burgh; and the principal outlet for the sewage from the houses and buildings west of the Steamboat Quay being intended to be at the west end of the property belonging to the petitioner, the said Mrs Caroline Anne Oswald or Gamble, being at the extreme point of convergence or the part of the shore opposite the centre of the bay at Ashton, the sewage from this outlet cannot, for the same reason, be properly carried away, but the same, or portions thereof, will be thrown back upon the shore, opposite the petitioner's property, and prove a nuisance, and injurious to the petitioners and other inhabitants of the burgh. That the said sewer is insufficient to meet the increasing wants of the burgh, and much expense will be incurred in enlarging and altering the same from time to time. That by the said system it is proposed that a certain portion of the foul air from the sewer shall be forced up the rain conductors to the roofs of the houses in the burgh, and there escape. The foul air thus emitted is certain to find its way into the houses through the attic windows, which are to be found in almost every house in the burgh, and the same will be most injurious to the petitioners and other inhabitants foresaid."

The respondents lodged answers, in which they founded on section 108 of the Public Health Act, as excluding review of their actings.

The Sheriff (Fraser) dismissed the petition.

"*Note.*—In dismissing this petition the Sheriff does not do so upon the ground that he has no jurisdiction to entertain it. A petition asking a Sheriff for interdict against a nuisance is a competent proceeding. The Sheriff rests his judgment upon more general grounds.

"The Public Health Act, passed in the year 1867, came in place of the Nuisances Removal Act of 1856, the Sanitary Act of 1866, and certain clauses of the General Police and Improvement (Scotland) Act, 1862. It was found impossible to carry out these Acts into practical working in Scotland, and representations having been made to this effect to the Government of 1867, the Public Health Act of that year was passed. By this Act certain bodies in every parish were charged with the administration of the laws relative to the public health, subject to the control of the Board of Supervision for the relief of the poor in Scotland. There were also certain cases in which the Sheriff was called upon to decide, and his judgment was declared by the 108th section not subject to appeal under certain exceptions. Lastly, there is a power given to the Board of Supervision, with the approval of the Lord Advocate, to apply to a Division of the Court of Session by summary petition for the legal remedy necessary, '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 obstructions shall arise in the execution of this Act.'

"The Sheriff cannot find in the reports of the decisions of the Supreme Court any case, except one, where the Board of Supervision have been under the necessity of applying to the Court of Session for its aid. The case referred to is *Board of Supervision* v. *Dull*, June 9, 1855, 17 D. p. 827. It is understood that the Board has endeavoured to induce Local Authorities, both in the administration of the Poor-laws and of the public health, to do their duty more by persuasion and advice than by legal prosecution, and all the more that to many of these local authorities correct ideas upon the matter of public health are imperfectly known. It is so difficult in many cases to get any motion taken at all in villages that have not known what foul drainage is, and who are using wells polluted with the flow from neighbouring midden-steads, that it is satisfactory to find a body like the Local Authority of Gourock taking up the matter of drainage of that village with energy and determination.

"The Sheriff is now called upon to say that this Parliamentary Commission, whose duty it is to provide proper drainage for Gourock, shall be controlled by a court of law from carrying out a scheme which, in their best judgment, and in all good faith, and after taking the aid of skilled intelligence, they have resolved upon. There is no allegation against them farther than this, that they have made an error in judgment. It is not said that they have any corrupt motive in what they have determined to do, nor that they have come to their resolution without due care and consideration; and the petitioners now ask the Sheriff, upon the allegation that the scheme of drainage is a bad one—supported as they will no doubt do it by their own engineers—to determine the relative value of the conflicting opinions of rival engineers. This jurisdiction was not given even to the Board of Supervision, and the Sheriff is of opinion that it was not given to him. If the Local Authority had not proceeded with a system of drainage, they would, no doubt, have been prosecuted for neglect of duty at the instance of the Board of Supervision under the 97th section. But then the petitioners are not without their remedy, for the 73d section

provides for the case of a nuisance created by the operations of the Local Authority. If such a nuisance be created, *then* is the time for the petitioners to apply for redress to a court of law. It is a totally different inquiry whether a nuisance exists, from what it is, whether a nuisance will be created. The Sheriff, or any other unskilled layman, could quite fitly determine the former question, and be left at sea in casting the balance of conflicting evidence of engineering witnesses in regard to a mere matter of opinion. If the Local Authority by their operations created a nuisance, the whole work may require to be undone. But in the meantime the drainage operations in Gourock will go on, in place of their being delayed, it may be, while this case is running the course of appeal from court to court.

"The petitioners have mistaken their remedy. If they consider that the scheme of drainage for their village, devised by the Local Authority, is a bad one, they must just turn out their representatives at the Local Board at the next election, or wait until a nuisance actually exists, and then compel the Local Authority to remove it.

"The Sheriff has disposed of this case without the aid of any direct authority or precedent in the judgments of the Supreme Court. None of the cases which he can find directly rule the present one, and therefore he thinks it unnecessary to analyse those cases where somewhat similar questions have been mooted. They seem to be the following—*Lord Advocate* v. *Police Comrs. of Perth*, Dec. 7, 1869, 8 Macph., p. 244; *Smeaton* v. *Police Comrs. of St. Andrews*, May 17, 1865, May 30, 1867, and Dec. 10, 1868, and also in House of Lords, March 20, 1871, 9 Macph., p. 24, H.L.; *Blantyre* v. *Trustees of Clyde Navigation*. March 3, 1871, 9 Macph., p. 6; *Bremner* v. *Huntly Friendly Society*, Dec. 4, 1817, F.C.; *Dunbar* v. *Levack*, Feb. 10, 1858, 20 D., p. 538; *Guthrie* v. *Miller*, May 25, 1827, 5 Sh., 711; *Nicol* v. *Magistrates of Aberdeen*, Dec. 20, 1870, 9 Macph., p. 306; *Douglas* v. *Dundee and Newtyle Railway Company*, Dec. 22, 1827, 6 Sh., p. 329."

The petitioners appealed.

TRAYNER for them.

SOLICITOR-GENERAL and BURNET, for the respondents, were not called upon.

At advising—

LORD PRESIDENT—If the statute of 1867 had given to the inhabitants, or the proprietors, or the ratepayers, a right to appeal against a resolution of the Local Authority, either to the Sheriff or to this Court, we should be bound to listen to this appeal; and if relevant statements were made, to allow an inquiry. But the statute has given no such right of appeal. It is true that this action is not in the form of an appeal. It is an application to us, at common law, to interdict the Local Authority from carrying their resolutions into effect. If it were made out, or relevantly averred that the Local Authority were about to violate the statute, this course would be justified. But the allegations do not amount to more than that the proposed system of drainage is a bad one for the interests of the burgh, not for the interests of the individual petitioners, as distinguished from the general interests. It is really an application to the Sheriff to consider the question how the burgh of Gourock should be drained. I do not say that the Sheriff has no jurisdiction to entertain this petition, but the spirit of the statute certainly excludes him from anything like a review of the resolutions of the Local Authority. If a nuisance was actually created there is no doubt that those affected by it would have a right to complain. The Sheriff has taken the right view.

LORD DEAS concurred.

LORD ARDMILLAN—There is nothing here of a proved personal injury, or dread of injury to person or property, or any such invasion of private rights as to entitle the Sheriff to interfere.

LORD KINLOCH concurred.

The Court refused the appeal.

Agent for Petitioners—William Mason, S.S.C.

Agent for Respondents—L. M. Macara, W.S.

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*Thursday, July* 11.

## SECOND DIVISION.

### SPECIAL CASE — ALLAN GILMOUR AND OTHERS (BOYD GILMOUR'S TRUSTEES AND OTHERS).

*Trust-Settlement—Construction—Aliment.*

Terms of trust-settlement under which trustees *held* entitled to pay a yearly sum for maintenance of three pupil children out of the income of general trust-estate.

By trust-disposition and settlement, dated 19th March 1869, Boyd Gilmour, coalmaster at Galston, who died on 26th March 1869, conveyed to trustees his whole heritable and moveable estate for the uses and purposes after-mentioned, viz.,—"First, that my trustees shall, from the produce of my means and estate, pay all my just and lawful debts, and funeral expenses, and the expenses of executing this trust: Secondly, that my trustees shall continue to carry on, for behoof of my estate, the trade or business in which I am at present engaged, in company with the said Allan Gilmour, until the expiry of the copartnership entered into, and at present subsisting, betwixt him and me, conform to contract of copartnery executed by the said Allan Gilmour and me upon the 21st day of April 1862; but declaring that in the event of differences arising betwixt my said trustees and any of my family in regard to the terms and provisions of this deed, whereby my said trustees may be prevented from continuing to carry on the said business in a satisfactory manner, then, and in that case, they may, if they think fit, and with the concurrence of the said Allan Gilmour, withdraw from the said business, and realise my share therein by disposing of the same to the said Allan Gilmour, in manner provided by article ninth of said contract of copartnery: Thirdly, that my trustees shall allow Elizabeth Howatson or Gilmour, my wife, in the event of her surviving me, the liferent use and enjoyment of my house in Titchfield Street, Galston, at present occupied by me; and also my trustees shall make payment to her of a free yearly annuity of £120 sterling, till such time as my youngest child shall attain the age of twenty-one years, after which event they shall pay her a free annuity of £60 sterling, to which the said annuity of £120 shall then be restricted and reduced, payable, the said annuity and restricted annuity, half-yearly, in advance, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first term of Whitsunday or Martinmas after my