suer's consent, because he can force them to purchase his whole interest. But while the pursuer's entire interest must be paid for, I do not see how he can, by refusing to enter into an agreement, force the defenders to retain rights to his benefit and to their manifest loss.

If a railway company took land for the purposes of their railway, they might, I think, surrender a use of it for which they had no need, and the retention of which would cause a serious liability. The company would surely be entitled to decide whether it was more for their advantage to surrender the use or incur the debt consequent on its retention. Indeed, this was not, as I understood, disputed in argument. The theory was that a company which existed for profit might be trusted with the determination of what was best for its own interests.

But I fail to see any solid distinction between a railway company and a harbour trust. It is true that the one subsists with the view to the profit of its shareholders, and that the other is charged with the interests of the public. But it seems to me that they must have the same powers to protect the interest of the beneficiaries, so that the public shall not suffer a loss from which private shareholders could escape. Whether it is better to retain the power of putting the land in question to all possible statutory uses, or by surrendering some of them to save the trust from a heavy payment, is, I think, a point of trust administration which the defenders are competent to decide. The question would not be varied although it could be shown that the uses which the defenders proposed to renounce could never be of any value to the trust. For the pursuer would reply that the land had been taken for all the possible statutory uses, and that his claim for damages must be dealt with on the footing that it might be put to all or any one of them. I cannot accede to an argument which would lead to a result so inequitable and so burdensome to the trust. I prefer to hold that it is within the discretion of the defenders to decide which of the two courses may be the more beneficial to the trust, and I see no ground for thinking that in this case they have exceeded their discretion.

The Court recalled the interlocutor of the Lord Ordinary, ordained the defenders to make payment to the pursuer of the sum of £4900 with interest at 5 per cent. from 2d February 1880, and found the pursuer entitled to expenses in the whole cause.

Counsel for Pursuer (Reclaimer) — Solicitor-General (Asher, Q.C.)—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Defenders (Respondents) — Lord Advocate (Balfour, Q.C.)—Mackintosh—Guthrie. Agent—T. J. Gordon, W.S.

Friday, January 26.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Adam, Ordinary.

BARONY PAROCHIAL BOARD *v.* CADDER PAROCHIAL BOARD AND OTHERS.

Property—Nuisance—River Pollution—Sewage—Public Health Act 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 22.

A parochial board acting as local authority under the Public Health Act 1867, having petitioned the Sheriff under that Act to have a person on whose ground a nuisance existed ordained to remove it, themselves, under interlocutor of the Sheriff, executed certain works for the purpose of removing the nuisance, but failed to recover the cost from that person as author of the nuisance, on the ground that that person had not been given an opportunity of himself carrying out the necessary works. The works consisted of the conversion of an open ditch into a drain with cesspools. The board did not establish any special drainage district nor take over the drain from the proprietor of the ground. Thereafter an action was raised against the board by an inferior heritor on the stream into which the drain (by means of a smaller burn into which it opened) discharged its contents, concluding, *inter alia*, for interdict against their discharging or permitting to flow into the stream any sewage or drainage whereby it might become unfitted for the primary purposes. *Held*, by a majority of seven Judges (*rev.* judgment of Lord Adam), that the defenders having done nothing beyond remedying, as ordered by interlocutor of the Sheriff, the nuisance existing within their own parish, and not being the owners of the drain, nor causing the pollution complained of, nor because of their operations responsible for it, the action was wrongly directed against them, and that the proper defenders would have been the proprietors of the houses, the sewage from which was sent into the drain. The Lord Justice-Clerk and Lord Craighill *dissented, being of opinion* that the defenders were vested in and responsible for the drainage works which they as local authority had had executed.

Section 22 of the Public Health (Scotland) Act 1867 provides—"In case of non-compliance with or infringement of any decree aforesaid," for the removal, remedy, or discontinuance of any nuisance, "the Sheriff, magistrate, or justice may, on application by the local authority, grant warrant to such person or persons as he may deem right to enter the premises to which such decree relates, and remove or remedy the nuisance thereby condemned or interdicted, and do whatever may be necessary in execution of such decree; or if in the original application it appears to his satisfaction that the author of the nuisance is not known or cannot be found, then such decree may at once ordain the local authority to execute the works thereby directed; and all expenses incurred by the local authority in executing the

works may be recovered from the author of the nuisance or the owner of the premises."

Section 3 enacts, *inter alia*,—"The expression 'author of a nuisance' shall signify the person through whose act or default the nuisance is caused, exists, or is continued, whether he be the owner or occupier or both."

This was an action of declarator and interdict at the instance of the Parochial Board of the Barony Parish of Glasgow against the Commissioners of Police of the Burgh of Kirkintilloch, as such and as the local authority of the burgh under the Public Health Act, and the Parochial Board of the Parish of Cadder as the local authority of that parish. There were also called certain individuals, proprietors of houses in the village of Lenzie. The houses of some of these last defenders were in that part of Lenzie which lies in Kirkintilloch, those of the others being in that part which lies in the parish of Cadder.

The declaratory conclusions of the summons were that the pursuers had "good and undoubted right to have the water of the Bathlin Burn, so far as that burn flows past or through the lands and estate of Woodilee, lying in the parish of Kirkintilloch or Wester Lenzie, in the county of Dumbarton, belonging to the pursuers, transmitted past and through the said lands and estate in an unpolluted state, fit for domestic purposes and for the enjoyment and use of man and beast; and that the defenders, and generally the inhabitants of the village of Lenzie, and of the drainage districts under the jurisdiction of the defenders, the Police Commissioners of the Burgh of Kirkintilloch, and the Parochial Board of the Parish of Cadder, as respective local authorities foresaid, have no right to pollute the water of said burn, nor to discharge or permit to flow into said burn the sewage and drainage of the said village and drainage districts, or any part thereof, nor in any way to render the water of the said burn noxious, impure, and unwholesome, or unfit for domestic uses, the use of cattle, or other primary purposes." The conclusions for interdict was that the defenders be interdicted "from discharging or permitting to flow into the said Bathlin Burn, or into any streams or watercourses leading thereto, either directly or indirectly, any sewage and drainage or other impure matter, whereby the water of the said burn where it flows past and through the pursuers' said property may be polluted or rendered unfit for domestic use, or for the use of cattle or other primary purposes."

The pursuers were proprietors of the estate of Woodilee, which was partly bounded and partly intersected by the Bathlin Burn. They had erected on this estate a lunatic asylum accommodating 500 patients, and also a house for the medical superintendent of that asylum. The following facts with regard to the source of pollution to the Bathlin Burn above the asylum caused by the village of Lenzie were narrated by the Lord Ordinary. [*After stating that the drainage of North Lenzie was under the jurisdiction of the Commissioners of Kirkintilloch as local authority, and that of South Lenzie under the jurisdiction of the Parochial Board of Cadder as local authority*]—"Although in different parishes, North and South Lenzie adjoin each other, the one lying to the north and the other to the south side of the line of the North British Railway. Lenzie is a village of comparatively modern origin. Before the opening of the Edinburgh and Glasgow Railway in 1842 the district was an entirely rural one with five or six houses scattered over it. The modern village seems to have been commenced about 1849, and to have increased slowly until 1869, when a considerable increase took place in the buildings there. But it has increased most rapidly since 1874, in consequence, it was said, of the introduction of a gravitation water supply. In 1870 there were thirty-three houses in North Lenzie; in 1879 there were 112. In South Lenzie in 1860 there were ten houses; in 1870 there were fourteen; In 1879 144 houses. There seems to be every likelihood that Lenzie will go on increasing in size. The natural drainage of South Lenzie is into a small stream called the Cult, which joins the Bathlin Burn opposite the estate of Woodilee at a point higher up the stream than the asylum. The sewage of the houses in South Lenzie, and of two or three houses in North Lenzie, went into the Cult, and so into the Bathlin. The natural drainage of the most part of North Lenzie is into another small stream called the South Middlemuirburn, which joins the Bathlin in the pursuers' lands at a point higher up the stream than the asylum."

In 1873, in consequence of a complaint by a tenant in South Lenzie of nuisance arising from an open gutter or ditch in which sewage flowed, on the lands of John Lang, a proprietor in South Lenzie, the Parochial Board of Cadder, acting as local authority of the parish, petitioned the Sheriff of Lanarkshire, under the Public Health Act 1867, to have Lang ordained to remove the open drain as a nuisance. Reports by men of skill having indicated that the nuisance complained of was at least contributed to by two other proprietors higher up on this open drain, the Sheriff appointed them to be called also as respondents. He thereafter found that it had not been satisfactorily ascertained who was the author of the nuisance, that that question could not be determined without further and probably protracted inquiry, and that the nuisance ought to be removed without further delay; after a remit to Mr Wharrie, engineer, a witness in the present case, on 17th April 1875 he ordained the parochial board, as local authority, to execute such works as might be necessary to remove the nuisance complained of. The board having executed works of a more extensive character than Lang could have been forced to execute, the Sheriff-Substitute on 8th May 1877 decerned against Lang and the two other respondents for the cost. The Court of Justiciary, on appeal by Special Case stated for the respondents, quashed this decree for the cost of the works, holding that the parochial board not having given the respondents an opportunity of themselves abating the nuisance, the Sheriff could not, under section 22, quoted *supra*, decern against them for the expense incurred in constructing the works (*United Kingdom Temperance Institution* v. *Parochial Board of Cadder*, 14th June 1877, 4 R. Just. Cases, 39). The parochial board then raised an action in the Sheriff Court of Lanarkshire against Lang for the cost of the works, which was finally determined by decree of absolvitor in his favour in the Court of Session (*Cadder Local Authority* v. *Lang*, 11th July 1879, 6 R. 1242).

The works executed by the local authority of Cadder under the authority of the Sheriff were partly on the lands of John Lang and partly on

those of the other respondents in the first case above mentioned. Mr Wharrie, the engineer who carried them out under appointment of the Sheriff-Substitute, gave in his evidence as a witness for the pursuers in this action an account of the works, which is referred to and quoted from in Lord Mure's opinion. It was shortly to this effect—that finding no other provision for the discharge of the sewage of South Lenzie than the open ditch on Lang's ground, he "recommended that a cesspool should be formed to intercept the solid matter of the sewage, and that a pipe should be laid, not exactly in the course of the burn, but parallel to the burn, the overflow from the cesspool passing through this pipe into the Cult." These works were accordingly carried out by the local authority under his superintendence, with the difference that ultimately two cesspools were made instead of one. The cesspools were so constructed that the solid matter of the sewage was, provided they were properly cleaned out at regular intervals about twice a-year, retained in them and did not get into the outlet pipe, only the outflow water passing through the pipe beyond them, and being discharged into the burn. The cesspools were made of a size to provide for an increase of drainage in the district. The pipe leading into the Cult Burn was an 18-inch one. The effect of these works was not to increase the amount of sewage discharged into the burn, but rather to diminish it by the interception of the solid matter in the cesspools. The works were completed in 1876. About two-thirds of the houses in South Lenzie drained into this pipe. It appears from the evidence that the cesspools had only once been opened and cleaned out after being constructed. It appeared from the evidence of several scientific witnesses that though neither the Cult nor the Bathlin above the point where the sewage entered were sufficiently pure for use by human beings as drinking water, they were pure enough for watering animals or for washing, but that the Cult below the point where the South Lenzie drain entered it, and the Bathlin below its confluence with the Cult, were polluted by sewage matter of a highly deleterious character, so as to be unfit for any of these purposes.

The pursuers averred—"(Cond. 11) The defenders the Parochial Board of the parish of Cadder are also the local authority of the said parish under the Public Health Act, and they have established in terms thereof a special drainage district which comprehends the portion of the said village of Lenzie lying to the south of the main line of the North British Railway called South Lenzie, in the said parish of Cadder, and a district therewith connected. The said defenders are vested in and have under their control the sewers of the said drainage district, and are charged under the said Act with the disposal of the sewage therefrom. By the wrongful arrangement of the said defenders the sewage of the said houses and district or part thereof passes into streams and watercourses which flow into the Bathlin Burn at the southern boundary of the pursuers' said lands, and thereby contributes to the pollution of the said burn."

The pursuers pleaded—"(2) In respect that the water of the said Bathlin Burn has been and is being polluted by the defenders, all or some of them, to the nuisance of the pursuers, the pursuers are entitled to decree of declarator and interdict as concluded for, with expenses against such of the defenders as appear and oppose the conclusions of the action."

Both the Police Commissioners of Kirkintilloch, the Parochial Board of Cadder, and two of the proprietors in North Lenzie, defended the action. The proprietors in South Lenzie did not.

In their defences the Cadder Parochial Board merely stated that they had received no requisition to form the Lenzie district into a special drainage district, and that without such requisition, they could not take such a step. They denied that by any acts of theirs they had materially contributed to or increased the pollution of the Bathlin Burn.

They did not oppose the obtaining by the pursuers of declarator in terms of the declaratory conclusions of the summons, but with regard to the conclusions for interdict they pleaded—"(1) The allegations of the pursuers are not relevant or sufficient to warrant the granting of the interdict craved against the defenders. (2) The material allegations of the pursuers being unfounded in fact, the defenders are entitled to be assoilized from the conclusions for interdict, with expenses."

The Lord Ordinary on the 12th June 1880 found and declared in terms of the declaratory conclusions of the summons, and *quoad ultra* continued the cause.

His note, so far as relating to the defenders the Cadder Parochial Board, was as follows:—"The parochial board of the parish of Cadder did not object to decree of declarator being pronounced against them, but they objected to any interdict being granted, on the ground that although they were the local authority of the parish of Cadder, they had not interfered with the sewers or drains of South Lenzie, and that proceedings should have been taken, not against them, but against the individual wrongdoers. The parochial board have, however, caused two large cesspools to be constructed, into which the sewage of about two-thirds of the houses in South Lenzie is conducted, the overflow from which is led, by an 18-inch pipe laid down by them, into the Cult Burn, and thence into the Bathlin. They thus contribute to its pollution. These works are under their charge as local authority, and they are responsible for them. The Lord Ordinary therefore thinks that the pursuers are entitled to have them interdicted from polluting the stream. . . . . The pursuers stated that they did not at present desire to have interdict granted, as they wished, should their right to have the stream freed from pollution be determined, that the defenders should have an opportunity afforded them of taking measures for that purpose, but that if they failed to do so, that they would then ask for interdict. That appeared to the Lord Ordinary to be a reasonable course."

Thereafter, under a subsequent interlocutor of the Lord Ordinary ordaining them to do so, the defenders the Cadder Parochial Board lodged a minute containing a proposal to carry out certain works with a view to abating the nuisance. The Lord Ordinary on 5th March 1881 remitted to Professor Crum Brown to report upon the proposed scheme. His report was to the effect that the scheme proposed would be quite inadequate to remove the sewage pollution caused by the drainage of South Lenzie. On 15th July 1881

the defenders the Cadder Parochial Board lodged another minute, in which, in respect that they hoped soon to be able to submit a fresh scheme which they hoped would obviate the reporter's objections, and also in respect that in proceedings which they had taken in the Sheriff Court for the formation of a special drainage district for South Lenzie (which was necessary to enable them to carry out the scheme proposed) the Sheriff had not yet pronounced a judgment, they craved reasonable delay.

On 16th July 1881, after hearing counsel on this minute, and on a motion for interdict by the pursuers, the Lord Ordinary pronounced the following interlocutor:—"On the motion of the pursuers, and in respect of the report by Professor Crum Brown, and that the defenders the Cadder Parochial Board have made no definite proposal for abating the nuisance complained of—Interdicts, prohibits, and discharges them in terms of the conclusions of the summons to that effect, and decerns."

By a subsequent interlocutor he similarly interdicted the other defenders the Kirkintilloch Police Commissioners.

All the defenders reclaimed, but before the case was heard the Police Commissioners of Kirkintilloch and the two proprietors in North Lenzie withdrew their reclaiming note. Thereafter the Cadder Local authority obtained delay for the purpose of enabling them to mature some proposal for the abatement of the nuisance. Thereafter it was intimated for them that they desired judgment on the case as it stood. After argument the Second Division appointed the cause to be heard before the Judges of the Division with three consulted Judges of the First Division.

Argued for the Cadder Parochial Board—They as a public body did not cause this pollution, and therefore could not be held responsible for it. There was no special drainage district in Lenzie, and they had as local authority neither right nor power to interfere with the disposal of this sewage. They had no power to carry out the recommendations of the report. They were neither owners nor occupiers of the ground through which it passed, and had no control over its transmission. The stream which carried the alleged pollution into the Burn, running through the pursuer's lands was not "vested in" the defenders "and under their control" in the sense of the Public Health Act. Except applying to the Sheriff for an order to abate the nuisance, the local authority could do nothing. The pursuers have mistaken their remedy; they should have gone against the owners who have caused the nuisance. This was a case of redress by lower to an upper proprietor, and had nothing whatever to do with a local authority.

Authorities — *Attorney-General* v. *Council of Borough of Birmingham*, 4 Kay & Johnstone, 528; *United Kingdom Temperance Association* v. *Cadder Parochial Board*, June 14 1877, 4 R. Just. Cases, 39; *Cadder Local Authority* v. *Lang*, July 11 1879, 6 R. 1242; *Glossop* v. *Heston & Isleworth Local Board*, L.R., 12 Chan. Div. 102.

Argued for pursuers—The defenders had taken the drainage of the district in hand, and made an *opus manufactum*, through which the sewage was transmitted to the pursuers' lands, and had thus undertaken responsibility for the pollution. This was a public system of drainage both in fact and in law. The drains were vested in the defenders under sec. 71 of the Public Health Act. They are not private property, for they were made by the defenders on the Sheriff's order and at their own expense, as ultimately decided by the Court of Session.

Authorities— *Birmingham Case* (*supra cit.*); *Caledonian Railway Co.* v. *Baird*, June 14, 1876, 3 R. 839; *Attorney-General* v. *Leeds Corporation*, L.R. 5 Chan. App. 583; *Goldsmid* v. *Tunbridge Wells Improvement Commissioners*, L.R., 1 Chan. App. 349; *Scott* v. *Scott*, June 28, 1881, 8 R. 851; 31 and 32 Vict. c. 101, secs. 22, 70, 71, 73.

At advising—

Lord Justice-Clerk—The circumstances out of which this protracted litigation has arisen are simple enough. The pursuers, the Barony Parish of Glasgow, are proprietors of certain lands lying in the parish of Kirkintilloch and county of Dumbarton, which are partly bounded and partly intersected by a small stream called the Bathlin Burn. It appears that further up this stream there are two villages or hamlets called North and South Lenzie, the former lying in the parish of Kirkintilloch, and the latter in that of Cadder, and in the county of Lanark. Both are situate on the bank of the Bathlin Burn and its feeders. It appears that the ground in the neighbourhood has of late years been in request as a site for detached houses or villas, and the pursuers complain in this action that by reason of sewage sent down from these houses the water of the Bathlin Burn, which was formerly a pure stream, has been polluted and rendered unfit for primary purposes, and they conclude for declarator and interdict against the parties called as defenders, including the Local Authorities of Kirkintilloch and Cadder.

As regards those of the defenders who were made parties in respect of operations within the parish of Kirkintilloch, the case is substantially at an end. They have adopted the reasonable course of removing the cause of complaint, undertaking to construct an efficient drainage system. We were in hopes that the authorities of South Lenzie would have followed their example, and on more than one occasion during the three years which have elapsed since the action was raised they asked for and obtained delay to enable them to make some proposition for that purpose. They have now, however, disclaimed any such intention, and take their stand on an absolute denial of liability. I regret this result — first, because if judgment had been asked in the outset on the technical grounds we are now to consider, a vast deal of time and expense would have been saved; and second, because it is plain that the injury complained of must in the end be stopped, and that the local board of Cadder, as representing the ratepayers of the parish, or of a district within it, must bear the cost of removing it.

I proceed, however, shortly to consider the questions which have been argued to us. I do not intend to encumber my opinion with any detailed reference to the evidence. In so far as it is material it seems to me to admit of no controversy, and had the case been confined to its import we might not have troubled your Lordships of the First Division with this consultation.

The ground of action as set forth in the record is as follows -[*reads Cond.* 11, *quoted supra*].

Some criticism has been made on the allegation here contained as to the official character of the Local Authority of Cadder. It is true that the Parochial Board of Cadder had not at the date of this action established a special drainage district as they have since done, but they had, under the Public Health Act, the duties and powers given by that statute within the parish, as the district assigned to them, the erection of a special drainage district concerning only the area of assessment. But the mistake ought not to have remained so long uncorrected. The powers of the local authority within the parish which are conferred by the statute appear to me to be ample, and quite sufficient to enable and require them to redress this injury if it has been caused by them. They have powers to make sewers and remove nuisances, and construct structural works for that purpose. No statement of fact is made for the Cadder Board, and we have been left to gather the real grounds of their defence from the argument addressed to us from the bar.

The Lord Ordinary has granted interdict on grounds with which I entirely agree. I shall assume, because the Lord Ordinary has so found by his interlocutor of date 12th June 1880, acquiesced in by all the parties, that the right of the pursuers in the stream in question is that set out in the first declaratory conclusion of the summons, which is as follows—[*reads*]. I also assume it to be proved as matter of fact—First, that in the year 1876 the Parochial Board of Cadder constructed a system of drainage pipes and cesspools on the property of several proprietors, which was intended to provide for the drainage of a large number of existing houses, and on a scale calculated to meet the requirements of prospective increase; and secondly, that the lower of these cesspools is so constructed as to discharge into the feeders of the Bathlin Burn a large amount of liquid sewage, which materially pollutes the stream, and renders it unfit for primary purposes as it flows through the lands of the pursuers. These matters of fact seem to me to be so clearly established by the evidence as not to admit of controversy.

If these postulates are assumed, it remains for the defenders to justify an act which, *prima facie*, is an invasion of the pursuers' rights. The pursuers are not parishioners of Cadder, and have no concern with their drainage operations excepting as far as their interests have been injured by them, and if these interests have been affected by acts on their part which are illegal, it is immaterial on what title they professed to proceed.

The grounds of defence, as I gather them from the argument, seem to be these—1. That these works were constructed under judicial authority. 2. That they are private property, and therefore not vested in the local authority. 3. That the authors of the injury are the proprietors of the houses which use and drain into this sewer. 4. That the pursuers have mistaken their remedy, and should have called other parties to answer to other conclusions.

In regard to the first of these, I may answer, before considering the true meaning and operation of the clauses of the Public Health Act which are founded on by the defenders, that their responsibility to the pursuers does not necessarily depend on them. The general rule in such questions is that the position of a local authority, professing to act under the powers of such statutes, is, in a question with third parties, no better than that of an individual would have been. Here the Parochial Board of Cadder have constructed works the direct operation of which has fouled the stream as it flows past the property of the pursuers. This was an illegal act when done. They could therefore have been prevented from doing it, or compelled to remove it.

The view which appeared to be contended for on the second ground was that this sewer, consisting of the pipes and the two cesspools, could not be vested in the local authority, because it was the private property of a person of the name of Lang, on whose ground the lower of the cesspools is constructed, and that he alone is responsible. When the facts are attended to, however, I think this view cannot be supported.

It appears that nearly ten years ago an old ditch or watercourse which ran through ground belonging to Lang, and communicated with the feeders of the Bathlin Burn, became foul from sewage sent down from houses above, and that the effluvia from it became offensive to the neighbourhood. Lang himself seems to have had no house there, and had not helped to foul the ditch. The defenders thereupon, with a view to abate this specific nuisance, had recourse to the 22d section of the Public Health Act, which is in the following terms—[*reads*]. The term "author of the nuisance" is defined in the interpretation clause thus—[*reads*]. They accordingly presented a petition against Lang as the author of the nuisance, praying that he might be ordered to abate it. But the Sheriff, not apparently finding that Lang had been guilty of any act or default in this matter, pronounced a judgment finding that the author of the nuisance could not be ascertained without further expense—(I suppose that he thought, as seems to be thought in the present case, that the persons who sent down the filth were the authors of the nuisance)—and on this footing authorised the defenders to proceed to execute these works.

Now, even if the defenders had proceeded under the 22d section of the Act, and confined their works to abating the nuisance existing on the premises of Lang, which was all which at first they intended, I do not know that this would have afforded any answer to this action. The statute gave them no authority, whether acting on behalf of the community or in substitution of the obligation of a private owner, to interfere with the rights of the pursuers. How, in that case, they would have stood in a question with the private owner we need not inquire. But in point of fact the defenders did not proceed under the 22d section of the statute. They took an entirely new departure, and proceeded to obtain plans for an extended system of drainage, which was in no degree in the line of the old ditch. Lang was not called on, as, if he were truly the author of the nuisance he should have been, to execute the works, and accordingly it has been twice judicially decided—first in the Court of Justiciary and then in the Court of Session—that he was not liable in the expense of them. The cost has been defrayed by the ratepayers.

But indeed no other result was possible. The works resolved on by the defenders were such as Lang could not have constructed, and which he never could have been compelled to construct. The defenders not unnaturally took the opportunity of providing not only for the houses recently constructed, but for those in progress or in prospect. What these requirements were, or were likely to be, is well proved by the witness M'Lellan, the sanitary inspector. In 1869-70 there were only 14 houses which drained into this ditch. In 1874, when the first proceedings were taken, there were 68, and in 1879-80 there were 144, of which 96, or two-thirds, now use or are in a position to use the works of the defenders. Mr Wharrie, the defenders' engineer, says, moreover, that the works were constructed on a scale to admit of the prospective growth of the quarter.

It seems needless to say that these works were such as Lang, the owner of the ground through which the foul ditch ran, could never have been required to construct, and which, being intended for the benefit of a large section of the community, necessarily vested in the local board. Under the statute they had sufficient power to execute them, the only result being, that as they were on a scale beyond what was required to abate the immediate nuisance, they could not require any individual proprietor to bear the cost. The works, as a whole, stand on *solum* belonging to several proprietors, and they probably, had they thought fit, might have demanded under the clauses of the Act compensation for the use of their ground for the purpose. No such claim has been made, as the value of the adjoining land as building ground is of course increased by the drainage arrangements; but I cannot think that any of them acquired any right of administration or control over them, which remained solely with the defenders, who constructed them, as representing the community, by whom their cost has been paid.

The third ground of defence maintained is, that the proprietors or occupiers of the houses which drain into these cesspools are liable for the injury complained of, and ought to have been cited as defenders in this action.

This plea, I presume, either means that these proprietors are alone liable, or that at least they ought to have been made parties for their interest. If the last, had the defenders pleaded this, as they were bound to have done, on the record, the proprietors might then have been called, with little expense, in a supplementary action, at the risk, of course, of the defenders, and the process might have been sisted to allow of this being done. But if I am right in the view that these works are not private property, but are vested in the defenders, then it is trite law under such statutes, that in a complaint by a third party of a wrong done by the works of the local authority, it is sufficient to call the local authority, and that it is not necessary to proceed against individual inhabitants.

But supposing the house proprietors to be called, I do not see what the pursuers would have to say against them. No doubt on the invitation and by the direction of the defenders they send their sewage down to these cesspools. These were made by the defenders in order that the house proprietors should so use them, and in using the cesspools for the purpose for which they were constructed the house proprietors did the pursuers no injury. It is the discharge or overflow into the feeders of the Bathlin Burn which alone injures the pursuers, and that is entirely the doing of the defenders, and they must find the means of undoing it.

Lastly, it has been said that the pursuers here have mistaken their remedy, that they should have called other parties, and submitted to the Court other conclusions. I am not of that opinion. I think they have called the only parties they ought to have called, and have framed the conclusions of their action in a way quite sufficient for their purpose, and in accordance with practice in such cases. What may be supposed to be the true remedy I cannot tell, for this was not made clear in argument. Only two views were to be gathered from what passed at the debate—the first, that the pursuers should have laid the foundation in their action for some new scheme of drainage in the parish of Cadder; and the second, that the conclusion for interdict ought not to be granted until it is seen how it is to be obeyed. Neither of these objections appear to me of any weight. As to the first, this is an action at common law, founded on a specific wrong, and directed, as I think rightly, only against the wrongdoers. Whether the wrongous act has been committed as part of a system of drainage or on any other footing is of no consequence to the pursuers. It is enough for them to show that it is illegal, and to require its discontinuance. What the effect of a sudden discontinuance of the illegal act may be is not a consideration with which the pursuers are in the least concerned, although the Court may, if they think fit, give time for other arrangements. Here, however, any such consideration is entirely excluded, for the defenders have had ample time, and have ended by emphatically disclaiming any intention of making any suggestion on the subject. As to the form of interdict not being adapted to such a case, it is, as far as my experience goes, the appropriate remedy in such cases, and in a recent case between the Local Authorities of Portobello and Edinburgh* we were agreed in applying it. It has been urged that the defenders have no means of repairing the injury they have done, or of preventing the discharge of these impurities into the stream. I by no means question that if from circumstances it is shown that a party has no means of obeying an interdict, that is a consideration to be weighed by the Court. But I think that in this case it has not been shown that the defenders cannot obey the interdict. If this be an illegal pollution of a stream, they have ample power to stop it under the procedure pointed out in the Public Health Act. The report of Messrs Crum Brown and Fleeming Jenkin proves the same thing. It is a mere matter of cost, or if they wish for time the Court will do what seems expedient and reasonable. I conclude by remarking that in the present case no prescriptive rights can be pretended. The evil is one entirely of recent growth. Even if there had been, of which there is not a trace, a right on the part of any of the proprietors to drain into Lang's ditch, it does not appear that its contamination in any degree affected the stream as it passes the pursuers' lands. This is a source of injury entirely distinct. I think all these considerations entirely unavailing to jus-

**Mags. of Portobello* v. *Mags. of Edinburgh*, Nov. 10, 1882, 20 Scot. Law Rep. 92.

tify the further continuance of a manifest if not an admitted wrong.

Lord Mure—By the judgment of the Lord Ordinary the defenders the Parochial Board of the parish of Cadder have been interdicted "from discharging or permitting to flow into the Bathlin Burn," which forms the southern boundary of the pursuers' property of the pursuers, "or into any streams or watercourses leading thereto, any sewage and drainage or other impure matter, whereby the water of the burn," where it flows past the pursuers' property, may be polluted or rendered unfit for domestic use or other primary purposes. By an interlocutor of an earlier date, viz., that of the 12th of June 1880, the Lord Ordinary, after proof adduced, had pronounced a decree of declarator against the defenders, to the effect that the pursuers had right to have the water of that burn, where it passes through their property, transmitted to them in an unpolluted state, and that neither these defenders, nor the defenders the Police Commissioners of Kirkintilloch, had any right to pollute the water of the burn by the discharge of sewage from the village of Lenzie or any part thereof.

In that interlocutor there is no finding that the defenders the Parochial Board of Cadder had ever discharged sewage into or otherwise polluted the water of the Bathlin Burn, which they denied that they had ever done, and they did not object to decree of declarator being pronounced in the above very general terms. But they objected and now object to any interdict being granted against them in terms of the interlocutor reclaimed against—1st, because they have not in point of fact discharged any sewage or other offensive matter into the Bathlin Burn; and 2d, because even if the cesspools and pipes which under the direction of the Sheriff were laid down in 1875 in order to remove a nuisance from the property of Mr Lang referred to in the proof, may have had the effect of conducting sewage water from South Lenzie into the Cult, and thence into the Bathlin Burn, remedy by way of interdict is not in the circumstances the competent and appropriate remedy for such a proceeding. The facts upon which the solution of the questions thus raised mainly depends are not, as it appears to me, in serious dispute between the parties, and are shortly as follows:—

Since the year 1870 there has been a rapid increase of building in the village of Lenzie, and in that part of it in particular which is called South Lenzie, in the parish of Cadder. It appears from the evidence that there were then only 14 houses in South Lenzie, that in 1875 there were 68 houses, and that in 1880 the number had risen to 144. All of them appear to be of a description superior to the ordinary run of village property, and many of them seem to be large and commodious villas.

The natural drainage of South Lenzie is into a small stream called the Cult, which joins the Bathlin Burn opposite the pursuers' property. This is stated as matter of fact in the note of the Lord Ordinary to his interlocutor of the 12th of June 1880, and is very clearly proved in the evidence adduced. Thus, Mr Wharrie, the engineer appointed by the Sheriff to report upon the matters complained of in 1875, who was a witness for the pursuers, states that when he visited the place he found "that a very large proportion of the sewage of South Lenzie discharged into an open ditch, which open ditch fell into the Cult at the point marked A on the Ordnance plan. This ditch was in a very objectionable state when I first saw it. I recommended that a cesspool should be formed to intercept the solid matter of the sewage," and that the overflow from the cesspool should be led by a pipe into the Cult, into which it had been in use to flow, and which was accordingly done. At another part of his evidence he says—"The Cult Burn was the natural outlet of the drainage, and I carried the drainage into the natural outlet accordingly."

The formation of this cesspool, and the laying down of the pipes, instead of the open ditch, to the Cult Burn, is the operation which led to the proceedings in the Justiciary Court and in this Court to which your Lordships have been referred, and which resulted, owing to a mistake of the Sheriff as to the mode of exercising his powers under the Public Health Act, in the expense of those operations being thrown upon the Parochial Board of Cadder instead of on Mr Lang, upon whom they ought to have fallen, as the proprietor of the property in which the cesspools were placed, and through which the pipes were laid, in order to abate a nuisance on that property which was then effectually done.

That nuisance consisted in the accumulation and frequent stagnation in the open ditch of the sewage of South Lenzie, which flowed through that ditch in the natural course of the drainage of South Lenzie to the Cult Burn. The fact that this sewage, which with the solid matter contained in it was intercepted in the cesspool, was in the course of its transition from South Lenzie to the Cult Burn is in my opinion a very important fact in dealing with the present question, and I must therefore ask your Lordships' attention to two other passages in Mr Wharrie's evidence which seem to me to place that matter beyond all doubt.

The one is a passage where he says—"I found no other provision when I visited South Lenzie for the disposal of the sewage except the open ditch which I converted into a drain and cesspools." The other passage is that to which we were referred in the argument, where he says—"With regard to the work which I did under the Sheriff's remit—the open ditch which I found communicated with the Cult Burn—in its then condition it was a nuisance and offensive. I don't think that anything I did under the Sheriff's remit increased the amount of sewage that flowed into the burn. The result of the construction of the cesspools was this—that I intercepted the solid matter and prevented it from entering the Cult Burn. Before the interception by the cesspools the solid matter entered the burn by the open ditch. The work which I carried out certainly effected a great improvement upon the existing state of matters at the time, and would continue to do so now if the cesspools were carefully attended to. I am not aware whether any arrangement has been made as to the cleaning out of the cesspools."

These operations, carried out by Mr Wharrie under orders from the Sheriff, seem to have had the effect of removing the nuisance then complained of, which was caused by the sewage discharged from South Lenzie into the open ditches leading to the Cult Burn, and that before the

Parochial Board of Cadder was called on to interfere in the matter. Since then, however, the number of houses in South Lenzie has more than doubled, and it is in evidence that there are now upwards of 144 houses, two-thirds of which at least discharge their whole sewage in the direction of the Cult Burn, and all of which finds its way to the burn, either through the natural course of the ditches or through the pipes laid by Mr Wharrie in the site of the old open ditch leading to the Cult and thence into the Bathlin Burn.

It is thus in my opinion clear upon the evidence that the only place from which it is proved that sewage is discharged from within theparish of Cadder, which finds its way into the Cult Burn, is the sewage from these 144 houses in South Lenzie. And so standing the facts, it humbly appears to me that it is against the owners or occupiers of those houses, or such of them as may be ascertained so to discharge their sewage, that the pursuers should have proceeded by way of interdict against any further discharge, and not against the Cadder Parochial Board.

Apart from any specialty or even difficulty which may arise from the existence of the cesspool and pipes laid down by order of the Sheriff in 1875, the course I have now suggested appears to me to be the one which must beyond all question have been taken to remedy such evils as those here complained of. It is the clear, obvious, and direct remedy in all such cases to proceed against the parties who are known to be committing the nuisance, instead of against a public body who are not alleged throughout the record, as I read it, to discharge any sewage into the Cult in the ordinary sense of that expression. Why the pursuers did not adopt that obvious and direct remedy I have never been able to understand. It is not said that the interference of the defenders to put a stop to the nuisance which existed on Mr Lang's property in 1875 has had the effect of depriving the pursuers of their remedy against the proprietors of houses in South Lenzie who are polluting the Cult Burn with their sewage. The pursuers have called four of these proprietors, who they say wrongfully discharge their sewage into the drains or ditches leading to the Cult, as defenders in this action, and they obtained interdict against these four proprietors on the 5th of February 1880. If they had called the other proprietors who are said to be acting in the same wrongful way, I see no reason why they should not have obtained a similar interdict against them; and had they done so, the nuisance, in so far as South Lenzie is concerned, would in all probability have by this time come to an end. The pursuers have, however, not adopted this course, and I am of opinion that as they have failed to instruct that the present defenders are the parties who discharge sewage or other obnoxious matter into the Cult Burn, they are not entitled to interdict in terms of the first alternative of the interdictory conclusion of the summons.

But it is said that although the defenders may not actually discharge sewage into the Cult Burn, they permit the sewage discharged from houses in South Lenzie to run into the cesspools, and thence to the Cult through the pipes laid down by them under the Sheriff's order; and that the pursuers are therefore entitled to interdict in terms of the other alternative in that conclusion of the summons, viz., against the defenders "permitting" the sewage water "to flow into the Bathlin Burn, or into any streams or watercourses leading thereto."

I am of opinion that such an interdict is not suited to the circumstances of this case, and ought not to be granted. For I do not very well see how such an interdict could be obeyed or carried out to any good purpose by the defenders. The natural drainage of the district of South Lenzie, and the natural flow of the water at the place where the cesspools here in question were made, is into the Cult Burn; and it is proved that the sewage from South Lenzie, with the solid matter in it, found its way into that burn through the open ditch or watercourse spoken to by Mr Wharrie as existing at the time he was appointed to report to the Sheriff, leaving behind, however, in the open ditches such an amount of deposit of solid matter as was sufficient to create a nuisance. That is a fact clearly proved by Mr Wharrie, and is I think beyond dispute. If, then, the cesspools had not been made, and the pipes had not been laid down, in room of the open ditch, to carry the sewage to the Cult, the sewage, or that portion of it at least which did not stagnate in the ditch, would have flowed, and would now be flowing, through that open ditch instead of through the pipes to the Cult Burn. So that if the cesspools and pipes were now closed by the defenders, or removed by them, the sewage which at the time the cesspools were made and the pipes laid down was carried and is still carried from South Lenzie through closed drains to Mr Lang's property, would find its way to the Cult Burn from the place from which the cesspools are removed, which is not much more than a hundred yards from the burn. It is in these circumstances therefore plain that the interdict, if granted in terms of the second alternative of the conclusion for interdict in the summons, is one which could not have the effect of obviating or abating the nuisance here complained of, while it would at the same time have the effect of restoring the nuisance on Mr Lang's property which was abated by the Sheriff's order. I am of opinion therefore that interdict even in terms of the alternative or qualified conclusion of the summons is one that ought not to be granted.

These observations are made on the assumption that the defenders may have the power at their own hand to close up or remove the cesspools and pipes laid down under the Sheriff's order. But as at present advised I am disposed to think that the defenders have no such power, more particularly in the absence of Mr Lang, who has a material interest to be heard on any such question, and who has not been made a party to the present proceedings. These cesspools were placed where they are and the pipes laid under a Sheriff's order, and it is very difficult to see how they can legally be removed except under an application to the Sheriff to which Mr Lang is made a party, or under a decree pronounced by this Court in a process containing competent conclusions to that effect, and in which all parties interested are called. Upon the whole, therefore, I have come to the conclusion that the interlocutor of the Lord Ordinary ought to be recalled and interdict refused.

While such is the conclusion I have arrived at

upon the evidence with reference to the question of interdict as dealt with by the Lord Ordinary, I have not thought it necessary to enter at length upon the question raised in the argument of the pursuers as to the obligation under which the defenders lay to obey any such interdict, because of their position as the local authority of a parish in which they had established "a special drainage district," as alleged in the 11th article of their condescendence. That allegation is expressly denied by the defenders, and, as I read the evidence, there is no proof whatever of any such special district having been formed. The provisions of sec. 76 of the statute as to the way in which alone such a district can be formed are express, and admittedly no such proceedings had been taken, or were even proposed to be taken, by the defenders at the time when the proof in this action was concluded. Neither do I think it necessary to enter on the general question of the powers of the Cadder Board to erect drainage districts, or to enter lands with a view to abate a nuisance. On that point I refer to the opinion of Lord Young, in which I substantially concur.

Lord Shand—Lord Mure and Lord Young have been good enough to allow me an opportunity of reading their opinions, and as I entirely concur in the result and the grounds of these opinions, I have only further to make two observations. The first is, that it seems to me to be very clear, for the reasons stated by Lord Young, that the only grounds of action stated against the Cadder Parochial Board, which are contained in the 11th article of the condescendence, are untenable. The action was directed against that board obviously on the assumption and averment that the board as the local authority had established a special drainage district in the parish, and were therefore vested in and had under their control the whole sewers of the district. No such drainage district had been established, and even if it had it does not follow that the whole drains would have been vested in or under the control of the board, and therefore the only ground of action alleged fails, and indeed was not maintained in the argument.

Again, with regard to the ground on which the pursuers have fallen back, but which is not averred on record, viz., that it had been proved that by certain special operations on one particular drain the defenders were wrongdoers, and caused pollution of the Bathlin Burn, I think the proof entirely fails. The defenders, it is true, covered in and improved an existing drain used by others, their purpose being to abate the existing nuisance caused by offensive matter in the drain, then open to the air. Beyond this they did nothing. They have in my opinion neither caused nor contributed to the pollution complained of. That pollution is caused entirely by persons using the drain who ought to have been made the defenders in this action.

Lord Young—It is not doubtful, or indeed disputed, that all public drains in a burgh or parish are by the Public Health Act 1867 vested in and under the control of the local authority thereof, so that they shall be responsible therefor, and may by interdict or otherwise be compelled to abate any nuisance or discontinue any legal injury thereby occasioned without protection from their public character or the provisions of the statute under which they exist. In the present action the pursuers complain of nuisance and injury occasioned to them by public drains alleged to be vested in and under the control of two public authorities, viz., that of the burgh of Kirkintilloch and that of the parish of Cadder. The former have admitted that the drains for which they are sought to be made responsible are public, and so vested in them and under their control. They have, in short, admitted their responsibility, and come to terms with the pursuers so as to be out of the case. The latter (that of the parish of Cadder) deny that there are any public drains in the parish, and particularly, which is sufficient for their defence here, that the drain referred to in the evidence and argument—for the averments on record are quite general—as issuing into and polluting the Bathlin Burn to the injury of the pursuers is a public drain vested in them and subject to their control under the Act. They do so by their denial of the pursuers' averments in art. 11 of their condescendence, and whether the averments or the denial be according to the truth is the leading question in the case. I say the leading question, because there is a subsidiary question depending on the effect of certain proceedings taken by them (the public authority of Cadder) under the Public Health Act to abate a nuisance injurious to health within their parish, and certain operations on the drain referred to ordered and executed in consequence of these proceedings, which the pursuers rely upon as raising a responsibility which would not otherwise have existed.

On the leading question the undoubted fact is that there are no public drains in the parish of Cadder, and so none vested in the public authority. I would add none subject to their control, with the qualification that they are charged with the duty of seeing that no private drain, or indeed anything else in the parish, is in a state injurious to health, and of taking proceedings to have it made innocuous if it be. They are, in short, in the same position with reference to the drains in their parish as any other parochial board with reference to the private drains of the parish, there being no public drainage for the whole or any part of it. Whether looking to the circumstance that there exists in the parish a large and rapidly growing village for which a system of drainage under public control might be desirable, they are chargeable with a failure of duty in neglecting to provide it, I cannot say, having in this case no jurisdiction to determine that question. In point of fact they have not provided it. It is not suggested, and plainly is not the fact, that there was a single public drain in the parish when the Public Health Act came into operation, or that the local authority has acquired one under the Act. The particular drain of which the pursuers complain is unquestionably private, with a private owner responsible therefor. This, indeed, is not disputed. Mr John Lang is the owner of the land in which it exists, and he must be held to be the owner of the drain, and responsible for its condition and discharge, unless something has occurred to divest him of the ownership or transfer the responsibility. But nothing of the kind is alleged, unless, indeed, the proceedings of the local authority under secs. 21 and 22 of the Act may have that effect. These proceedings were commenced in 1873, and had for their object the

abatement of a local nuisance occasioned by the then existing state of the drain. The Sheriff fell into the error of holding that the author of the undoubted nuisance was unknown, and so ordering the local authority to abate it by executing certain operations which after inquiry he prescribed on that footing. In subsequently criticising the regularity of these proceedings to found a claim for the cost against the undoubted author, the Lord President observed—"It is too clear to admit of doubt that the author of the nuisance in the sense of the statute was perfectly well-known — the proprietor of the ground, and respondent in the original application by the local authority. That petition sets out—the respondent John Lang has been repeatedly warned to remove said nuisance, but has failed to do so." His Lordship proceeds to demonstrate that Mr Lang was the proprietor of the drain, and responsible for it, and that the Sheriff "entirely misunderstood his position" in proceeding as if the author of the nuisance could not be ascertained. But if thus responsible as the private owner of the drain to the local authority for the local nuisance thereby occasioned, it follows clearly that he and not the local authority was responsible for the discharge of it into the Bathlin Burn. The claim of the local authority against him was frustrated by the Sheriff's error—by his having "entirely misunderstood his position" as the Lord President expresses it. Whether the error shall have the further effect of vesting the drain in the local authority or rendering them responsible for its discharge into the Bathlin Burn is the question to be considered under the next head. On the leading question my opinion is against the pursuers.

And on what I have called the subsidiary question my opinion is also against the pursuers. To hold that proceedings rightly taken by a local authority to abate a local nuisance within their parish caused by the state of a private drain renders them responsible for its discharge outwith the parish, or even within it, would in my opinion be extravagant. They have no concern with the discharge of the drain, unless indeed it causes a nuisance in their district which it is their duty to abate. Whether or not as in a question with another proprietor the owner of the drain is at liberty to discharge it into a particular stream is no affair of theirs to begin with, and I am unable to see how they take that question upon them by proceeding to abate a local nuisance caused by its condition at a place within the district with the health of which they are charged irrespective altogether of a public system of drainage. But while it is not suggested that the proceedings of the local authority to abate the nuisance were irregular on their part, it is said that the Sheriff having "entirely misunderstood his position" may have ordered more extensive operations than he ought, and that these being executed had caused the discharge to be more noxious than it was before or would have been had no other than necessary operations been ordered, and that for this superfluity of naughtiness the local authority is responsible. I am unable to assent to this view, the objections to which are so numerous and obvious that it would be tedious to enumerate them. The statutory proceedings before the Sheriff to abate the local nuisance were perfectly regular on the part of the local authority, and we have no jurisdiction in this action to say that the operations to that end ordered by the Sheriff after inquiry were excessive, or materials for arriving at that conclusion if we had jurisdiction in the matter. That the local authority failed to recover the cost from the author of the nuisance because of the Sheriff's blunder in holding that he was unknown, and so not calling upon him to execute the operations himself, is plainly immaterial. The owner of the drain, who as such was the author of the nuisance, was a party to the proceedings, and acquiesced in the operations, although by a lucky accident for him quite immaterial to the present question he escaped paying for them. The suggestion that he was thereby deprived of his drain, or of any proprietary right he had before, is, I think, quite extravagant, and equally so the counterpart suggestion that the local authority thereby acquired the drain or any proprietary right theretofore belonging to another. By submitting to the operations the proprietor of the drain ratified one of the conditions of continuing it, viz., the abatement of the local nuisance in the parish of Cadder. With the observance of that condition the local authority of Cadder was charged. Whether or not the discontinuance of its discharge into the Bathlin Burn so as to pollute it was another condition I cannot in this action say, for one of the parties to that question, viz., the owner of the drain, is not a party to the action. I can, however, say that the local authority of Cadder is in no way interested in it.

The conclusion of the action is to interdict the defenders from continuing to discharge this drain into the Bathlin Burn—not to undo what was done by order of the Sheriff under the proceedings instituted by them, so as to restore things to the state in which they were before. Now, I am clearly of opinion that it is not their drain, that it forms no part of any system of drainage under their control, and that any question about the discharge of it must be raised and tried with the proprietor and not with them. They have, indeed, no authority whatever to interfere with it in any way, or even to enter on Mr Lang's land when it exists, unless it is in a condition injurious to health within their parish, and then only under the authority of the statute, with a view to operations, with the assent of the proprietor or under judicial authority, for the purpose of making it locally wholesome. If a wholesome drain within the parish, they have no right whatever to interfere with it, and I am unable to see how an interdict against them could have any operation—for they are doing or permitting nothing which they can be ordered by interdict to discontinue. To stop the drain is beyond their power, and, indeed, for anything we know or can in this action decide, it may be according to the owner's right to continue it.

Lord Craighill—The pursuers of this action are proprietors of lands which in part are bounded and in part intersected by the Bathlin Burn, of which, higher up than the pursuers' lands, the Cult Burn is one of the feeders. The pursuers allege that the water as it reaches their property is polluted by the discharge of sewage into the two streams, and they also say that this sewage arises in part from sewers belonging to or under the control of the defenders; and the purposes of the present action are—1st, to have it declared

that the pursuers are entitled to have the water free from pollution, and that the defenders, collectively and severally, are not entitled to pollute it; and 2d, on the assumption that the water has been polluted by the defenders, to have all interdicted from continuing the pollution.

After proof the Lord Ordinary, by his interlocutor of 12th June 1880, granted declarator of the pursuers' rights in the premises, and nothing having been done within the period for which the case was continued to abate the nuisance, he, by his interlocutor of 16th July 1881, granted interdict against all the defenders in terms of the conclusions of the summons. None of the defenders reclaimed against the first of those interlocutors, but the defenders the Cadder Parochial Board, as local authority, that being the character in which they were called as defenders and in which they were interdicted, have reclaimed against the second. The other defenders have not reclaimed.

The ground on which the Lord Ordinary has granted interdict against the Cadder Local Authority is explained in the paragraph of his note to the interlocutor of 12th June 1880. What is there said is—[*reads from Lord Ordinary's note above quoted*].

To these reasons for judgment the local authority reply, first, that what they did was done in furtherance of the ends of the Public Health (Scotland) Act of 1867, sec. 22; and second, that as they are a statutory body, their powers being derived from the statute, and the consequences of their conduct being only those sanctioned by the statute, the operations referred to resulted neither in the acquisition of a property in nor in a responsibility for the management of the sewer which they are said to have constructed.

These are the questions presented for consideration or determination on the present occasion. They from the first have appeared to me to be attended with difficulty, but on reviewing what was done in connection with the relative provisions of the statute, I have come to think that the opinion to which the Lord Ordinary has given effect by his judgment is the true conclusion.

What was done was this—The Local Authority of Cadder in 1874 presented a petition to the Sheriff of Lanarkshire under the Public Health (Scotland) Act 1867 against John Lang, the owner of a small property in which there was a foul ditch or watercourse, constituting a nuisance in the sense of sec. 16 of the Public Health Act. The Sheriff did not order Lang to remove the nuisance, but found that it had not been satisfactorily shown who was the author of the nuisance; that this question could not be determined without further and probably protracted inquiry; and that the nuisance ought to be removed without delay, in terms of the 22d section of that statute, by which, *inter alia*, it is enacted "That if in the original application it appears to his [the Sheriff's] satisfaction that the author of the nuisance is not known or cannot be found, then such decree may at once ordain the local authority to execute the works thereby directed." Accordingly after remitting to Mr Wharrie, civil engineer, the Sheriff ordained the local authority to execute such works as might be necessary for removing the nuisance complained of, in accordance with Mr Wharrie's report and at the sight of Mr Wharrie. The local authority accepted and acted under this appointment, and the works described in the passage already quoted from the Lord Ordinary's judgment were the result. Those works, it appears to me, were plainly more extensive and more costly than were necessary for the abatement of the nuisance in Lang's ground, and consequently were such as neither Lang nor any other contributory to that nuisance could have been obliged to construct. Nevertheless the local authority, once the works were completed, asked and got from the Sheriff decree for the cost against Lang and other owners of the ground who had compeared, but on appeal to the High Court of Justiciary (4 R., Just. Cases, 39) this decree was quashed, because the local authority had not given the respondents an opportunity of themselves abating the nuisance. The local authority afterwards raised an action against Lang as owner of the ditch which had been the source of nuisance, but he was assoilzied, in respect that he had not been called upon or ordered to abate the nuisance, as in the opinion of the Court was necessary under sec. 22 of the statute if the works were to be executed at his cost as the author of the nuisance (6 R. 1242).

These being the facts, I am of opinion that the sewer in question, with its cesspools, as constructed by the local authority, is a work for the consequences of which the local authority must answer to any, if any there be, who are thereby aggrieved. In the first place, it was formed by them and at their cost, or rather the cost of the ratepayers, and, in the second place, the works were constructed by them on an order pronounced by the Sheriff, in respect it had not been satisfactorily ascertained who was the author of the nuisance. This was a competent proceeding under section 22, but its adoption involved the result, as was subsequently shown in the appeal to the High Court of Justiciary and in the ordinary action, that the work was not the work of Lang or of any other owner of the ditch, but of the local authority, by whom under judicial sanction it was undertaken and executed. The local authority may not be, probably they are not, feudal proprietors of the ground, but they may be, and I think are, nevertheless the owners of the sewer and cesspools which they constructed, and which was paid for by assessments levied by them. If this sewer is not theirs, it belongs to nobody. This, however, would be a result so strange and anomalous that the view by which it is suggested cannot be taken to be sound. The defenders and nobody else must therefore be taken to be the owners of the drain.

For these reasons I think that the local authority must be dealt with as being the owners, or as having the control, of the sewer and cesspool in question, by the discharge from which in part the water of the Bathlin Burn when it comes down to the pursuers' land is polluted.

The defenders, however, contend that, even though they should be taken to be the owners or the body having the control of the drain and cesspools, they ought not to be interdicted. How this should be is not easily understood, having in view the case of *The Corporation of Birmingham*, 4 Kay & Johnston, 528, and the recent decision of the Second Division of this Court in the case between *Magistrates of Portobello as Local Authority of Portobello* and *Magistrates of Edinburgh*,

relative to the pollution of the Pow Burn. The local authority have acquiesced in the decree, declaring that they are not entitled to pollute the water as it reaches the pursuers' land, and if they have polluted it, and there is reason to suppose that the pollution will be continued, it would seem to follow that the next step must be an interdict. The grounds on which the contrary is maintained are, first, that the defenders by their operations did not make things worse. But this is, I think, an erroneous contention. The fact appears to me to be that things have come to be worse since the works undertaken by the defenders were constructed, and in consequence of their construction the quantity of sewage has been increased, because preparations were made in the system adopted by the defenders for the reception of the sewage of new houses, and also because the effect of the cesspools has been to intensify the pollution of the burn. The solid matter is separated from the fluid. The solid matter stagnates and putrifies in the cesspools, and the fluid overflow which escapes not only flows further, but is more noxious than the discharge from the ditch which reached the cesspools. These things are proved by Wharrie as well as by Dr Stevenson Macadam and by other witnesses.

The second ground taken by the defenders is, that the owners and occupiers of the houses from which much of the sewage that is discharged first into and then out of the sewers and cesspools constructed by the defenders have not been called as defenders in this action. Certainly they might have been called, but the omission to call them does not lead to the conclusion that as regards the defenders interdict is an incompetent or an inappropriate remedy, for if the persons referred to had been called, and being called had been interdicted, that would not have affected the liability of the defenders to interdict, though the need of this remedy in their case would have been diminished or, it may be, obviated. Besides, it is not by any means clear that the owners and occupiers of the houses referred to could have been interdicted from discharging their sewage into the drain in question. They might have said that by paying their parts of the assessment, out of which the cost of the works executed by the defenders were defrayed, they had purchased a right to run their sewage into the drain which was constructed, and that the local authority from whom or through whose administration this right was acquired were the party to see that the outflow from the drains was not a nuisance to the lower heritors. This view of the matter might or might not have been sustained, assuming that it had been presented, and if there be uncertainty on the subject the pursuers' omission to call the owners and occupants of the houses referred to ought not in the circumstances to affect their right to a remedy against the local authority.

Last of all, the defenders say that to interdict them would be idle, if not worse, as they could not prevent the thing the occurrence of which is to be interdicted. There are two views which here occur for consideration. If the defenders communicated a right to others they must do what is necessary to obviate the consequences, and by the adoption of a general drainage scheme this would be effected. If, on the other hand, they have communicated no right, the defenders by a very obvious remedy may prevent all discharge of sewage into their drain, and as a consequence prevent the pollution complained of in their case by the pursuers. On this part of the case reference may be made to the case of *The Attorney-General* v. *The Acton Local Board*, decided by the Lords-Justices in England on 22d November last (Weekly Notes, December 3, 1882, and Weekly Reporter), and to the case of *The Metropolitan Board of Works*, 17 Chan. Div. 246, there cited.

In fine, the amenability of the defenders to interdict appears to me to rest upon the same ground as their amenability to the decree of declarator which has been pronounced against them. The latter has been acquiesced in; the former should not have been opposed, but opposed though it has been, it should, as I think, be granted. The recent case of *The Attorney-General* v. *The Union of Dorking*, L.R., 20 Chan. Div. 595, is not an adverse authority, for here there is present that which was not present in that case, viz., the construction of drainage works by the local authority, resulting, as I think, in an aggravated nuisance, and consequently in their responsibility for the discharge from those works by which in part the pollution complained of by the pursuers was produced.

For these reasons, and those set forth in the opinion of the Lord Justice-Clerk, I concur with him in thinking that the judgment of the Lord Ordinary ought to be affirmed.

Lord Rutherfurd Clark—I concur in the opinions of Lord Mure and Lord Young.

Lord President—I also concur in the opinions of Lord Mure and Lord Young.

This interlocutor was pronounced:—

"Having heard counsel . . . on the reclaiming note for the defenders the Parochial Board of the parish of Cadder, as the local authority of the said parish, against Lord Adam's interlocutor of 16th July 1881 . . . Recal the said interlocutor in so far as regards the interest of the said defenders; assoilzie the said defenders from the conclusions of the action for interdict . . . and decern."

Counsel for Pursuers (Respondents)— Lord Advocate (Balfour, Q.C.)— J. Burnet — Vary Campbell. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Defenders (Reclaimers)—Solicitor-General (Asher, Q.C.)—Lang. Agents—Dove & Lockhart, S.S.C.

Friday, January 26.

FIRST DIVISION.

[Sheriff of Lanarkshire.

MACKENZIE'S TRUSTEES *v.* SMITH.

Heritable Security—Poinding of the Ground—Partnership—Competency.

It is not necessary that a party called as proprietor of subjects in a summons of poinding