arranged, and may safely be left to the parties themselves. If the creditor proposes to put too small a value upon his security, I think that the discharged bankrupt would be very well justified in insisting upon redeeming that portion of his estate which forms the subject of the security at the sum named by the creditors.

I therefore think that the Lord Ordinary's interlocutor must be recalled, and the logical consequence of that is that the defender must be assoilzied.

Lord Mure—I agree with what your Lordship has said as to the general rule of law relating to secured creditors, and I also think that the provisions of this 65th section of the Bankruptcy Act of 1856 are specific and clear. It must be kept in mind that the composition offer here was made in the course of the sequestration proceedings, and also that the rules laid down for ranking and drawing a dividend under this 65th section of the Act are very express, and declare that the creditor must value his security on oath, and deduct that value from his debt. It appears that no claim in the sequestration was lodged by the present pursuer, as he considered the heritable security which he held sufficient to meet his debt, but he now proposed to recover a composition upon his whole debt without valuing and deducting the heritable security which he holds. I agree with your Lordship in thinking that a secured creditor, like the present pursuer, is bound to value and deduct his security, and can only claim a composition on the balance. He must act as he would do if he were claiming a dividend.

It was argued to us in the course of the discussion that the qualification requisite for drawing a composition was analogous to that which was essential for voting; and that in the latter case under the provisions of sec. 59 the creditor was obliged to value and deduct, and I must say that that is my reading of that section also. It provides that "If a creditor hold a security for his debt over any part of the estate of the bankrupt, he shall before voting make an oath, in which he shall put a specific value on such security, and deduct such value from his debt, and specify the balance, . . . and he shall be entitled in any case to vote in respect of the balance and no more." . . .

Now, in the interpretation clause the word "vote" in addition to its ordinary meaning includes "a consent to any offer of composition," . . . and therefore in the consideration of any question of composition all creditors who hold securities are, I think, bound to value and deduct their securities, and can claim a composition only upon the balance.

Lord Shand concurred.

The Court recalled the Lord Ordinary's interlocutor, and assoilzied the defender.

Counsel for Pursuer—J. P. B. Robertson—M'Kechnie. Agents—Smith & Mason, S.S.C.

Counsel for Defender—Mackintosh—Pearson. Agents—Ronald & Ritchie, S.S.C.

Friday, March 14.

FIRST DIVISION.

[Bill Chamber.

LOCAL AUTHORITY OF DUMFRIES *v.* MURPHY.

Police—Public Health—Nuisance—Smoke—Consume "as far as Practicable"—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 16, *sub-sec. H—Interdict.*

The Public Health (Scotland) Act 1867, sec. 16, sub-sec. H, provides, with regard to burghs, that the word "nuisance" shall be held to include any furnace "which does not as far as practicable" consume its own smoke. In a complaint brought by a local authority under this sub-section—*held* that it would be sufficient to constitute a nuisance within the meaning of the Act if a furnace, though well constructed, were systematically badly worked, but on the facts that the nuisance averred had not been proved.

This was a petition presented to the Sheriff of Dumfries and Galloway by the Local Authority of Dumfries, acting under the Public Health (Scotland) Act 1867, against Hugh Murphy, tanner, Dumfries, the prayer of which was "to decern for the removal, or remedy, or discontinuance of the nuisance hereinafter condescended on, and to grant interdict against the recurrence of it, all in terms of the Public Health (Scotland) Act 1867, and particularly sections 16, 18, 19, and 105 thereof."

By section 16, sub-section H, of the Public Health (Scotland) Act 1867, the word "nuisance" under said Act is declared to include, *inter alia*, "any fireplace or furnace which does not as far as practicable consume the smoke arising from the combustible matter used in such fireplace or furnace, and is used within any burgh for working engines by steam, or in any mill, factory, dyehouse, brewery, bakehouse, or gaswork, or in any manufactory or trade process whatsoever."

The petitioners averred that the respondent carried on a currying and tanning business in Shakespeare Street, Dumfries, and that within these premises on or about 17th, 18th, 19th, 20th, 24th, 25th, 26th and 27th July 1883 he "used, and still uses, a fireplace or furnace which did, and does not, as far as practicable, consume the smoke arising from the combustible matter used therein for working one or more engines by steam in said premises, or in the manufacture of leather or other trade process carried on by him therein, whereby a nuisance within the meaning of said section 16, sub-section H, existed, and still exists."

They further averred "that the said nuisance is caused by the burning in said fireplace or furnace of refuse bark or other similar material, instead of having the same removed to a suitable place, and to save the expense of such removal."

Section 17 of the Public Health (Scotland) Act 1867 provides that "If the local authority or sanitary inspector have reasonable grounds for believing that nuisance exists in any premises, such local authority or inspector may demand admission for themselves . . . . or any other person or persons whom the local authority may desire to inspect such premises, or for any or all

of them, to inspect the same . . . at any hour when the operations suspected to cause the nuisance are in progress or are usually carried on."

A proof was taken before the Sheriff-Substitute, the import of which was as follows:—The smoke of three furnaces used in connection with the respondent's trade was carried away by one chimney stalk, and on the nights of the 18th, 19th, 20th 24th, 25th and 26th of July, 15th, 30th and 31st of August, and 13th October 1883, dense volume, of black smoke issued from this chimney. It was proved that the furnaces were well constructed for consuming the smoke, and not proved that the burning of bark was the cause of the discharge of smoke. There was no evidence that the system of working the furnace was bad.

The Sheriff-Substitute (HOPE) on 7th December 1883 pronounced an interlocutor finding in law that on the occasions in July above mentioned there existed a nuisance within the meaning of the Act: "Therefore repels the defences, ordains the respondent forthwith to discontinue said nuisance, grants interdict against its continuance in terms of the prayer of the petition, and decerns," &c.

On appeal the Sheriff (MACPHERSON) adhered, except in so far as interdict was granted, and gave the respondent an opportunity of stating by minute what steps he proposed for the abatement of the nuisance.

In a note to this interlocutor his Lordship expressed his opinion that the nuisance found to exist arose from no defect in the respondent's furnaces, and that if they were properly stoked and attended to none would be caused, but that in point of fact the furnaces were not used so as to consume their own smoke.

The respondent stated that he had no proposal to make for the alteration of the furnace, and submitted that the only nuisance alleged was the furnace itself. Thereafter the Sheriff granted interdict in terms of the prayer of the petition, and ordained the respondent forthwith to discontinue the nuisance.

The respondent then appealed, under sec. 107 of the statute, to the Lord Ordinary on the Bills (KINNEAR), who on 29th January 1884 sustained the appeal, recalled the deliverance of the Sheriff, and dismissed the petition.

"*Opinion.*—This petition is presented under section 16, sub-section H, of the Public Health Act 1867, by which it is enacted that the word 'nuisance' under the Act shall include . . . any fire-place or furnace which does not, as far as practicable, consume the smoke arising from the combustible matter used in such fire-place or furnace, and is used within any burgh for working engines by steam, or in any mill, factory, dye-house, brewery, bakehouse, or gas-work, or in any manufactory or trade process whatsoever.'

"The averment upon which the petition is supported, and which is undoubtedly relevant, is (art. 4) that the 'defender, within the said premises, on or about 18th, 19th, and 20th days of July 1883, used and still uses a fire-place or furnace which did and does not as far as practicable consume the smoke arising from the combustible matter used therein for working one or more engines by steam in said premises, or in the manufacture of leather or other trade process, carried on by him therein, whereby a nuisance within the meaning of said section 16, sub-section H, existed and still exists.'

"It is further averred that at 'certain times large quantities of dense smoke proceed from the chimney-stalk connected with the fire-place or furnace, from which there proceeds an offensive smell,' and that this occurred on the dates already mentioned. But this is not brought forward as the nuisance of which the Local Authority complain, the discharge of smoke from a chimney not being in itself a nuisance under the Act, unless it be injurious to health, but is stated, I understand, as the effect of the nuisance relevantly alleged in the fourth article of the statement.

"The Sheriff-Substitute allowed a proof; and by his interlocutor of 7th December he finds, *inter alia*—'3. That on various occasions during the summer and autumn of this year, and more particularly on the 13th, 14th, 18th, 19th, and 20th of July and the 13th of October, there issued from the chimney-stalk of respondent's works volumes of smoke which overhung the neighbourhood, and penetrated the houses, and caused an offensive smell; 4. That the chimney-stalk in question carries away the smoke from two furnaces used in connection with the respondent's said trade; 5. That said furnaces, or one or other of them, did not on said occasions, as far as practicable, consume the smoke arising from the combustible matter used therein;' and thereupon he finds in law that on the occasions beforementioned there existed a nuisance within the meaning of the said Act, and therefore 'ordains the respondent forthwith to discontinue said nuisance,' and 'grants interdict against its continuance, in terms of the prayer of the petitioner.'

"The Sheriff upon appeal adhered to this interlocutor, except in so far as it granted interdict, thinking it proper to give the respondent an opportunity of stating what steps, if any, he proposed to take for the abatement of the nuisance; but ultimately, by his interlocutor of 7th January, he repeated the judgment of the Sheriff-Substitute, and granted interdict in the terms already quoted.

"The judgment is, in my opinion, open to objection, inasmuch as it does not define the nuisance against which it is directed. I assent to the observation of the respondent's counsel that no objection can be taken to the generality of the prayer, both for the reasons he urged and also because the Sheriff is not restricted to any special remedy which may be prayed for in the petition, but may pronounce such competent order as the case may in his judgment require. But this does not dispense the Court, if it grants interdict, from defining the acts or operations which it prohibits with sufficient clearness to leave no room for reasonable doubt in the mind of the party as to what it is that he is forbidden to do under the penalties applicable to a breach of interdict. Now, the judgment appealed against interdicts the 'said nuisanee in terms of the prayer of the petition.' But it does not define the nuisance; and the natural construction of it therefore is that it interdicts in terms of the prayer the continuance of the nuisance complained of in the petition. But the only nuisance complained of is the use of a certain fire-place or furnace which does not, so far as practicable, consume the smoke arising from combustible matter, and an interdict against the continuance of the nuisance so described

would appear to me to be an interdict against the use of the furnace. But I do not think this is what the learned Sheriffs intended. For they appear to be satisfied by the evidence that there is no defect in the construction of the furnace, but, on the contrary, that it is well adapted for the consumption, so far as practicable, of the smoke which it generates, and the Sheriff-Substitute points out that, in his view, the judgment will not involve the appellant in the expense of any structural alteration.

"I concur with the Sheriffs in the view taken by them of the facts, and I am therefore of opinion that if the interdict means what from its terms it would appear to mean it is not warranted by the evidence. On the other hand, if without interfering with the use of the furnace, it is intended to interdict the discharge of smoke from the appellant's chimney, that would in my opinion be an interdict which is not authorised by the statute, for the discharge of smoke from a chimney is not in itself a nuisance under the Act, unless (under sub-section 1) it is injurious to health, which is not alleged by the Local Authority. If, again, it was intended that the discharge of smoke should be prohibited not absolutely, but under certain conditions, I think it was indispensable to express these conditions distinctly, not only because the party against whom an interdict is directed should never be left in doubt as to the act or operations which will constitute a breach of interdict, but because otherwise it cannot be clear that the remedy which has been granted is within the statute.

"It appears to me, therefore, that the decree cannot stand. But farther, I am of opinion that the enactment founded on, as applied to the facts of the case, does not warrant an interdict. I cannot agree with the learned Sheriffs in their construction of sub-section H. It appears to me that what constitutes the nuisance defined in sub-section H is a quality or defect in a furnace, and not the occasional negligence of a workman. I think this is the natural construction of the words, and it is borne out by the special provisions of section 20 for the remedy of this particular kind of nuisance. It may be possible, as was suggested by the respondent's counsel, that a furnace originally well constructed for consuming smoke may be rendered useless for that purpose in consequence of some defect in the system of working adopted by the manufacturer; and it may be, as he maintained, that such a case would be within the scope of the enactment, because the furnace when in operation would not, in a reasonable sense of the words, be a furnace that consumed its own smoke. But nothing of the kind is proved in the present case. It is proved that the furnaces in themselves are perfectly well fitted for consuming their smoke; it is not suggested that they could be improved, and there is no evidence that the method of working adopted or authorised by the appellant is in any way objectionable. Accordingly the Sheriff does not find that these furnaces are ineffectual to consume their smoke, or that, in general, they fail to do so; but that, on certain specified occasions in July, and on one occasion in October, the appellant's chimney sent forth volumes of smoke. That is certainly very strong evidence that on these occasions the furnaces were not fairly or properly worked. Various suggestions have been made to account for these occasional discharges of smoke, but I agree with the Sheriffs in thinking that they may very probably be ascribed to the negligence of a workman in the appellant's employment. And if that be so, I am of opinion that the furnaces being properly constructed, and the method of using them adopted by the appellant being perfectly proper and such as to take due advantage of their construction, the occasional carelessness of a workman stoking does not constitute an offence under sub-section H. Nor does it appear to me that this construction is open to the objection which has been urged—that it renders the enactment nugatory. It must be remembered that section 16 of the Public Health Act does not profess to embody the whole law of nuisance. It defines certain specific nuisances, and sub-section H in particular creates a statutory nuisance for which the Act provides summary and very stringent remedies. To bring sub-section H into operation it is not necessary to prove anything approaching to nuisance at common law; for the mere use within a burgh of a furnace of the kind described, is a nuisance under the Act, even although it cannot be shown to produce what would be a nuisance at common law or under sub-section I. And any infringement or failure to comply with a decree of the Sheriff for the removal or remedy of such a nuisance is an offence which may be punished by severe penalties. The purpose of the enactment, therefore, is to secure that no furnaces shall be used in manufactories within a burgh excepting such as are properly constructed for consuming their own smoke; and that is a purpose which may be very effectually secured, even if the Act does not provide any new remedy against the occasional negligence of workmen. It appears to me that for such negligence an interdict against the manufacturer would be a very inappropriate and unworkable remedy. A manufacturer may be responsible in other ways for the negligence of his servants; but I can see no ground in principle, and no authority under the statute, for directing an interdict against the master in order to prohibit the recurrence of a negligence, or, it may be, of direct disobedience to his orders, on the part of his servants.

"The respondent's counsel referred to the Smoke Nuisance Acts of 1857 and 1865. There can be no question that the negligent use of a furnace is an offence under these statutes, and if an offence under these statutes has been committed the respondent may have his remedy against the actual offender, whether it be the owner or occupier of the premises or a 'foreman, or other person employed by him in connection with the furnaces.' But I think he has failed to establish his case under the enactment upon which he founds, and that the appeal must therefore be sustained."

The respondents reclaimed, and argued—Under sub-section H a nuisance might be created either by a furnace of bad construction or by systematic negligence in working it. The latter cause was here to be inferred from the fact that quantities of smoke issued from this chimney, and the respondents' inability to assign any other reason. It was not necessary for the Local Authority to show what substance caused the nuisance. The respondents might be interdicted from working the furnaces in such a way as

to create a nuisance—*Fraser's Trustees* v. *Cran*, June 1, 1877, 4 R. 794, December 1, 1877, 5 R. 290.

The respondent (appellant) replied—It was admitted that the furnaces were well constructed, and if the cause of the nuisance was negligence, then the complaint could not be brought under this subsection, but should have been brought under subsections E or I, or under the Smoke Nuisance Acts of 1857 and 1865. The particular nuisance averred had not been proved.

At advising—

Lord President—In this case the Lord Ordinary has pronounced an interlocutor by which he sustains the appeal, recals the deliverance of the Sheriff, dismisses the petition, and decerns—assigning two very distinct grounds for this judgment in the opinion which has been printed for our information.

The prosecution is based on section 16 of the Public Health Act 1867, and sub-section H of that Act; and the question comes to be, whether the Local Authority have established the existence of a nuisance of the nature specified in that subsection H? The Act declares that the word "nuisance" shall include, among other things, "any fireplace or furnace which does not, as far as practicable, consume the smoke arising from the combustible matter used in such fireplace or furnace.'

Now, in the present case it has been proved, and indeed it was not matter of dispute, that the furnace complained of was perfectly-well constructed for the purpose of consuming its smoke, so that there was no deficiency in the construction or quality of the furnace, and it is quite clear that the nuisance specified and described is the existence of a furnace which does not, as far as practicable, consume its own smoke. I do not say, however, that the only kind of fault which would be sufficient to create a nuisance under sub-section H must necessarily be a fault of construction. I think that the sub-section may very fairly be read as meaning that if the furnace was constantly and habitually worked so as not to consume its own smoke, that is to say, if, as the result of an imperfect system which did injustice to its construction, it did not consume its smoke, then that would be sufficient to constitute a nuisance under the statute. The words are not "incapable of consuming," or "so constructed as not to consume," but "which does not consume," that is to say, if the furnace does not, as matter of fact, consume its own smoke as far as practicable, whether from fault in the construction or fault in the system of working, then a nuisance is created within the meaning of sub-section H.

But how do the facts stand here? It appears that there were three furnaces, all discharging their smoke by one chimney, and that from this chimney there issued on certain occasions volumes of dense black smoke. The smoke was always discharged at night, and the number of times when this happened—I do not refer merely to the occasions specified by the Sheriff-Substitute, but to all the occasions that have been proved—was six times in July, three times in August, not at all in September, and once in October. Therefore I think it is quite plain that it has not been established that the furnace was systematically worked in such a way as not to consume its own smoke. On the contrary, it is granted that on every other day the furnace worked well, and did consume its own smoke. Therefore, on that clear ground, I think the case for the Local Authority has not been established, that they have not established that there was a nuisance. The truth is, that the Local Authority came into Court without attending to what it was they were going to establish, or what the nuisance was they intended to complain of. All they knew was that on these occasions I have mentioned smoke did issue from this chimney. They knew nothing more. But they came into Court alleging that the mischief was occasioned by the burning of bark, which is certainly not established. The allegation is contained in the fifth article of the condescendence, and is to this effect—"The Local Authority believe and aver that the said nuisance is caused by the burning in said fireplace or furnace of refuse bark or other similar material, instead of having the same removed to a suitable place, and to save the expense of such removal." No such case has been made out. I think the Local Authority came into Court very much in the dark as to the facts. That I think was quite unjustifiable, for under the Public Health Act, and especially section 17, they had power to make themselves thoroughly acquainted with the cause of the nuisance. They were entitled to have access to the premises at any time in order to see whether the furnace was well or ill constructed, and whether it was being worked upon a good or bad system, that they might ascertain whether the smoke was or was not being consumed as far as practicable. They have not availed themselves of these powers, and as I read the statute, they were not entitled to go on and prosecute under section 18 for a nuisance as defined by section 16, without an inspection which is authorised by section 17. It is said that the premises were shut up while the nuisance was going on, but the Local Authority were entitled to demand an entry at any time during the day or night, and if an inspector had been sent there could not have been any difficulty.

On the whole, upon that special ground, I am of opinion that it has not been established that there was a nuisance under sub-section H. I am not disposed to undervalue the other ground upon which the Lord Ordinary has proceeded, but do not consider it necessary to enter upon that, as the ground I have stated appears so clear.

Lord Mure—I think that the interlocutor of the Lord Ordinary is right. It is very plain on the evidence that the Local Authority misapprehended what the nuisance was, and the statements of the condescendence, as well as the correspondence before the raising of the action, show that they thought burning of bark was the cause. There the proof has entirely failed, for it appears from the evidence that the burning of bark has the effect of preventing smoke issuing from the chimney. Apart from that it appears that smoke was occasionally discharged from the chimney at night, but that only occurred two or three times monthly, which is not sufficient to constitute a nuisance under sub-section H of the statute.

As regards the terms of the interdict, I am of the same opinion as the Lord Ordinary. I do not

see how it would ever be safe to grant interdict in terms of the prayer of the petition, which asks the Court "to decern for the removal or remedy or discontinuance of the nuisance hereinafter condescended on, and to grant interdict against the recurrence of it, all in terms of the Public Health (Scotland) Act 1867, and particularly sections, 16, 18, 19, and 105 thereof." I never knew of an interdict being granted in terms so wide as that. Originally the Sheriff pronounced interdict in terms of the prayer, and on looking at the prayer I find that it is necessary to read the different sections of the statute. I think the terms of that interdict were so wide that it would have been impossible to comply with them.

I think that the observations of the Lord Ordinary on this point are important, and with them I entirely concur.

Lord Shand—I am of the same opinion. The statute provides that the word nuisance shall include "any fire-place or furnace which does not, as far as practicable, consume" its own smoke. I agree in thinking that this means, "which does not in point of fact," and that whether the fault arises from the bad construction of the furnace, or from a bad system of working, the result being that the furnace does not consume its smoke. And in the case of a bad system of working, I do not think that it would be necessary for the complainer to show that it had been going on for any lengthened period of time. If it was proved that at intervals for two or three days at a time the furnace was so worked that quantities of smoke issued, I should hold that sufficient to create a nuisance.

It appears, however, that what occurred here might have happened from accidental causes, and not from a mode of working, or a system which can be condemned. And I therefore think we should adhere. In such cases it is very desirable that the local authority should be at more pains, before coming into Court, directly to investigate into the operations which are going on. They had power under the statute to enter these premises for that purpose, and it rather appears that if that course had been here adopted they might have saved this litigation. They might then have been able to point out to the respondent in what respect his system was defective, or, at all events, the Local Authority would have been in a much better position for proving their case, and showing at any rate that the discharge of smoke did not arise from accidental causes.

Lord Deas was absent.

The Court adhered.

Counsel for Local Authority—Mackintosh—A. J. Young. Agents—Whigham & Cowan, S.S.C.

Counsel for Murphy—J. P. B. Robertson—W. Campbell. Agents—J. & J. Galletly, S.S.C.

Friday, March 14.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

IRVINE *v.* IRVINE.

Husband and Wife—Divorce—Desertion.

A husband who had failed in business went abroad, arranging with his wife to send for her when he could earn enough to support her and their family. He corresponded with her for a year, and sent her a little money, after which she heard no more from him, though there was reason to believe that her letters reached him, and it was reported that he was doing well. More than five years after the date of the last letter she received from him, she raised against him an action for divorce for desertion. The Court, holding it not proved either that the defender had wilfully deserted his wife on going abroad or that he was in wilful desertion at the date of the action, *dismissed* the action.

Agnes Goudie or Irvine, residing in Edinburgh, raised an action for divorce against her husband, Erasmus Irvine, on the ground of desertion. The following facts were established at the proof:—The parties were married in Lerwick in 1863. Defender had shortly before returned from the Australian Gold Fields, and pursuer had known him only for a few months before their marriage. After their marriage they stayed a few months in Shetland with pursuer's mother, and then sailed for Melbourne. Defender was not successful in business there and became addicted to drink, and they returned to Lerwick in 1869. They afterwards lived in London, and then in Edinburgh, where defender opened a grocer's shop, but ultimately he became insolvent and sailed for New Zealand in August 1875, leaving pursuer in Edinburgh, and she never saw him again. There were seven children born of the marriage. Defender wrote to pursuer regularly for the first twelve months. It had been arranged that he was to send for her when he got employment. He told her he was unsuccessful, and was generally employed as a gold digger. He sent her £5 or £6 after he left. She supported herself and the children by keeping lodgings. The last letter she received from him was about the end of 1876 or beginning of 1877. He told her to address her letters to him to the Post Office, Dunedin. In his last letter he said he was going 300 or 400 miles further west. She wrote several letters to the last address he gave her without getting a reply. She afterwards got another address from a friend of her husband's in Edinburgh, and wrote several times to it also without getting a reply. None of her letters were returned. The last she wrote was in the end of 1878 or beginning of 1879. An intimate friend of the parties had received one letter from defender shortly after he went out to New Zealand. Defender was working in Dunedin at that time, but things were then looking very dull. Defender did not allude to his wife or family in that letter. Another friend of the parties knew a person who lived near where the defender was working about the year 1878, and who gave him defender's address at different places on the west coast of New Zea-