to the right he is acquiring, and to take them into account in estimating the price he can afford to pay, if he cannot provide against them otherwise. In the present case the purchaser must have known that he would be liable for a casualty, as the Lord Ordinary says, "sooner or later." If he desired to postpone that payment until the death of the vendor, it was perfectly open to him to stipulate that the latter should make payment of the relief-duty, and so put things in the same position as if he had been duly entered under the old law. If he failed to do so the superior is not responsible for that omission. The result is that the trustees have no answer to the demand except that Mr Ferryman was entered by implication under the statute, and the statute provides that that shall not be a good answer.

2. The second ground of defence is that under the Act of 1887 no casualty will become exigible until the death of Mr Ferryman as heir of the last investiture, because Mr Sinclair's trustees, who were entered in 1856, held for behoof of the truster's heir. On this ground also I agree with the Lord Ordinary. I think the Act has no application to transactions carried out and completed under the law in force before 1874, by the entry of trustees under a charter from the superior. The legal effects of such entry were perfectly fixed and indisputable long before the Act of 1887 was passed, and I see nothing in the statute to alter them. I am therefore for adhering to the interlocutor of the Lord Ordinary.

LORD ADAM concurred.

LORD M'LAREN — I have had serious doubt about the decision to be given in this case, but on the best consideration I have been able to give to it I think the legal considerations developed by Lord Kinnear in his judgment ought to prevail over the equitable considerations which would obviously lead to a different conclusion. My doubt arose upon the first line of defence founded upon the argument that an illusory feu-duty or casualty is not intended to be exacted, and that it ought to be held as paid. The name "blench-holding" rather suggests this construction. Under the older feudal law a superior could not have brought a declarator of irritancy *ob non solutum canonem* because a blench-duty of one penny Scots had run into arrear, and this on the principle of the common law, which after all is only common sense, that a man is not to be deprived of his property because he has failed to make an illusory payment—that is, to satisfy a condition of the holding which the superior has no interest to enforce.

It was argued that by a reasonable extension of this doctrine all payments due by way of relief or other casualty of an illusory nature should be held as paid if not asked for and refused. The argument has much to recommend it. At the same time there is a difficulty in extending the common law to this effect, for this ought to have been done by statute, but it is not done by the Act of 1874, which enters the vassal automatically, and I do not see my way to make a rule infringing on the statutory rights of a superior. The question is by no means confined to blench-duties, for the same considerations would apply to cases where there was a real but small feu-duty with an untaxed entry.

The lesson which conveyancers should draw from this case is, when a client dies to tender payment of 2d. Scots on behalf of the heir, so that he may not be called on to pay a year's rent when the property comes to be sold.

The LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuer and Respondent—Craigie—Laing. Agents—Laing & Harley, W.S.

Counsel for the Defenders and Reclaimers—Campbell, K.C.—Hunter. Agents—Russell & Dunlop, W.S.

Saturday, November 29.

FIRST DIVISION.

[Sheriff Court at Hamilton.

DUNCAN *v.* MAGISTRATES AND TOWN COUNCIL OF HAMILTON.

Reparation—Liability of Local Authority for Acts Done in Exercise of Statutory Power—Limitation of Time for Bringing Actions — Public Health (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 38), *sec.* 166.

Section 166 of the Public Health (Scotland) Act 1897 is in these terms:—"The local authority and the Board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act; and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected; and every action or prosecution against any person acting under this Act, on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen."

A child who, under the powers conferred by the Public Health (Scotland) Act 1897, had been removed by a local authority to a burgh fever hospital, was injured by upsetting over himself a bottle of acid left within his reach by a servant in the course of cleaning the ward. Ten months after the accident his father, as his administrator and tutor-in-law, brought an action in the

sheriff court claiming damages against the local authority.

Held that the action was barred by the time limitation contained in the 166th section of the Act.

Andrew Duncan, 148 Glasgow Road, Greenfield by Hamilton, tutor and administrator-in-law for his pupil child John Duncan, and as such tutor and administrator-in-law on his behalf, brought an action in the Sheriff Court at Hamilton on 4th February 1902 against the Magistrates and Town Council of the Burgh of Hamilton, being the local authority thereof constituted and acting under the Public Health (Scotland) Acts. The pursuer craved decree for £250 damages in respect of injuries suffered by his said pupil child.

On 2nd April 1901 the said pupil child, John Duncan, had taken ill with scarlet fever, and on the 23rd of that month had been removed to the Burgh Fever Hospital, over which, as local authority, the Magistrates and Town Council had complete charge. On the following day he had been seriously injured by upsetting over himself a bottle of acid which had been temporarily placed where he got access to it by a servant engaged in cleaning out the ward. On 14th July 1901 the child was discharged from the hospital but continued to be treated as an out-patient for some time longer.

The defenders pleaded, *inter alia*—(2) The pursuer is barred by *mora*.

On 17th March 1902 the Sheriff-Substitute at Hamilton (DAVIDSON) issued this interlocutor:—"Finds that this is an action arising on account of an alleged wrong done in a proceeding under the Act (60 and 61 Vict. cap. 38); that, by section 166 of the the said Act such action shall be commenced within two months after the cause of action shall have arisen; that a longer space of time elapsed between the arising of the cause of action and the raising of this action: Therefore sustains the defenders' plea of *mora:* Dismisses the action: Finds the pursuer liable in expenses."

Note.—"The care of the child in question is admitted to have been a proceeding under the 54th section of the Act of 1897, and the argument of the pursuer is that the word 'person' in section 166 does not include the Local Authority itself. I cannot take that view. The Local Authority is a legal *persona* or person, and as actions such as this are almost certain to be laid against them and not against their officers or servants, I think it is clear that the phrase is intended to apply to them."

The pursuer appealed to the Sheriff (BERRY), who on 18th July 1902 issued this interlocutor:—"Having heard parties' procurators, adheres to the judgment appealed against."

Note.—"Having regard to the provisions of the Interpretation Act 1889, the pursuer does not now contend that under the word 'person' the Corporation of the Burgh of Hamilton is not included.

"The action falls within the rule of sec. 166 of the Public Health Act 1897 regarding the time within which certain actions must be brought. The ground on which the defenders are sued is not, as was argued, a defect in the furnishing of the hospital, but fault on the part of a servant in their employment engaged in the work of the institution.

"The action being of that character was not brought till after the statutory time had expired. The child met with the accident on 3rd April 1901, and was discharged from the hospital on 14th July. Even if we were to accept the latter date as that from which the period of two months had to be calculated, on the ground that the pursuer did not know what had happened till then, the action was too late, not having been brought till 4th February 1902."

The pursuer appealed, and argued—Section 166 of the Public Health Act 1897 did not apply. That section was intended to provide for a different class of Acts, viz., the irregularities of officers using the machinery of the Act irregularly—*Sutherland* v. *Magistrates of Aberdeen*, November 24, 1894, 22 R. 95, 32 S.L.R. 81; *Mitchell* v. *Magistrates of Aberdeen*, January 25, 1893, 20 R. 553, 30 S.L.R. 351. It did not cover the gross and culpable negligence of a domestic servant. A domestic servant was not an officer within the meaning of the section.

Argued for the defenders—Section 166 of the Public Health Act was applicable. It was extremely wide in its terms, and there was no reason to exclude the acts of a domestic servant from its range. If the servant was protected it was impossible to believe that the Board itself was not also protected.

The defenders also maintained alternatively that the action was barred by the Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61).

LORD PRESIDENT—This action is at the instance of Andrew Duncan, tutor and administrator-in-law for his pupil child John Duncan, and it is directed against the Magistrates and Town Council of Hamilton, "being the Local Authority thereof constituted and acting under the Public Health (Scotland) Acts," so that there is no dubiety as to the capacity or character in which the defenders are called. The cause of action is that a nurse in attendance at the Burgh Fever Hospital placed within reach of the pursuer's child a bottle containing nitric or other dangerous acid which the child seized and upset, the contents falling upon the child and inflicting serious injury upon him. The Sheriff-Substitute and the Sheriff have held, in concurring judgments, that the action is barred by the 166th section of the Public Health Act of 1897, by which it is, *inter alia*, provided that "every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen."

This action is founded on an allegation of neglect by a servant in attendance at

the Burgh Fever Hospital, and in the employment of the defenders. Now, the effect of section 166 is that the Local Authority shall not be responsible for the irregularity of their servants, and then follows the time limitation which I have read. Now, in that state of facts, it seems to me, agreeing with both the Sheriffs, that the statutory limitation very clearly applies, and we have a very definite *terminus a quo*, or point of time from which to count the two months.

On that short ground I am of opinion that the action is barred, and this being so, it is not necessary to consider the argument which was stated on the Act of 1893.

LORD M'LAREN—I think that it is perfectly clear that this is an action against a Local Authority. It is so stated in the instance of the petition, and the ground of action is based on that description of the defenders. It appears to me to be equally clear that the action is for a wrong done in the exercise of powers conferred upon a local authority by the provisions of the Public Health Act 1897. These two facts concurring appear to be the condition under which a party bringing an action against the Local Authority is bound to give notice within two months. The Act says—"Every action or prosecution against any person acting under the Act on account of any wrong done in, or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen." This seems to me to be just an amplification of the words in other Acts of Parliament with which we are familiar—"for any wrong done in the execution of the Act." It is evidently impossible to make a relevant case against the Local Authority except on the assumption that the neglect of the servant in leaving the acid beside the child was a wrong done in the execution of the Act of Parliament; for if not, it would become a wilful wrong committed by the servant outside the sphere of her employment. I am therefore of opinion that the two months' limitation of the Act of 1897 applies to this case. That being so, it is unnecessary to consider the Act of 1893, because in Scotland it is only applicable where there is no other statutory limitation of the right of action.

LORD KINNEAR—It appears to me that this action is founded upon the alleged negligence of the Local Authority in the performance of a statutory duty laid upon them by the Public Health Act 1897. The duty they undertook to perform was to take charge of a child suffering from an infectious disease, whose removal they had ordered to the fever hospital, and the negligence with which they are charged consisted in the carelessness of a housemaid, for whom they are responsible, and who had left a bottle of nitric acid within reach of the child. If that is not an action for negligence in the performance of a statutory duty, I am unable to find any other ground of action in the case. I think, therefore, that the limitation in the Act of 1897 applies. If that limitation does not apply, the Act of 1893 would probably be available to the defenders, but it is unnecessary to consider that question, because your Lordships hold, and I concur in that opinion, that the Act of 1897 does apply.

LORD ADAM was absent.

The Court refused the appeal, affirmed the interlocutor appealed against, and of new dismissed the action, and decerned.

Counsel for the Pursuer and Appellant—J. R. Christie. Agent—Archibald R. Steedman, Solicitor.

Counsel for the Defenders and Respondents—Cullen. Agents—Carmichael & Miller, W.S.

Tuesday, December 2.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

STROYAN *v.* M'WHIRTER.

Expenses—Copying—Type-writing.

Observations on the use of type-writing for copying purposes.

When the pursuer's taxed account of expenses in this case came before the Court in the Single Bills their Lordships' attention was drawn to a note to the Auditor's docquet in the following terms:—*Note.*—"In this case a very large amount is charged for copies. This would have been very much less if the copies had been type-written. Without referring to all the copies the Auditor finds that by type-writing the copies of the precognitions and correspondence there would have been a saving of £34, 8s. 6d. It seems unreasonable that such an unnecessary expense should be allowed, but there being no rule against it the Auditor has not felt himself entitled to deal with the matter."

The expenses were taxed at the sum of £459, 8s. 2d. No objections had been lodged to the Auditor's report.

The table of fees in the Supreme Courts of Scotland as regulated by Act of Sederunt, 15th July 1876, provides as follows:—"3. Copying papers per sheet—(1) If in English 1s. 6d. . . . Where more than three copies of papers are necessary the same shall be printed, and if not printed the charges for three copies only shall be allowed by the Auditor."

Counsel for the pursuer argued that as no objection had been taken to the report the question was now closed, but that even if the question had still been open no objection could have been taken, for only two written copies were charged for, and that was allowed (Act of Sederunt, 15th July 1876). An agent was not bound to use a new and, possibly for him, inconvenient