September 8, 1902, approved of the intention intimated to it by the petitioners to make an application to the Court for their discharge and to have the expenses of the application paid out of the remaining funds of the estate in their hands.

The petition further stated, *inter alia*, as follows—"No trustee has been appointed in room and place of the said deceased John Elder. The Bankruptcy (Scotland) Act 1856 contains no provisions as to the mode in which the representatives of a trustee dying undischarged after a final division of the sequestrated estates, or otherwise, shall apply for discharge of the intromissions of the deceased trustee; and the said statute contains no provision authorising either the Lord Ordinary or the Sheriff to grant such discharge or warrant for delivery of the deceased's bond of caution to his representatives. The petitioners are thus under the necessity of making the present application to your Lordships."

The Court having remitted to the Accountant of Court to report on the intromissions of John Elder as trustee in the sequestration, the Accountant, after stating that the accounts showed an unapplied balance of £24, 1s. 8d., which fell to be consigned, stated as follows—"The Accountant is aware of only two applications to your Lordships under similar circumstances (*Brown's Trustees*, 1864, 3 Macph. 56; *MacEwan's Trustees*, 1872, 9 S.L.R. 568). The procedure is expensive, and might entail considerable hardship on the deceased trustee's representatives where the estate was entirely exhausted or where the usual cost of discharge (£5, 5s.) had only been retained. For the last twenty years a more liberal interpretation of section 152 of the Bankruptcy (Scotland) Act 1856 has prevailed, and in numerous cases before the Lord Ordinary and in the Sheriff Court the trustees' representatives have been allowed to take the proceedings directed by that section to be taken by the trustee, and have called meetings and got their discharge in ordinary form. This was pointed out to the petitioners, but though they went the length of calling and holding the final meeting of creditors they have thought it necessary to present the present petition. The Accountant would humbly suggest to your Lordships that on consignation of the unapplied balance of funds the petitioners may be exonered and discharged and the bond of caution directed to be delivered up, and that the expenses of this application may be authorised to be paid out of the funds of the estate, but that only to the extent of £5, 5s., the amount required for a discharge in ordinary form."

Argued for the petitioners—Section 152 of the Bankruptcy Act contained no provisions authorising the Lord Ordinary on the bills or the Sheriff to grant discharge of the intromissions of a trustee dying during the dependence of the sequestration. In any view the cases of *Brown's Trustees*, November 17, 1864, 3 Macph. 56, and *M'Ewan's Trustees*, June 28, 1872, 9 S.L.R. 568, showed that the procedure by petition to the Inner House was competent, and the procedure being competent full expenses should be allowed out of the estate.

The Court granted the prayer of the petition, but in respect that the petitioners in presenting this petition, instead of following the usual practice of proceeding under section 152 of the Bankruptcy Act 1856, had adopted an unnecessarily expensive procedure, authorised the expenses of the application to be paid out of the funds of the estate only to the extent of £5, 5s.

The Court pronounced this interlocutor:—

"Approve of said report, and on consignation by the petitioners of the unapplied balance of funds exoner and discharge them as the trustees and representatives of the deceased John Elder, S.S.C., and all others his heirs and representatives whomsoever, of the whole intromissions and management as trustee mentioned in the petition: Grant warrant to and authorise the Sheriff-Clerk of the county of Edinburgh, or other custodier of the deceased's bond of caution, to deliver up the same to the petitioners as trustees and representatives foresaid, and decern: Find the petitioners entitled to expenses, modifying the amount thereof to £5, 5s., and ordain the same to be paid out of the funds belonging to the sequestrated estate."

Counsel for the Petitioners—R. D. Melville. Agents—Elder & Aikman, W.S.

Thursday, February 5.

FIRST DIVISION.

CULLEN *v.* MAGISTRATES OF EDINBURGH.

Process—Jury Trial—Fee Fund Dues not Paid by Pursuer—Dismissal of Action—Act of Sederunt 16th Feb. 1841, *sec.* 46.

A pursuer in a jury trial did not pay the fee fund dues so as to enable a jury to be summoned for the day appointed for the trial of the cause. The defenders presented a note craving absolvitor, but in sending the note to the pursuer's agent the agent of the defenders gave notice that they were to move that the action be dismissed. The Court *dismissed* the action with expenses.

John Cullen, shoemaker, 34 Potterow, Edinburgh, brought an action of damages against the Lord Provost, Magistrates, and Council of the City of Edinburgh for alleged injury caused to him owing to a piece of fireclay chimney-can having fallen upon him from property alleged by the pursuer to belong to the defenders.

On July 1st 1902 the Lord Ordinary (PEARSON) approved of an issue for the trial of the cause.

On December 3rd 1902 the agent for the pursuer gave notice of trial for the Christmas sittings.

On January 21st 1903 an interlocutor was pronounced by the First Division appointing the trial of the cause to take place before the Lord President and a jury on Monday, February 9th 1903.

On January 30th 1903 the pursuer or his agent should have paid to the Clerk of Court for transmission to the Sheriff-Clerk of the Lothians the fee fund dues for summoning a jury for the day appointed for the trial of the cause.

The dues were not paid, and it was impossible for the trial of the cause to take place on the date fixed as no jury had been or could then be summoned for the date fixed for the trial.

The defenders in these circumstances presented a note in which they craved the Court "to discharge the diet fixed for the jury trial on 9th February 1903, and in respect of the pursuer's failure to take the necessary steps to have the cause tried on that day to assoilzie the defenders from the conclusions of the summons, and to find them entitled to expenses," &c.

In the letter by the agent of the defenders forwarding a copy of the note to the pursuer and also to his agent, the defenders gave notice that they were to move for the dismissal of the action.

Two notices of the date of trial were sent by the officials of the Court to the pursuer.

No appearance was made for the pursuer.

Argued for the defenders — The case came under the Act of Sederunt 16th February 1841, section 46, and was in the same position as a case which was abandoned by the party, or in which the party did not proceed to trial within twelve months after the issue was allowed. Accordingly the defenders were entitled to absolvitor.

The Court dismissed the action with expenses.

Counsel for the Defenders—F. T. Cooper. Agent—Thomas Hunter, W.S.

Thursday, February 5.

FIRST DIVISION.

SMART & SON *v.* MAGISTRATES OF PARTICK.

Burgh — Statutory Bye-Law — Validity — Ultra Vires—Private Court or Common Area — Back Yard — Bleaching Green — Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *secs.* 316 *B* (8); 322; *Sched. IV., Rule.* 17.

A bye-law of the burgh of Partick, under the powers conferred by secs. 316 B (8) and 322 of the Burgh Police (Scotland) Act 1892, and in pursuance of Rule 17 of Schedule IV. appended to that Act, and confirmed and published as provided in the Act, enacts—"Every owner of a private court, common passage, or common area (other than bleaching-greens) shall, on receiving notice from the sanitary inspectors, pave or cause to be paved such private court, common passage, or common area (other than bleaching-greens) with natural or artificial stone, or such other material as the commissioners shall require." . . .

Held (1) that the bye-law was valid and within the statutory powers conferred by the provisions of the Burgh Police (Scotland) Act 1892, relative to which it was passed; (2) that a plot of ground behind a tenement, covered with engine ashes, used by the occupants of the tenement for drying clothes, but on which no grass was or could be grown, and accessible to the dwelling-houses of the tenement by a back entrance, was a court or area within the meaning of the bye-law; and (3) that the plot of ground in question did not come within the exception of "bleaching-greens."

A. Wilson Smart & Son, C.A., 64 Bath Street, Glasgow, presented a note of appeal under section 339 of the Burgh Police Act 1892 praying the Court to quash certain proceedings by the Commissioners of Police of the Burgh of Partick, and James Reid, sanitary inspector to the Commissioners.

The appeal set forth that the appellants factored a four-storey tenement of dwelling-houses situated at No. 1 Wood Street, Partick, and that they had been served with a notice, dated December 10, 1902, by the respondent James Reid, sanitary inspector, ordaining them "in terms of the Burgh Police (Scotland) Act 1892, and of Rule (17) of Schedule IV. appended thereto, and of the bye-law for the paving of private courts, common passages, and common areas (other than bleaching-greens) made and enacted by the Town Council of the Burgh of Partick on 12th March 1900, under the powers conferred by the said Act, particularly section 316 B (8) thereof and said Rule, and which bye-law was confirmed by the Local Government Board on 20th November 1900, and by the Secretary for Scotland on 28th November 1900, to pave or cause to be paved the private court or common area behind or attached to No. 1 Wood Street, in the burgh of Partick, with asphalt to the extent shown on a plan or sketch annexed, and to provide the said private court or common area with proper and sufficient means for taking off the surface water within the period of one month from and after the date of the notice."

The bye-law referred to in this notice is quoted in the rubric.

The appellants maintained that the bye-law was *ultra vires*, and further stated as follows:—"The plot of ground referred to in said notice is situated behind the said tenement, and is provided by the appellants' principals for the use of their tenants as a bleaching or drying-green, and it is