what had been done, or who saw that an investigation was being made into the books and accounts of the pursuer, might be disposed to draw unfavourable inferences as to the reason for such an investigation, and they might even leap to the conclusion that no such investigation would have been made if the pursuer had been faithfully discharging his duties. Such an inference, however, would have been entirely unwarranted, and is not one for which the defender can be made responsible. Similar inferences might have been drawn if the pursuer had been summarily dismissed from the mere fact of his dismissal, but if the dismissal was itself within the defender's rights no responsibility would attach to him for the conjectures by which outsiders might seek to explain the circumstances. The only legitimate inference from any of the actings which I have detailed was that the defender, as the pursuer's master, desired to investigate his accounts, and pending the investigation wished to ensure that all the documents which were necessary for the purpose should remain undisturbed. In all that was done I can find nothing which is reasonably capable of a defamatory meaning, any more than I can spell an accusation against the pursuer out of the defender's letter desiring him to give possession of the estate papers to Mr Dalziel. I shall accordingly sustain the defender's first plea-in-law and assoilzie him from the conclusions of the action.

"I would only add, in justice to the pursuer, that the result of the investigation appears to have been entirely satisfactory, and that no allegation against his probity is made by the defender on record."

The pursuer reclaimed, and argued—There might be slander by actions alone, and here, whether the exact issue proposed were allowed or not, an issue should be allowed as to whether by the actings averred a charge of dishonesty and untrustworthiness had been made. [LORD PRESIDENT—Do you say the actings were illegal?] Perhaps taken one by one the acts were legal, but taken together they were not. The acts, however, must be regarded as a whole and not considered in isolation—*Monson* v. *Tussauds Limited*, [1894] 1 Q.B. 671, Lord Collins at p. 678, Lopes, L.J., at p. 692. It could be shown that everyone present understood that a charge of dishonesty was being made, and that was the proper test of whether the actings complained of were libellous—Lord Halsbury at p. 686 of *Monson* (*cit. sup.*).

The Court did not call upon counsel for the defender.

LORD PRESIDENT—In this case the matter has been admirably put by the Lord Ordinary, and I have really nothing to add to what his Lordship has said. I think there may be an actionable wrong of the nature of slander by actions alone; but the question must always be whether the innuendo sought to be put upon such actings can in truth reasonably be drawn from them. In this case I think it cannot. I am appalled at the length to which the opposite doctrine would lead. If a person is not to be entitled to investigate his agent's accounts without thereby charging him with dishonesty I think that all protection of confidential relations would be at an end.

The actings here seem to me, if I must say so, perfectly reasonable and without harshness; and on legal grounds I have not the least doubt that they will not bear the innuendo sought to be put upon them by the pursuer.

LORD KINNEAR and LORD GUTHRIE concurred.

LORD M'LAREN and LORD PEARSON were sitting in the Extra Division.

The Court adhered.

Counsel for the Pursuer (Reclaimer)—Morison, K.C. — Sandeman. Agents — Thomas White & Park, W.S.

Counsel for the Defender (Respondent)—Murray, K.C.—Hon. Wm. Watson. Agents —Tods, Murray, & Jamieson, W.S.

Wednesday, June 2.

SECOND DIVISION.

[Sheriff Court at Dunoon.

SCOTT *v.* BURGH OF DUNOON.

Police—Public Health—Burgh—Drainage—Sewers—Formation—"Reasonable Notice in Writing" to Owner of Private Ground —"Report of Surveyor"—Proof that Proceedings were Regularly carried through —Onus—Public Health (Scotland) Act 1867 (30 *and* 31 *Vict. cap.* 101), *sec.* 73—*Burgh Police (Scotland) Act* 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 215.

The Public Health (Scotland) Act 1867, sec. 73, enacts—"The local authority shall have power to construct within their district . . . such sewers as they may think necessary for keeping their district properly cleansed and drained, and may carry such sewers . . . after reasonable notice in writing (if upon the report of surveyor it should appear to be necessary), into, through, or under any lands whatsoever. . . ."

In 1875 a sewer for the purpose of the drainage of a portion of their district was carried through private ground by the then local authority of a burgh.

In 1908 a singular successor in possession of this private ground brought an action against the burgh authority to interdict the use of the sewer. There was no evidence that any "notice in writing" had been given to the owner in 1875, but it was proved that he knew of the work being done, raised no objection to it, took a great interest in it, and that the drain from his own house was carried into it. In 1875 the local authority had no burgh surveyor, but for the drainage scheme, of which the

sewer in question formed a part, a firm of engineers was employed, and the work was carried out under their supervision.

Held that the *onus* lay on the pursuer of proving that the proceedings in 1875 had not been carried in accordance with the statute, and that he had failed to prove his case.

Held further (*per* the Lord Justice-Clerk) that the "notice," and (*per* Lord Low) that both the "notice" and the "report of surveyor" were for the protection of the owner of the private property affected and could consequently be dispensed with by him, and (*per* Lord Ardwall) that "when a new proprietor finds in his property a public sewer forming part of the existing sewage scheme of a burgh . . . he must start with the presumption . . . to the effect either that originally it was laid there by the local authority after all proper formalities had been complied with in terms of the Public Health Act, or otherwise that the former proprietor and the town had agreed to its being laid there."

Opinion (*per* the Lord Justice-Clerk) that section 215 of the Burgh Police (Scotland) Act 1892, which vests all sewers and drains within a burgh in the commissioners, would have been a complete answer to the pursuer had he succeeded in proving informalities.

The Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), section 73 is quoted *supra in rubric.*

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 215, enacts—"All sewers and drains within the burgh, whether existing at the time when this Act comes into force or made at any time thereafter (except private branch drains, drains made and used for the purpose of draining, preserving, or improving land, and sewers made under any local or private Act of Parliament) shall vest in and belong to and be entirely under the management and control of the commissioners."

On 5th May 1908 J. G. Campbell Scott, physician, Burnbank, Auchamore Road, Dunoon, brought in the Sheriff Court there an action against the Provost, Magistrates, and Councillors of the Burgh of Dunoon. In it his claim was—"For declarator that the pursuer's said property known as Burnbank, Auchamore Road, Dunoon, in the burgh of Dunoon and county of Argyll, is free of any servitude, wayleave, or right of passage for a common sewer or drain running through said property or any part thereof: For interdict against the defenders using any drain or sewer passing through the pursuer's said property as a public drain or sewer under the pretence of such servitude or otherwise."

The pursuer pleaded—"(1) The defenders have not, either by virtue of any written title or by virtue of the necessary prescriptive possession, or by statute, any valid right to the servitude or wayleave claimed by them, and the pursuer is therefore entitled to declarator as craved. (2) In respect that the defenders, on the pretext of an alleged title or right of servitude, or statutory right, which has no valid existence, are using the said pipe running through the pursuer's said lands as a public sewer, and that they have refused to discontinue said use, the pursuer is entitled to interdict as craved."

The defenders pleaded—"(2) The defenders' predecessors having laid the sewer in question through the grounds of the pursuer in virtue of the powers conferred upon them by section 73 of the Public Health (Scotland) Act 1867, the declarator and interdict craved should not be granted. (3) The sewer in question being now vested in the defenders in virtue of the Burgh Police (Scotland) Act 1892, and the Town Councils (Scotland) Act 1900, the action should be dismissed, with expenses."

After various procedure, including a proof, the Sheriff-Substitute (SCOTT MONCRIEFF PENNEY) on 6th November 1908 granted the declarator and interdict, and upon 30th December 1908 the Sheriff (M'CLURE) on appeal adhered.

It appeared from the proof that the pursuer had purchased his property on 22nd May 1907 from the trustees of the late James Bruce, and had shortly thereafter, the titles not disclosing the fact, discovered that a 9-inch sewer, used for carrying the drainage of several houses and forming an integral part of the drainage system of the burgh, ran through his ground. He called upon the defenders to desist from using the sewer in question, and they refused. The sewer had been constructed in 1875. At that time the Commissioners of Police of the burgh of Dunoon were carrying out a scheme of drainage. They employed as engineers Messrs Storrie & Smith, C.E., Glasgow. There was no burgh surveyor appointed till May 1875, and the scheme of drainage was prepared and carried out by the engineers, the burgh surveyor after appointment merely inspecting. There was no evidence that any notice in writing had been given to Mr James Bruce, the proprietor of the ground in 1875, before the sewer was begun to be constructed. He, however, knew about it and took a great interest in its construction, and had never taken any objection. The drain from his own house ran into this sewer. The evidence as to whether any report by a surveyor had been submitted before this sewer was constructed was meagre. The minutes did not disclose any, there was no burgh surveyor to make one, and what report exactly the engineers had submitted was doubtful, but one witness stated that they had submitted a report. There was evidence that as matter of fact this sewer was the only way to take the drainage so as to avoid heavy cutting.

The defenders appealed, and argued—The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 215, was conclusive of the matter. Even if up to the date of that statute coming into force the sewer in question had not belonged to the burgh, that statute gave it to the burgh. Further, persons who have seen their rights invaded

and money expended are not entitled to come forward after the operations are completed and say that some formality has not been complied with—*Montgomerie & Company, Limited* v. *Haddington Corporation*, 1908 S.C., 127 (*per* Lord Justice-Clerk, at 150), 45 S.L.R. 73, *affd.*, 1908 S.C. (H.L.) 6, 45 S.L.R. 337. The fact that the requisite consent was not obtained for making a sewer did not prevent it from being a sewer when made—*Queen* v. *Vestry of St Matthew, Bethnal Green*, [1896] 2 Q.B. 95 (*per* Lord Russell of Killowen, C.J., at 96), *affd.* [1896] 2 Q.B. 319, and [1898] A.C. 190. The *onus* lay on the pursuer to show that written notice had not been given to Mr Bruce thirty-three years ago, or that no report had been made by a surveyor that the sewer was necessary. He had not discharged that *onus*. Moreover, it was not of the least importance at the present day whether notice had been sent to Mr Bruce, for he had taken an active part in seeing that the work was carried out to his own satisfaction. The provisions of the 73rd section of the Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), were for the protection of owners of property at the time the scheme was being carried through. The pursuer did not aver that it did not "appear to be necessary" that the drainage scheme should be carried out, and that if Mr Bruce had objected thereto he would have been successful in his objection.

Argued for pursuer—The evidence showed that the Police Commissioners in constructing the sewer in question were not acting under the Public Health (Scotland) Act 1867 at all. As the burgh had at that time no surveyor who could make a report, no report could have been made by the surveyor—*Lewis* v. *Weston-Super-Mare Local Board*, 40 Ch.D. 55. It was necessary to show that the pursuer's author accepted these drains as public sewers. Further, personal bar could not be pleaded against a singular successor; acquiescence of a predecessor would not bind him unless he had knowledge—*M'Gregor* v. *Balfour*, December 23, 1899, 2 F. 345, 37 S.L.R. 245. Acquiescence was not proved here. The pursuer's disposition gave him right to everything—*a cœlo usque ad centrum*. The *onus* therefore lay on the defenders, who maintained that his right was thus limited. Moreover, the defenders must prove that they complied with the statute under which they claimed their right. Certain procedure—the giving of a written notice and a report by a surveyor—must be followed in order to give local authorities a title to the land against everyone—*Brown* v. *Magistrates of Kirkcudbright*, November 17, 1905, 8 F. 77, 43 S.L.R. 81. The burgh would have had statutory right if they had adopted the procedure prescribed by section 73 of the Public Health Act. This they had not done. Failing that, they must have a written grant, which they had not got.

LORD JUSTICE-CLERK—In this case I have no hesitation in holding that the Sheriff is wrong. The history of the case is that in 1875 it "appeared to be necessary" (to use the language of section 73 of the Act of 1867) to construct certain drains in this burgh, and the drain in question was made with the consent and approbation of the proprietor in whose land it was laid, and for thirty years he took the benefit of it by having his branch drain led into it. The property has now been sold to someone else, and the new proprietor comes forward in the character of a singular successor and says—"I can find no trace in my titles of any grant of this sewer having been made by my predecessor, and therefore I claim that it must be taken away." I do not say that he is unreasonable enough to demand its actual removal, but he, at any rate, maintains his right to make such a demand. Is he entitled to make it? I am clearly of opinion that he is not. He, in the first place, founds upon this, that at the present date, thirty years after the drain was laid, the burgh cannot produce evidence that a certain statutory notice was duly given, maintaining that it lies on the burgh to adduce positive evidence that the notice was given. I am clearly of opinion that they are not called upon to prove anything of the kind. He also says that there was no report by a surveyor reporting that the drain was necessary, as required by section 73 of the Act of 1867. That, on any view, would have to be proved by the party who objected, and in the present case no such proof has been adduced, but the contrary; because undoubtedly the sewer was made under and with the advice of a surveyor, who although called an engineer was really a surveyor, an engineer and a surveyor in a matter of this kind being practically the same. Having then the advice of a surveyor, they resolved to carry out the work, and the proprietor himself took an active part in seeing it done to his satisfaction, and it is accordingly quite out of the question for the present proprietor to come forward at this time of day and say that the burgh must prove details about notice and so on. I go further, and say that I do not think that even if no notice had been given that would necessarily settle the question in favour of the pursuer. I think the provision as to notice is solely in the interest of the proprietor, and if he chooses to waive and dispense with it he can do so; and no better proof of waiver can be found than the fact that he himself promotes and assists in carrying out the operations to his own satisfaction, and makes use of the works without objection after they are completed. Even, however, if the pursuer were so far right in his contentions, I do not think it would avail him anything in view of section 215 of the Burgh Police (Scotland) Act 1892, which provides that all sewers and drains within the burgh, wherever situated (it does not matter whether under public streets or private property, if they are sewers carrying the sewage of the burgh), shall vest in and belong to the burgh, except in three instances. The three exceptions are—first,

private branch drains (just such a branch as this gentleman has into the drain he is complaining of); second, all drains which are made for the purpose of draining, preserving, or improving land; third, sewers made under any local or private Act of Parliament. Of these three exceptions not one applies to this case, and therefore in 1892 this sewer, which was undoubtedly a sewer in the burgh, vested in and became the property of the burgh. I am accordingly of opinion that the defenders ought to be assoilzied.

Lord Low—I am of the same opinion. It was suggested that it was not clear whether the Commissioners of Police of the Burgh of Dunoon in 1875, in constructing the sewer in question, were acting under the Public Health Act of 1867 at all. Now it seems to me that it is clear that they were acting under that statute, because in Dunoon the Commissioners of Police were the Local Authority under the Public Health Act. By the 71st section of that Act all sewers existing within the district are vested in the local authority, and by section 73 the local authority are empowered to construct within their district, and also, when necessary for the purpose of outfall, without their district, such sewers as they may think necessary, and they may carry such sewers through, across, or under any turnpike or other road or street, and also through or under any land whatsoever; but if they carry their sewers through lands which are not roads or streets, it must be after reasonable notice in writing, and if, upon the report of a surveyor, it should appear to be necessary. Now it is proved that in 1875, when the sewer in question was laid, the Commissioners were in the course of carrying out a general system of drainage throughout the burgh as local authority under the Public Health Act, and when they came to construct the sewer in question through the private lands of Mr Bruce, they were exercising, or ostensibly exercising, the powers conferred upon them by the 73rd section. The sewer was laid in 1875, and no challenge of the Commissioners' right to lay it down was made until thirty-three years afterwards. Now, of course, when a challenge is delayed so long as that, the presumption is that all the requirements of the Act were fully carried out, and that everything was done rightly and in order. Plainly, the *onus* of proving the contrary lies upon the person alleging that the Act was not complied with. There are two respects in which it is said the Act was not complied with, namely, that there was no written notice to the owner of the lands, and that there was no report of a surveyor that the sewer was necessary. I am of opinion that the pursuer has failed to prove his case. In the first place, it is quite certain that the owner of the lands knew all about the proposal to take a sewer across them, and that he agreed to the proposal, and, in fact, took considerable interest in the work. So, whether written notice was in fact given to him at first or not is immaterial. Then as to a report being given by a surveyor, my reading of the evidence is that such a report was obtained at the time when the sewage scheme, of which the sewer in question was a part, was put in hand. There was no burgh surveyor at that time, but the Commissioners employed a Glasgow firm of engineers, viz., Messrs Storrie & Smith, to carry out the necessary sewage works, and Mr Murray, who was afterwards appointed burgh surveyor, and who had a good deal to do with superintending the work was asked—"Did you, as burgh surveyor, present a written report in terms of the Public Health Act 1867"? And his answer was—"Messrs Storrie & Smith did so." Even, however, if it had been proved that there was no surveyor's report, the result would not in my opinion have been thereby affected. The provisions in the 73rd section in regard to reasonable notice in writing, and the report of a surveyor, are for the protection of the owner of the lands through which the local authority propose to carry a sewer, and if that owner approves of the proposal, and authorises the local authority to construct the sewer in his lands, the necessity for written notice and a formal report does not arise. The owner having given permission, no one else has a right to object or to challenge the title of the local authority.

I therefore agree with your Lordship that the defenders are entitled to be assoilzied.

Lord Ardwall — I also agree. The sewer in dispute here was laid down as far back as 1875 as part of a general sewage scheme for a portion of the burgh of Dunoon. A Mr Bruce was then proprietor of Burnbank, and there is evidence that he himself was looking after the laying of the drain in question, showing the engineer where he wanted it to be laid in its passage through the grounds, and knowing all about it. He thereafter used it for his own sewage, and went on doing so till the time of his death, which I think was in 1906. Thereafter Burnbank was sold, and in 1907 Dr Scott, the purchaser, shortly after the purchase of the property, became aware of the existence of this sewer. Now I think when a new proprietor finds in his property a public sewer forming part of the existing sewage scheme of a burgh and complains of its existence there, he must start with a presumption against him to the effect either that originally it was laid there by the local authority after all proper formalities had been complied with in terms of the Public Health Act, or otherwise that the former proprietor and the town had agreed to its being laid there. Now, these being the presumptions, I think it lay upon Dr Scott, before he can have the sewer in question removed or its use by the defenders interdicted, to displace these presumptions by distinct evidence to the contrary. Well, has he done so? I think not. In the first place, as pointed out by Lord Low, I think the evidence indicates that there was a report got from the sur-

veyor showing that the laying of this drain was a necessary proceeding; and, in the second place, I think it seems that the statutory notice was given. At all events, this is clear, that Mr Bruce knew all about the laying of the drain; that is the state of the evidence. So far from the pursuer rebutting the presumption referred to, I think the proof tends all the other way, and it certainly goes to show that whatever formalities were carried out, or whether they were carried out or not, Mr Bruce agreed to this drain being laid where it now is. It is said, however, that that will not do, that though he may have waived those formalities and allowed the construction of this sewer, the burgh cannot found upon his waiver in a question with the pursuer. I cannot agree with that at all. I think the local authority laid this sewer there under statutory sanction, and that whether before they laid it down they went through all the formalities prescribed by the Act of Parliament, or whether they laid it down merely after agreement with and consent of the then proprietor, it must remain where it is as a drain or sewer constructed under statutory powers. The learned Sheriffs, I think, have through the whole proceedings taken the view that the *onus* of proof in this case lay upon the burgh. They seem to hold that if a public sewer is found on a private party's land he may remove it unless the town council or other authority to whom the sewer belongs can show a written title constituting a servitude, or can go back to the time the sewer was laid there and prove affirmatively that all the statutory formalities were gone through at the time when the sewer was constructed some thirty years ago. I need hardly point out that if that were the law burgh authorities might be disturbed every day by private persons insisting on removal of public drains or sewers unless evidence were procured as to what happened years and years before. I think accordingly that the view which the Sheriffs took to the effect that the *onus* of proof lay upon the defenders was entirely wrong. The law as to private servitudes of drainage or wayleave has in my opinion no application to public drains or sewers within burgh. I therefore agree with your Lordships that the defenders should be assoilzied.

The Court pronounced this interlocutor—

"Sustain the appeal and recal the interlocutor appealed against, as also all the interlocutors since 8th July 1908: Find in fact (1) that the defenders' predecessors duly laid the sewer in dispute through the grounds of the pursuer in virtue of the powers conferred upon them by section 73 of the Public Health Act 1867; (2) that the said sewer is now vested in the defenders in virtue of the Burgh Police Act 1892, and the Town Councils (Scotland) Act 1900: Find in law that the pursuers are not entitled to interfere in any way with said sewer, or to interdict the defenders from using said sewer as hitherto as a public drain or sewer: Therefore assoilzie the defenders from the conclusions of the actions, and decern."

Counsel for Pursuer (Respondent) — Cooper, K.C. — Lippe. Agent — James Purves, S.S.C.

Counsel for Defenders (Appellants) — Blackburn, K.C.—Spens. Agents—Alex. Campbell & Son, S.S.C.

Wednesday, June 2.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

BRYANT *v.* EDGAR.

Reparation—Slander—Relevancy—Charge of Unpunctuality, Lack of Interest, and Inattention Made by Master against Servant in Circular Letter Addressed to Other Servants—Innuendo.

E, a wholesale jeweller who had some fifty shops in different parts of the United Kingdom, dismissed B, the manager of one shop. He thereafter addressed to the managers of all his other shops, a circular letter in the following terms—"(Personally dictated by Mr E.), The Manager. Dear Sir—I recently visited Glasgow, and on inspecting one of my branch shops there I was disappointed to find that it had a very neglected appearance, and that business had consequently fallen off. On inquiry I ascertained that the manager, Mr B, in whom great confidence has been placed, and who has been well remunerated, had not been punctual in his attendance at the shop, and that instead of being there at 9 a.m. prompt, he had been in the habit of arriving at 11 a.m. I was greatly pained to find that a manager who had always been well treated was causing me loss by his inattention and lack of interest, and I was reluctantly compelled in the interests of my business to dismiss him. I am writing this as a warning to all my managers, so that when I visit their branches I may not have any cause to complain of want of punctuality or other inattention on their part, or any fault to find with the appearance of their shops and windows."

B brought an action of damages for slander making averments of malice.

Held (*rev.* Lord Salvesen, Ordinary) that in the special circumstances of the case B was entitled to an issue whether the circular falsely, calumniously, and maliciously represented that he had been guilty of such inattention and neglect of the defender's interests as manager of the defender's shop that the defender had been compelled to dismiss him.

Jesse Harold Bryant, 20 Cranworth Street, Glasgow, brought an action of damages