ported by principle but by the tenor of all the authorities. Indeed, I think no other conclusion is consistent with the decision in the case of *Lord Hopetoun* v. *Ramsay*, referred to in the discussion, as decided both in this Court and the House of Lords. The true ground of judgment in that case appears to me simply to be that there was an interlocutor pronounced by the Lord Ordinary on the matter of legal right of consent of the common agent. Though certain pleadings appear to have been given in on both sides, these were not considered by the Lord Ordinary, whose judgment is simply—"Of consent sustains the claim of *decimæ inclusæ* in regard to the lands of Hallyards."

Allusion is made in the opinions of the judges to an alteration created by the Judicature Act, inasmuch as now a locality did not require to be reported to the Inner-House in order to become final, but became so simply by the Lord Ordinary's interlocutor approving of the locality not being reclaimed against. But this alteration was of no moment as affecting the intrinsic character of the judgment pleaded as *res judicata*, on a consideration of which the opinion of the Court substantially rested. The observation was only of importance as meeting the objection that the locality was still a depending process, which, in the earlier practice would, anterior to their approval by the Inner-House, have kept the interlocutors of the Lord Ordinary open to alteration.

I consider the authority of this case unaffected by the decisions quoted to us, in which the plea of *res judicata* was repelled. In some cases, as in the *Marquis of Queensberry* v. *Wright*, the ground of judgment was, that the interlocutor on which this plea was rested had never been approved by the Court, and, according to the then existing practice, was still liable to rectification. In the case of *Lord Blantyre* v. *Lord Wemyss*, the House of Lords altered the judgment of this Court sustaining the plea, on the ground that the interlocutor held to constitute *res judicata* had become of no moment in the ultimate adjustment of the locality, and could not therefore be held embodied in the final judgment in the cause. The present case must, I think, be ruled by the judgment in that of *Hopetoun* v. *Ramsay*.

Agents for Buccleuch—J. & H. G. Gibson, W.S.
Common Agent—J. Stormonth Darling, W.S.

Friday, November 6.

SECOND DIVISION.

ANDERSON AND OTHERS *v.* WIDNELL AND OTHERS (LASSWADE POLICE COMMISSIONERS).

General Police and Improvement (Scotland) Act 1862, *sec.* 36—*Nomination of Commissioners.* Proceedings under the General Police and Improvement Act 1862 set aside in respect of nonconformity with essential provisions of the Statute.

This was an action of reduction of declarator brought by certain inhabitants of Lasswade for the purpose of setting aside the proceedings by which the "General Police and Improvement (Scotland) Act" was adopted in that place, and commissioners elected, and an assessment of 6d. per pound imposed upon the inhabitants. The defenders called were six individuals who claimed to have been elected as commissioners, and by whose authority the assessment was imposed; and the grounds of reduction were (1) certain alleged irregularities in the outset of the statutory procedure; and (2) the omission of the householders at the meeting where the Act was adopted to fix, in terms of the Statute, the number of the commissioners to be elected. It was said that, in respect of the said irregularities, and of the omission so made at the said meeting, the whole procedure was rendered null and void, and must be begun again *ab ovo.*

The Lord Ordinary (KINLOCH) repelled the first, but sustained the second of the above grounds of reduction; and, in respect thereof, he reduced the whole procedure.

The following is the interlocutor of the Lord Ordinary:—"*Edinburgh, 10th June* 1868.—The Lord Ordinary, having heard parties' procurators, and made avizandum, and considered the proceedings—Finds that the meeting of householders held on 29th May 1866 ought, in terms of the Statute 25 and 26 Vict., cap. 101, to have fixed and determined by a majority of votes, and set forth in their minutes, the number of commissioners to be elected by the householders to carry the Act into operation; and that, in consequence of their failure so to do, the alleged resolution of the said meeting to adopt the said Act, and the interlocutor of the Sheriff, dated 30th May 1866, finding and declaring the powers and provisions of the said Act to apply to the burgh of Lasswade, were and are inoperative and void: Finds that, in respect of the failure to fix and determine at the said meeting the number of commissioners to carry the Act into operation, the meeting of householders held on 1st March 1867 had no power to elect commissioners, and the alleged election by the said meeting of the defenders, Henry Widnell senior, William Todd junior, Robert Blair, John Porteous, William Thomson, and John Macdonald, to be commissioners under the said Act, and the interlocutor of the Sheriff, dated 1st March 1867, finding and declaring the said defenders to have been duly elected commissioners aforesaid, were and are inoperative and void: Finds that the said defenders are not entitled to act as such commissioners, nor to make and levy any assessment for police or other purposes, nor to perform any other acts or duties competent to commissioners duly elected under said Act: To the foregoing extent and effect finds, declares, reduces and decerns, interdicts, prohibits and discharges, in terms of the conclusions of the summons; to any other extent or effect assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers entitled to expenses, allows an account thereof to be given in, and remits to the Auditor to tax the same, and to report.

"*Note.*—The Lord Ordinary is not prepared to sustain any of the objections to the proceedings anterior in date to the meeting of 29th May 1866. He considers all the things objected to as, at worst, those trivial irregularities which cannot be held to overcome the statutory finality of the proceedings.

"But he thinks a fatal blunder was committed at the meeting of 29th May 1866, and such as altogether threw the proceedings out of the statutory course, and so admits judicial interposition. After providing for a meeting of householders to decide whether the Act should be adopted in whole or in part, and also for the adjournment of the meeting when a poll should be demanded, the Statute enacts in section 36—'Where this Act shall be adopted in any burgh in whole or in part, the resolution to

adopt it shall not be subject to any further question; and the householders thereof present at the meeting adopting the Act, or at some adjourned meeting as aforesaid, shall then and there proceed to determine, by a majority of votes, and shall set forth in their minutes, the number of commissioners to be elected by the householders to carry the Act into operation; and also whether such burgh shall be divided into wards for the purposes of this Act, and if so, the bounds and limits of such wards.'

"It appears to the Lord Ordinary that this declaration of the number of commissioners who are to act in that particular locality is an essential part of the proceedings at this meeting. It is thus that in some sense the constitution of the police province is settled. Without such a declaration, the charter of the constitution exhibits a fundamental defect. The Statute, in the most express terms, requires such a declaration to be made. It must be made at this particular meeting and no other; and so the Sheriff very rightly refused to call another meeting for the purpose. The meeting is required also to determine 'whether such burgh shall be divided into wards for the purposes of this Act, and if so, the bounds and limits of such wards.' If the meeting is silent on this point, it may be not unreasonably inferred that no division is contemplated. It may not be necessary to declare expressly that *no* division shall take place. The locality will remain undivided if no division is declared. But it is very different as to the determination which the Statute requires in regard to 'the number of commissioners to be elected by the householders to carry the Act into operation.' Mere silence will never fix a number. This requires a positive expression. Silence on the part of the meeting simply amounts to the meeting not doing at all what the Statute requires to be done.

"In the present case the meeting altogether omitted to determine the number of commissioners to carry the Act into operation. The result, as the Lord Ordinary thinks, was simply to render inoperative their adoption of the Act, because they failed to set up the machinery essential to working the statute. They could not work the Act without commissioners. They could not have commissioners, because they failed at the only competent time to determine how many commissioners they should have.

"The householders, notwithstanding, having been unsuccessful in prevailing on the Sheriff to convene another meeting to supply the statutory defect, held a meeting on 1st March 1867, at which they elected six commissioners, the present defenders. They now defend this election on the ground that it is provided by the 44th section of the Statute that 'in burghs where commissioners shall be elected as herein provided for the purposes of executing this Act, they shall not exceed twelve in number, but the number may be less than twelve, and not less than six, as may be determined on in manner hereinbefore provided.' It is argued that by fair implication this must be held to sanction an election of the *minimum* number of six commissioners.

"The Lord Ordinary cannot adopt this view. He conceives that this subsequent meeting had no more right to elect six commissioners than they had to elect twelve, or any other number between the two extremes. Their right was to elect the number of commissioners fixed by the previous meeting neither more nor less. They had no power in themselves to fix the number. Yet this is what in reality they did. Their resolution was in substance double—*1st*, That the number of commissioners should be the *minimum* of six; and *2dly*, that the defenders should be these six. The first branch of the resolution was wholly beyond their powers. It did not belong to them, but to the householders at an entirely different meeting to fix the number. For anything that appears, the householders at this second meeting might not one of them have been present at the previous meeting; yet they took it upon them to do what none could do but those present at the previous meeting. The Statute, in that part of it which concerns the election of commissioners, expressly says—'In burghs where commissioners shall be elected as herein provided for the purposes of executing this Act, they shall not exceed twelve in number, but the number may be less than twelve, and not less than six, *as may be determined on in manner before provided.*' In referring to numbers, the Statute merely specifies the extremes. It does not in any case whatever fix the number to be elected. It does not say, what it might have said, that where no number is fixed the number shall be six. It merely specifies six and twelve as the extremes, between which the number shall be fixed. But what the number is to be is to be determined 'in manner hereinbefore provided,'—that is, by the meeting which adopts the Act, and by no other or after meeting.

"It is scarcely possible to deal with this case without remarking the extreme length of time which the proceedings for adoption of the Police Act occupied,—these having begun in December 1862 and not terminating till March 1867, more than four years afterwards. And with all this deliberateness of movement, they terminated, as the Lord Ordinary thinks, in abortiveness, from the non-observance, not of any obscure or ambiguous direction, but of a statutory provision as to what should be done at the meeting for the adoption of the Act, so plain and precise as to make it altogether inexcusable in the managers of the proceedings to have overlooked it. All this is something very different from what the Statute contemplated; and if nothing better than this is to come out of these popular *comitia* the benefit to be derived from them is at best somewhat questionable. The course of the proceedings in question may naturally suggest the question, whether this very pleasant rural locality is perfectly ripe for the enjoyment of the General Police Act, the sway of Police Commissioners, and a police assessmentof sixpence in the pound?"

The defenders reclaimed.

YOUNG, GIFFORD, and A. MONCRIEFF for them.

CLARK and ADAM for pursuers.

The Court *held* that the failure of the householders to act at their first meeting, in terms of the 36th section of the Statute as to the nomination of commissioners nullified all the *subsequent* procedure, including the election of the Commissioners, and the laying on of the assessment; but it was a different question whether the failure in question could operate *retro*, so as to vitiate the anterior procedure, including the resolution adopting the Act. According to the view taken by the Court, that procedure and that resolution were final, and must stand. How it could now be followed up was a matter for the parti s to consider. It might very well be that, on application made, the Court might, in the exercise of its *nobile officium*, authorise a meeting for the fixing of the number of commissioners, and setting the statutory machinery again in motion; but it was not necessary to desire that

at present. The result of this case must be to reduce the procedure subsequent to the adaptation of the Act, but to repel the reasons of the reduction *quoad ultra.* The pursuers should get expenses, but modified to one-half of the taxed amount.

The following is the opinion of the LORD JUSTICE-CLERK:—The pursuers, who are householders in Lasswade, bring under reduction in the present action a series of proceedings under the Police and Improvement Act of 1862, by which Lasswade was declared to be a populous place, a body of commissioners were appointed under the Police and Improvement Act 1862, and an assessment for the purposes of that Act imposed.

The reduction is directed against the whole proceedings, beginning with the petition to the Sheriff to have Lasswade declared a populous place and the Act adopted.

All that was done from the commencement of the proceedings to the end is sought to be set aside. The interlocutors calling the meeting and ascertaining boundaries, the minutes of the meeting of the inhabitants presided over by the Sheriff, the interlocutor declaring the Act to have been adopted, are called for, as well as the minutes of the meeting which elected commissioners and imposed the assessment. The whole are sought to be reduced. A declaratory conclusion follows, the substance of which is that it should be found that the boundaries of Lasswade, as a populous place, have not been marked out; that the village has not been legally declared as a populous place; and that the defenders have none of the rights which commissioners under the Act can competently exercise.

The record is framed with a view to a challenge of the whole proceedings. Alleged deviations from the prescribed rules of the Act as to the preliminary stages of the proof are stated, and alleged defects in intimations of the various steps of the procedure are set out. It is unnecessary to enter into a detailed examination of these statements. The Lord Ordinary has proceeded on the footing that there was no departure from the Statute up to the 29th May, the day on which the householders passed resolutions adopting the Act, and we have heard nothing directed against that view.

I am, with the Lord Ordinary, of opinion that in so far as relates to the objections stated to the proceedings under the application up to the time when the inhabitants declared their resolution to adopt the Act, the objections to the regularity of the proceedings have failed. The first valid objection to the proceedings arises in a failure of the meeting of the 29th May, at which the resolution to adopt the Act was come to. The 36th section of the Act provides that at the meeting at which the resolution to adopt is passed, or some adjourned meeting as aforesaid, whatever that may mean, the householders present at the meeting shall fix and record the number of commissioners, as also whether the burgh should be divided into wards. The meeting, resolving to adopt the Act, separated without fixing the number or dividing the burgh. There was no adjourned meeting. In doing so without fixing the number of commissioners they certainly failed to obtemper a very direct and explicit provision of the Act.

The result assuredly was to leave a very necessary matter, and one vital to the working of the Act, unfixed. Without ascertaining the number of the administrators no administrative body could well be formed. When the defect became palpable an application was presented to the Sheriff to call a meeting. The Sheriff refused to call a special meeting to fix the number, holding that he had no statutory power to do so; but he thereafter, in obedience to a requisition, called a meeting for the election of commissioners, at which six commissioners were appointed, and these commissioners proceeded to carry out the Act.

The Lord Ordinary has held that the nomination of commissioners has failed, and that the assessment has been unduly imposed, and I agree in that view. The meeting at which the householders should have fixed the number passed, and no number having been fixed, the election of six commissioners was bad. It was argued that, as six is the number of commissioners, as fixed by the 44th section, the failure imparted a fixing of the minimum. I agree with the Lord Ordinary in thinking that an actual fixing on a number is indispensable. Taken together, the two sections do not imply under any circumstances the adoption of one or other number, except by direct option expressed.

I am quite prepared, therefore, to agree so far with the Lord Ordinary as to reducing in the proceedings of meetings for electing commissioners, the nomination of commissioners, and the act of assessing. I am unable to concur with his finding that the preliminary proceedings should be found to be inoperative and void, or to reduce any of the proceedings before the act of nomination of commissioners.

The 36th section assumes an adoption of the Act as the necessary condition precedent of the further and separate step of fixing the number of commissioners. It is only after the Act shall be adopted that the householders are directed to proceed to fix the number of commissioners. The Acts are not only separable but necessarily separate, for the one can only be done after the other has been accomplished. The language of the Statute is to the effect that the Police and Improvement Act shall have been adopted before the meeting proceeds to the destined act of fixing the number of commissioners, and, what is conclusive, the resolution to adopt is said not to be open to any further question. This is very much opposed to the validity of an objection going to the annulling of the Act, because something directed to follow has not been carried out. Further, there is a separate finality in the resolution to adopt the Act itself under the 29th clause, where, as here, the resolution was adopted without any show of opposition, and, consequently, without the demand for a poll.

The Sheriff here, in compliance with the 37th section, pronounced an interlocutor finding and declaring that the Act was adopted. The section provides that the Sheriff, on receipt of the documents, shall, within 48 hours, "pronounce a declaration thereon, finding and declaring, as the case may be, either that this Act has not been adopted, or that the powers and provisions thereof, in so far as the minutes show this to be the case, have been adopted." I see nothing here which the Sheriff did contrary to the Statute. The Act declares the separate resolution to adopt the Act final, and open to no question, and this resolution appeared on the minutes. I am therefore unable to perceive any good ground for reducing the resolution or the interlocutor declaring it. Nothing is required to be certified as to the compliance of the meeting with the direction to proceed to do something additional and different.

I am not moved by the view that all that has

been done may fail to be followed by any good or practical result. I am asked to reduce proceedings which have been regular so far as they went.

Nor am I clear that the acts done may not be to some effect useful or beneficial. It may be that there may be a power resident in the Court to direct that a meeting be called to remedy the error by fixing the number now. I see formidable objections to this course, but I see some plausible grounds on which such an exercise of our prætorian power might be vindicated. I think it a question on which different views might well be entertained, to be solved by discussion on such an application, in the event of such an application being made. It may be that the public Act may be so amended as to enable the course to be followed out; it may be that a private Act may be obtained proceeding upon the fact as ascertained by a judgment not reduced. It may be that in new proceedings before the Sheriff what has been already done may save a repetition of some, at all events, of the things well done under this application. It is enough for me to say that the Acts seem by the Statute separate and distinct, and that up to the failure to follow up what had been well done, we have nothing irregular or contrary to the Act. Whether the distinction prove in its results material or immaterial, I think we must deal with the case according to ordinary legal principles. The result of my view is, that the interlocutor should be substantially adhered to in so far as relates to proceedings subsequent to the 30th May 1866, but that the reductive and declaratory findings should be, as to the former proceedings, refused.

Agent for Pursuer—James Steuart, W.S.

Agents for Defenders—Millar, Allardice & Robson, W.S.

Tuesday, November 10.

COURT OF LORDS ORDINARY.

TAYLOR *v.* SHARP.

Sale—Inferior quality—Breach of contract—Consequential damage—Reparation. A seedsman *held* liable in damages for loss occasioned by his furnishing seed of an inferior quality and different from the kind agreed on betwixt him and the purchaser. Claim of consequential damage disallowed.

Sharp, farmer at Lindifferon, brought an action in the Sheriff-court of Fifeshire against William Taylor, seedsman, Cupar-Fife, for a sum of £157, being loss on a field of turnips by reason of the defender having wrongfully furnished a quantity of turnip seed of inferior quality, and different from the kind ordered and purchased by the pursuer. The account annexed to the summons included a sum of £40, as "loss sustained because of not having sound turnips to fatten" the pursuer's stock. After a proof, the Sheriff-substitute (TAYLOR) pronounced this interlocutor:—"Finds, in point of fact, that the defender, who is a dealer in seeds, on a verbal order by the pursuer for fifty pounds weight of Aberdeen green-top turnip seed, sold and delivered that quantity of turnip seed to the pursuer on the 29th May 1866, which seed so furnished the defender put into a bag with a ticket or label marked 'Aberdeen yellow selected stock, crop 1865,' and the defender also invoiced the same as 'Aberdeen yellow turnip,' the price being £1, 13s. 4d., which the pursuer paid on 18th June thereafter:—Finds that no express warranty of the quality of the said seed was asked or given, but that the defender at the time of the sale represented it to be 'pure seed' of Aberdeen yellow turnip, from selected bulbs of his own growing:' Finds that the pursuer, relying on said seed being pure Aberdeen yellow turnip seed as contracted for, sowed it in the course of a week or two thereafter in portions of his farms of Lindifferon and Fernie: Finds that these sowings produced a fair average crop of turnips in point of quantity:—Finds that 'Aberdeen yellow turnip' is a well known distinct kind of turnip, different from and more hardy and valuable than the hybrid varieties of turnip, and especially has the property of not being so readily injured by frost: Finds that on that account the bulk of pursuer's crop grown from the said seed sold by the defender as Aberdeen yellow turnip was intended by the pursuer for consumption on the ground by his stock in the spring, and was with that view accordingly left in the ground, with the exception of about three quarters of an acre at Fernie, and an acre and a quarter or so at Lindifferon, which had been drawn and carried away in December: Finds that in January 1867, after a severe frost, the pursuer seeing that the said turnips were much injured by the frost, began to suspect that the turnips so grown from the seed supplied by the defender as Aberdeen yellow were not of that description, but a different and softer kind, and he intimated so to the defender on 12th February, requesting him to go and inspect the crop; and he afterwards suggested a settlement of the matter by mutual valuation of the damage, which was not agreed to: Finds it proved that the turnips in question were not Aberdeen yellow turnips but a turnip of a different and softer description, and that they consequently yielded to the power of the frost that prevailed for some weeks in January 1867; and finds that, as compared with a corresponding crop of Aberdeen yellow turnips, the turnips in question became unfit for use and valueless as food for the pursuer's stock in the spring to the amount specified in the first branch of the account sued for, viz., £117, 6s. 11d. sterling; Finds that the pursuer thus sustained a direct loss to that amount through the fault of the defender, and that the defender is liable in reparation to the pursuer for said loss, and decerns against him therefor accordingly: Sustains the defender's sixth plea in law, so far as it relates to the pursuer's claim for £40, forming the second branch of the account sued for:—Finds the defender liable in expenses," &c.

The claim of £40 was disallowed as being of the nature of consequential damage.

The Sheriff (MACKENZIE) substantially adhered, but reduced the sum of damages to £73.

The defender advocated.

MONRO and RHIND for advocator.

YOUNG and BALFOUR for respondent.

The Court adhered.

Agents for Advocator—Murdoch, Boyd, & Co., S.S.C.

Agents for Respondent—Jardine, Stodart & Frasers, W.S.

Thursday, November 12.

WRIGHT *v.* BAIRD.

Broker—Commission Agent—Bankrupt—Failure by Agent to give full information to Principal. A