landlord, under this clause, was bound to show reasonable cause for dissatisfaction, which I am clear he is not, I think he has done so.

I think there has been some laxity in admitting letters as evidence which were not put before the witnesses at the proof.

LORD NEAVES—I concur. This case is important as to the relations of proprietor and tenant. I am not quite satisfied with the way in which it has been matured by the Lord Ordinary. There is no qualification of the interlocutor of July as being before answer, and a good deal of irrelevant evidence has been admitted. I do not say a cause such as this may not be got behind on the ground of the dissatisfaction being a fraudulent pretence for ulterior purposes, but there is nothing of that kind here. We have the landlord affirming on oath that he was dissatisfied. He was no doubt acting for his own interest, but his evidence is above suspicion. He had a sincere feeling of dissatisfaction, and probable cause for it, and he is entitled to act on his own advice, and take advantage of the qualification in the lease.

I concur with your Lordship that Bain's letters should not have been admitted without his being examined on oath as to them.

LORD ORMIDALE—I concur without difficulty. It is important to keep in view that the tack was originally conceived in favour of Hyslop and Brand, and was not taken to survivors, and there is some evidence that Hyslop was chiefly relied on. While the dispute between Hyslop and Brand was going on the minute of agreement was drawn up, and the landlord agreed to take Brand as sole tenant. So far as we can see the landlord might then have got rid of both. The clause here is different from any previous one. It was not framed by a professional man. It is not if there are grounds of dissatisfaction, or if the colliery is not fairly and properly worked, but if the landlord should be dissatisfied with the working. In reality this puts the matter into the almost arbitrary power of the landlord. All he had to do was to satisfy himself he was dissatisfied, and express this dissatisfaction. The defenders say we shall prove the landlord was not really satisfied. They might have referred the matter to the landlord's oath, and satisfied the Court that really the landlord was quite satisfied. The Lord Ordinary allowed a proof. I would have laid the onus on the defenders. The Lord Ordinary lays the onus on neither party. The question comes to be—was the pursuer in *mala fide* in giving the notice he did? I am clear he was not. On the contrary, the evidence shows that he was most considerate and indulgent, and the correspondence, especially the letters of 1st and 22d August, are conclusive as to his *bona fides*.

LORD GIFFORD—I am of the same opinion. The question turns on the true intention and legal effect of the clause in the minute of agreement. My opinion is that the clause refers only to the mind of the landlord, not to the condition of the colliery, and that to get behind it there must be an averment of *mala fides* or fraud, and that unless it is proved the pursuer acted fraudulently in giving the notice he must succeed. The Court has nothing to do under this clause with the reasonableness of the grounds of dissatisfaction, but solely with the *bona fides* of the dissatisfaction. I view the issue as being—Was the notice given fraudulent and *mala fide*? I am clear it was not.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the Reclaiming Note for Alexander Brand's trustees against Lord Shand's interlocutor of 15th January 1875, Refuse said note, and adhere to the Lord Ordinary's interlocutor, with additional expenses, and remit to the Auditor to tax the same and to report; farther, remit the cause to the Lord Ordinary, with power to decern for the expenses now found due."

Counsel for Reclaimers—Dean of Faculty (Clark) and Alison. Agent—Alex. Morrison, S.S.C.

Counsel for Respondents — Solicitor-General (Watson) and Mackintosh. Agents—Murray, Beith, & Murray, W.S.

Tuesday, May 18.

SECOND DIVISION.

[Sheriff Court, Leith.

M'INTOSH *v.* LEITH COMMISSIONERS OF POLICE.

Road—Statute 25 *and* 26 *Vict., c.* 101, *secs.* 151, 152—*Private Street—Allocation.*

Held (1) that the lighting, watching, and cleaning of a thoroughfare by the police of a burgh is insufficient to constitute maintenance as a public street within the meaning of the Police Improvement (Scotland) Act 1862; (2) that the powers of the Commissioners are not exhausted by their making an abortive allocation, but they may still proceed to allocate *de novo* the expense of making a public street.

This was an action raised by the Leith Police Commissioners against William M'Intosh for payment of a sum of £50, being his proportion of costs, charges, and expenses incurred in respect of paving the private street called Livingstone Place.

The pleas ultimately maintained in defence were:—1. That Livingstone Place was not at the date of the operations in question a private street, having been maintained as a public street prior to the adoption of the Act 25 and 26 Vict., cap. 101, by the burgh of Leith. 2. That the assessment sued for was not imposed legally or in terms of said Act.

It appeared from the proof in the cause that the Police Improvement Act was adopted by the Burgh of Leith in October 1872, and that before the operations mentioned in the summons Livingstone Place had not been paved and flagged in any way, but had been patrolled and cleaned by the police and also lighted by them. It was causewayed in January and February 1873.

The Commissioners of Police made an allocation of the expenses of foresaid operations in March 1873 under section 151 of the Police Act of 1862.

Against that allocation appeals were lodged, which were sustained by the Paving Committee. On 18th April 1873, a re-allocation was made under section 152 of the Police Act. Against that allocation appeals were lodged, which were

sustained by the Sheriff. On 16th April 1874 the commissioners re-allocated the assessment in terms of section 151 of the Act. Against that allocation the present appellant appealed to the Sheriff, who dismissed the appeal. Thereafter this action was raised against the appellant by the commissioners to recover the expenses of said operations.

On 7th December 1874, the Sheriff pronounced the following interlocutor:—

"The Sheriff-Substitute having considered the closed record, proof, productions, and whole process, and having heard counsel for the parties thereon,—Finds, in point of fact, that at the date of the operations in question Livingstone Place mentioned in the summons was a 'private street,' within the meaning of the General Police and Improvement (Scotland) Act, 1862: finds that the notices required by the said Act were duly given before commencing to execute said operations: finds that the amount of the expenses incurred in respect thereof has been correctly ascertained and fixed, and the relative assessment has been duly imposed, in terms of the 105th, 106th, and 107th sections of the said Act; and finds that the defender is the owner of lands or premises fronting or abutting on said street: finds in point of law that the defender, as such owner, is liable for his proportion of the said assessment: therefore, repels the defences, and decerns against the defender in terms of the conclusions of the libel: finds the pursuers entitled to expenses: allows an account to be given in, and, when lodged, remits to the Depute Clerk of Court at Leith to tax the same, and report.

"*Note.*—Of the pleas stated in the defence, only the first and fourth were maintained at the discussion upon the proof, it being admitted on the part of the defender that the second plea is merely subordinate to the first, and must follow its fate, and that the third and fifth had not been supported by sufficient evidence. The following definition of 'private street' is given in the Police Improvement Act of 1862:—'The expression "private street" shall mean any road, street, or place within the burgh (not being, or forming part of, any harbour, railway, or canal-station, depot, wharf, towing-path, or bank), used by carts, and either accessible to the public from a public street, or forming a common access to lands and premises separately occupied, and which has not been before the adoption of this Act well and sufficiently paved and flagged by the owners of premises fronting or abutting on said street, and which has not been maintained as a public street.' The defender alleges that Livingstone Place, or rather the road or thoroughfare now known by that name, was maintained as a public street prior to the adoption of the said Act by the burgh of Leith, and, consequently, that it was not a private street at the date when the Leith Commissioners resolved to have it paved and causewayed. The Sheriff-Substitute has no very clear or decided opinion with reference to the meaning of the last clause of the above definition; but, as it appears from the 150th and 154th sections of the Act, that a street may be 'laid out and formed,' 'paved or causewayed and flagged,' and yet, if this is not done to the satisfaction of the commissioners, be still only a private street, it seems not unreasonable to hold that the defender was here bound to prove that the thoroughfare in question was at some time or other brought into the same or a similar condition with other undoubtedly public streets in the neighbourhood, and that it was taken over by the municipal authorities, or other public body, under an obligation to keep it ever afterwards in proper order and condition. In any view, the Sheriff-Substitute is satisfied that the circumstances spoken to by the defender's witnesses with reference to the thoroughfare in question, the lighting and cleaning of it by the police, and even the occasional mending of the roadway when it was reported to be dangerous, are insufficient to prove 'maintenance as a public street,' within the meaning of the Act, and therefore that the defender's first and second pleas must be repelled.

"It appears that this is the third independent allocation that has been made of the expenses connected with the paving and causewaying of Livingstone Place. The defender contends that in this respect the pursuers have exceeded their statutory powers, and that the present assessment must be held to have been illegally imposed. The Sheriff-Substitute cannot find in the statute any warrant for this contention. Provided the commissioners comply with the directions contained in the 106th section, there is clearly nothing to prevent them making more than one allocation of the rates therein mentioned. And in practice this will often be necessary, as when persons liable under the statute have been omitted from the original assessments."

The defender appealed to the Court of Session.

Case cited — *Miller* v. *Leith Commissioners*, 11 Macph. 932.

At advising—

LORD JUSTICE-CLERK—This is manifestly not a public street, and has not been maintained as such. The law was clearly explained in a very similar case (*Miller* v. *Leith Commissioners*), where the question was, whether there was a street or not?

As to the contention that the commissioners exhausted their powers by the first allocation under section 151, I cannot adopt that view. The result would be that the street would remain as it is, because the commissioners had once gone wrong.

LORD NEAVES—I concur. I cannot hold that the common good of the burgh must bear this expense because the commissioners made a wrong allocation at first.

LORD ORMIDALE—As to the first point, I am clear that although this street was lighted and watched, it is not sufficient to constitute maintenance as a public street under the statute. As to the second, I cannot hold that the powers of the commissioners were exhausted by the abortive allocation made by them.

LORD GIFFORD concurred.

Counsel for Appellant—Solicitor-General (Watson) and Trayner. Agents—Boyd, Macdonald, & Lowson, S.S.C.

Counsel for Respondent—Dean of Faculty (Clark) and Harper. Agents—Irons & Roberts, S.S.C.