action has been brought. Suppose an action for trespass was brought before the Sheriff, and it was clear that the real point at issue was the right to the property, then it is manifest that the Sheriff would not set himself to decide such a thing But that is not a question of jurisdiction; it is only the question of the propriety of exercising it under circumstances which would seem first to call for another action. I think that the Sheriff has power (and it is right that he should have it) where the defence is of the character I have indicated, to delay, or even decline, to hear the case till the other matter is settled. In the present case I entirely concur in your Lordship's observations.

LORD CRAIGHILL concurred.

Appeal dismissed.

Counsel for Appellant—Rhind.
Counsel for Respondent—W. A. Brown.

COURT OF SESSION.

Thursday, June 1.

SECOND DIVISION.

[Sheriff of Lanarkshire.

DUBS AND OTHERS *v.* POLICE COMMISSIONERS OF CROSSHILL AND OTHERS.

Burghs Extension Act 1857 (20 *and* 21 *Vict. c.* 70) *—Sheriff—Appeal—Competency.*

By sec. 1 of Act 20 and 21 Vict. c. 70, it is enacted—"(1) Any ratepayers to the number of twelve or more, in respect of lands and heritages situated beyond the existing boundaries of any royal or parliamentary burgh in Scotland, may present a petition to the Sheriff of the county in which such burgh or part of a burgh is situated, praying him to take the steps provided by this Act for extending the boundaries of the burgh to the extent to be specified in such petition; and the Sheriff shall, within three weeks from the date of the presentation thereof, define and specify in a written deliverance on the petition such boundaries, which shall include an area two-thirds of which is wholly or partially built on or laid out for building, as in his opinion would be suitable for the extended boundaries of the burgh, and the same shall be thereafter published by advertisement in such manner as the Sheriff shall direct; and it shall be lawful for the proprietor of any unbuilt-on land within the proposed extended boundaries, or to the Police Committee of the county to be appointed in terms of any Act passed during the present session of Parliament, within one month after the last advertisement so appointed to appeal by Note of Appeal to any one of the Lords Ordinary of the Court of Session, who shall have power in a summary way to dispose of such appeal after such inquiry as to him shall seem fit; and the judgment of such Lord Ordinary dismissing such appeal, or sustaining the same in whole or in part, shall be final and conclusive." In a petition presented by certain ratepayers to the Sheriff for the purpose of extending the boundaries of a burgh, the Sheriff found that the boundaries described in the petition, or any others which might be within its scope, did not contain an area two-thirds of which was wholly or partially built on or laid out for building, and also that the boundaries were not such as would be suitable for the extended boundaries of the burgh. The petitioners, and also the magistrates and town-council of the burgh, on whom intimation of the petition had been made, and who had complained, appealed to the Court of Session.—*Held* that the appeal was incompetent, there being no review of the Sheriff's judgment except what was expressly provided by the Act.

Counsel for Dubs—Pearson. Agents—Rhind & Lindsay, W.S.

Counsel for Town Council of Glasgow—Dean of Faculty (Watson)—Balfour. Agents—Campbell & Smith, S.S.C.

Counsel for Police Commissioners of Crosshill—Scott. Agent—John Gellatly, S.S.C.

Friday, June 2.

FIRST DIVISION.

[Sheriff of Forfarshire.

DUNDEE POLICE COMMISSIONERS *v.* ROBERT HARDY MITCHELL.

Jurisdiction—Sheriff—Statute 13 *and* 14 *Vict. cap.* 33, *secs.* 73, 213, 285, 286, 307-310—19 and 20 *Vict. cap.* 103, *sec.* 64—*Police Commissioners.*

Held that proceedings for recovery of expenses under section 64 of the Nuisances Removal Act, 19 and 20 Vict. cap. 103, are regulated by sections 307-310 of the Police Act, 13 and 14 Vict. cap. 33, and that sections 285-6 of the Police Act, whereby the Sheriff's jurisdiction is in certain matters declared final, do not apply.

This was an action brought by the Dundee Police Commissioners against the defender, who was alleged to be a house proprietor in Ann Street, Dundee, concluding for a sum of £30, 5s. 2d., "being the expenses incurred and laid out by the said Commissioners in paving the portion of Ann Street abutting on and bounding the defender's lands." The street in question had been repaired in consequence of a petition presented to the Commissioners, signed by the defender and eighty others, praying them to repair it as they might think best. This action was brought under the 64th section of the Nuisances Removal Act (19 and 20 Vict. cap. 103) quoted in the Lord President's opinion, and was supported by averments as to the insufficiency of the street in question before the adoption of the Police Act (13 and 14 Vict. cap. 33) by the burgh of Dundee in the year 1851, service of notice as required upon the defender, and the due execution of the works.

The defender pleaded—"(1) That not being owner of any lands or heritable subjects abutting on Ann Street, or any part thereof, he is not liable for the account sued for. (2) The road or street called Ann Street, so far as relates to the

present action, having been properly formed and made good before the passing of the Act 13 and 14 Vict. cap. 33, no action lies at the instance of the Police Commissioners against the owners of the lands abutting thereon, in respect of the causewaying thereof by said Police Commissioners. . . . . And (5) The Police Commissioners having, when they assumed the use of said road, taken it over as well made and in a sufficient state of repair, and having so maintained it for the period condescended on, they cannot now claim that the feuars whose lands abut on said street shall causeway it, or that they shall be made liable for the cost thereof."

When the case was heard before the Sheriff-Substitute (CHEYNE) the pursuers pleaded that the defender not having availed himself of the power of appeal to the Sheriff, provided by sec. 285-6 of the Police Act, against the notice served on him by the Commissioners within seven days, he was now barred from making any objection to the pursuers' account.

The Sheriff-Substitute allowed a proof before answer, and after evidence had been led as to the state of the road prior to the adoption of the Police Act by the burgh of Dundee, pronounced the following interlocutor:—

"The Sheriff-Substitute having advised the process, Finds, in point of fact, that in 1871 the Police Commissioners for the burgh of Dundee served notices under section 64 of the Nuisances Removal, &c. (Scotland) Act, 1856, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee, including the defender, requiring them to pave the carriage-way of said street opposite their respective properties, in manner therein specified, and on the owners failing to comply with the said requisition, had the work executed under a contract: Finds, however, also in point of fact, that the carriage-way of said street was made good prior to the adoption in the burgh of Dundee of the General Police and Improvement (Scotland) Act 1850: Finds, in point of law, that the owners of property abutting on said street are not liable for the expense of the foresaid works, but that the same must be defrayed out of the general police rates: Therefore assoilzies the defender from the conclusions of the action.

"*Note.*—After full consideration I am satisfied that the defender is not precluded by his non-appeal against the Commissioners' order from objecting in this process to the power of the Commissioners to issue that order. In all that regards the execution of works, the necessity of them, their style, &c.—in other words, in all matters of detail involving the exercise of discretion—I fully concede that, subject only to a summary appeal to the Sheriff, the Commissioners are final, but in my humble opinion the finality clause is no answer when it is offered to be proved either that the works are not authorised by the statute, or, which is the case here, that the party upon whom it is sought to lay the expense of them is not legally liable (see *Lord Advocate* v. *Perth Police Commissioners*, 7th Dec. 1869, 8 Macph. 244, and *Miller's Trustees* v. *Leith Police Commissioners*, 19th July 1873, 11 Macph. 932). It is said, however, that *esto* these allegations would form a relevant subject of inquiry in a suspension (which would necessarily be in the Supreme Court) of a charge for payment; they cannot relevantly be inquired into in an action like the present, in which it is argued the Sheriff's duties are merely ministerial. In the absence of any decision of the Court of Session to that effect, I must refuse to give my assent to such a proposition, or to take such a limited view of my functions. The action is in form an action for debt, and I can find nothing in the statutes which precludes me from considering any objections to the claim which the Court of Session could consider in a suspension. I am not asked to undo anything that the Commissioners have done, or to find that the work was unlawful. All that I am called upon to determine is on whom the expense is to fall, or rather, whether it can lawfully be laid on the abutting owners. That depends on its being shewn that the procedure has been regular, and that the clause of the statute applies to the street in question. The pursuer has very properly undertaken to satisfy me on both points, and he must prove his case."

There were some further remarks in his note as to the state of the street prior to 1851, and its management since that time.

The pursuer appealed to the Sheriff (HERIOT), who on 8th December 1875 pronounced the following interlocutor:—

"Having heard parties' procurators on the pursuer's appeal against the interlocutors of 29th September, 11th and 26th October last, and made avizandum, and having considered the record, proof, and whole process, Sustains the said appeal: Recals the interlocutor of 26th October: Repels the defender's pleas so far as preliminary: Finds in fact—(1) That the Police Act, 13 and 14 Vict. c. 33, was, except the clauses as to the supply of water, adopted in the burgh of Dundee in the year 1851, and is in force within the said burgh; (2) That in the year 1871 the Police Commissioners for the said burgh served statutory notices under the 64th section of the 'Nuisance Removal, &c. (Scotland) Act, 1856,' which comes in lieu of the 213th section of the said Police Act, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee, including the defender, containing requisitions to pave, within one month from the service of the said notices, the carriage-way of the said portion of said street in manner therein specified, and intimations that if they refused, neglected, or delayed to execute the said work in terms of the said requisitions, the Police Commissioners would cause the work to be executed, and that for the expense incurred by the said Police Commissioners in respect thereof proceedings would be taken against the said owners as the law directs; (3) That the said statutory notice, containing the said requisition and intimation, was served upon the defender on the 15th day of June 1871; (4) That the defender did not, as required by the said notice, execute the said work, or any part of it; (5) That the defender did not, in terms of the 285th and 286th sections of the said Police Act, make the said statutory notice, containing the said requisition and the said intimation, the subject of appeal to the Sheriff, nor did the defender take any proceedings in any Court for having the said statutory notice, containing said requisition and intimation, set aside or superseded, nor for having the said Police Commissioners prevented from proceeding to execute the said work on the faith and in terms of the said

notice, and of the intimation contained therein; (6) That the said Police Commissioners accordingly proceeded, in terms of said statutory notice which had not been made the subject of appeal to the Sheriff, and as authorised by the 286th section of said Police Act, to have the work executed under contract, and they have had the same completed at an expense of £469, 8s. 4d.; (7) That the share of the said expense incurred by the said Police Commissioners in paving the portion of the carriage-way of the said street on which the defender's property abuts, amounts to the sum of £30, 5s. 2d.: Finds, in law, that the defender cannot now object in this Court to repay to the said Police Commissioners the said sum expended by them in paving the portion of the carriage-way of said street on which his property abuts, paved in terms of said notice and intimation: Therefore decerns against the defender for the said sum of £30, 5s. 2d., with interest on the same at five per cent. from citation till payment: Finds the defender liable in expenses.

"*Note.*—The defender objects to reimburse the Police Commissioners in the sum expended by them in paving the carriage-way of Ann Street opposite his property. The ground of his objections is that the said street had before the adoption of the Police Act been 'made good,' as expressed by section 64 of the Nuisance Removal, &c. (Scotland) Act 1856. Now, this may be a very good objection if brought forward in proper time, but the Sheriff considers that he is now too late in bringing it forward.

"The defender, along with others, got a statutory notice on 16th June 1871 requiring him to do a certain work, and intimating that if he did not do so within a month the Commissioners would have it done at his expense. On getting this notice (and he admittedly got it) it seems to the Sheriff that, if the defender had any objection thereto, or to the execution at his expense of the work contemplated, he had two courses open to him, he might either have availed him of the statutory machinery provided by the Act, and made the notice the subject of appeal to the Sheriff, or he might have taken proceedings in the Supreme Court for having the notice set aside or suspended, if he considered that the proceedings contemplated were outwith the statute. This last was the course followed in the case of *Campbell* v. *The Leith Police Commissioners*, 29th June 1865, 37 Jur. 546, and of *Lord Advocate* v. *Perth Police Commissioners*, 7th Dec. 1869, 8 Macph. 244. But it is important to observe that in these cases legal proceedings were adopted before the execution of the proposed work, and before any expense had been incurred. The defender, however, took neither course. He did nothing but looked on and allowed the Police Commissioners to proceed to have the work executed in terms of the notice. By the 186th section of the Police Act the Police Commissioners are authorised to proceed with the work 'if such matter or thing shall not be made the subject of appeal to the Sheriff.' The defender did not make the notice the subject of any such appeal, nor did he bring a suspension of the same, nor did he do anything to make the Police Commissioners aware that he objected to the same. In such circumstances, it seems to the Sheriff that the Police Commissioners were entitled to proceed with the work on the faith that the defender had no objection to its execution in terms of the subsisting notice. Accordingly, it seems to the Sheriff to be too late in this mere secondary action to object for the first time that the Commissioners are outwith the statute, and had no right either to serve or act on the said notice.

"If such a course be open to the defender at this stage, the Sheriff fails to discover what is the use of the statutory machinery of appeal provided by the Act. The Sheriff could have tried the question raised by the defender as well under the appeal case as under this. The advantage of having had the question tried under the statutory appeal would have been that it would have been determined before the execution of the work, and before the expense had been incurred.

"The latter part of the 286th section of the Police Act seems to the Sheriff to have been passed for the protection of police commissioners. If the notice was left unappealed against, and was allowed to remain as a subsisting statutory notice, they were to be safe in proceeding to act upon it, and to incur expense. They were entitled to assume that no objection existed thereto, and that the parties interested acquiesced therein. Were it not for such statutory protection they might find themselves suddenly and unexpectedly made liable for large sums of money expended by them in good faith on behalf of others. It seems to the Sheriff that the defender having received the notice, and having left the same unappealed against and unsuspended, and having stood aside and acquiesced in the Police Commissioners expending considerable sums of money on the faith of the same, he is now too late in raising an objection to the right of the Commissioners to act as they did.

"As to the merits, the Sheriff may add that, supposing the question raised by the defender could be competently raised at this stage, there would have been considerable difficulty in holding that the street in question had been 'made good' previous to 1851."

The defender appealed to the First Division of the Court of Session.

The first plea was no longer insisted on.

Argued for him—There is no such acquiescence here as the Sheriff founds his judgment on, for there cannot be said to be undue delay on the defender's part in disputing his liability until the demand for payment has been made. Nor can it be said that there is here an appeal to the Sheriff, and that that appeal is final. The matter in question here is, whether the road falls under the operation of the Act or not, and to allow the Commissioners or Sheriffs to determine this question would be to allow them to determine their own jurisdiction. But further, there is no statutory appeal to the Sheriff provided by the Act; that appeal is by the 286th section of the Act limited to matters, "the cost attending which is directed to be provided by way of private or district assessment," whereas by the 64th section of the Act founded on here the procedure for recovery of the expense is regulated by secs. 307-10 of the Police Act, and is not limited to an appeal within a certain time to the Sheriff.

Argued for the pursuer—The delay by the defender in stating his objections has made it much more difficult to ascertain the state of this street at the date referred to than it would have been if proceedings had been taken at once by appeal to the Sheriff. It is not maintained that the Sheriff had power to determine finally what was and what was not a street, but merely—it being admitted by the petition which was signed by the defender that this was a street—to settle the incidence of the cost. Such a general clause as the 286th of the Police Act must be held to indicate that the Sheriff's judgment was intended to be final in all such questions, and must override apparent references to other clauses of the Act.

At advising—

Lord President—The interlocutor of the Sheriff, dated 8th December 1875, is chiefly based on this finding in point of fact—"That the defender did not, in terms of the 285th and 286th sections of the said Police Act, make the said statutory notice, containing the said requisition and the said intimation, the subject of appeal to the Sheriff, nor did the defender take any proceedings in any court for having the said statutory notice, containing said requisition and intimation, set aside or superseded, nor for having the said Police Commissioners prevented from proceeding to execute the said work on the faith and terms of the said notice, and of the intimation contained therein." And his finding in point of law is—"Finds in law that the defender cannot now object in this Court to repay to the said Police Commissioners the said sum expended by them in paving the portion of the carriage-way of said street on which his property abuts, paved in terms of said notice and intimation."

Now, it appears to me that there is no foundation for that judgment unless the Sheriff is right in thinking that the appellant here had a ground for appealing to the Sheriff under sec. 286 of the Police Act.

I shall say a word as to the fact, also founded on by the Sheriff, that the appellant did not take any other steps to set aside the notice or prevent the Commissioners from carrying out the proposed work; but the other is the important point.

Now, the Dean of Faculty in the course of his argument conceded that the 285th section of the Act was not applicable to this case, but he said that sec. 286 was applicable, and it affirms the right of appellant, as soon as notice was served on him, to appeal to the Sheriff against the said notice. The proceeding of the Commissioners is based on the 64th section of the Nuisances Removal Act, but the sort of proceeding authorised by that section was formerly authorised by the Act of 1850. The 213th section of that Act is repealed, and other regulations are substituted by this 64th section, and it is not immaterial to compare those sections.

But before doing so I must premise that there can, it appears to me, be no appeal to the Sheriff unless the work done is work the expense of which is intended to be provided for by district assessment.

Now, sec. 213 of the Police Act was in these terms—"That if any street have not before the adoption of this Act been well and sufficiently paved and flagged, or otherwise made good, the Commissioners may cause such street, or the parts thereof not so paved and flagged or otherwise made good, to be paved and flagged or otherwise made good in such manner as they think fit, and the expenses incurred by the Commissioners in respect thereof shall be repaid to them by the occupiers of the lands abutting on such street, or such parts thereof as have not been heretofore well and sufficiently paved and flagged or otherwise made good, and such expenses shall be recoverable from such occupiers respectively as herein provided with respect to private improvement expenses, and thereafter such street shall be repaired by the Commissioners out of the assessments levied under this Act."

Now under that section of the Police Act I concede that the money spent on such improvements might have been recovered by a private assessment from owners abutting on the street, and if the Commissioners had proceeded to levy the money thus, they must have done so under the 73d section of the Act, for I can find no other applicable to private assessment, and there is no distinction that I can see between private assessment and private improvement assessment. The 73d section is in these words—"When by this Act the occupiers of any premises are made liable to the payment of any expenses which are directed to be recoverable as private improvement expenses, the Commissioners may charge the occupiers of such premises respectively with special rates, over and above any other rates to which such persons may be liable under this Act, after the yearly rate of six pounds ten shillings in the hundred pounds on the cost of such private improvements respectively, such special rates to be payable during thirty years next after such expenses have been incurred," thirty years being necessary to recover the whole 100 per cent. at the rate of 6½ per cent. annually.

So stood matters under the Act of 1850. The parties to be charged were the occupiers of the premises, and the expense of improvements were to be laid on them at the rate of 6½ per cent. per annum.

Then comes the 64th section of the Nuisances Removal Act, which repeals the 213th section of the Police Act, and in lieu thereof enacts—"That if any street have not before the adoption of the said Act been well and sufficiently paved and flagged, or otherwise made good, the Commissioners may require the owners of the lands abutting on such street to cause such street, or the parts thereof not so paved or flagged or otherwise made good, to be paved and flagged, or otherwise made good, in such manner as the Commissioners shall direct;" and then proceeds to re-enact in the same words as to the requisition on owners, and the right of the Commissioners to proceed to do the work themselves and charge the expense against the owners; and then come these words—"And the provisions and enactments of the said Act with respect to ensuring the execution of the works thereby required to be done by the owners or occupiers shall apply to the execution of all works required to be done, and the recovery of all expenses incurred by the Commissioners with respect to the paving, flagging, or

otherwise making good such street under the provisions of this Act." It no longer directs the Commissioners to proceed to recover this expense by way of private assessment, but it directs them to proceed under the sections of the Police Act dealing with "the execution of the works thereby required to be done by owners or occupiers." That is, it incorporates the sections of the Police Act applicable to this subject. Now, what are these sections? We find them beginning with the 307th section, and these sections, be it remarked, are introduced by these words—"with respect to ensuring the execution of the works by this Act required to be done by owners or occupiers, be it enacted as follows," (words verbatim the same as those used in the Act of 1856). Now, what do these sections provide? The first is as to the service of notice; the second provides "that whenever under the provisions of this Act any work of any kind is required to be executed by the owner or occupier of any premises, and default is made in the execution of such work, the Commissioners may cause such work to be executed, and the expense incurred by the Commissioners in respect thereof shall, except in the case where such expenses are herein directed to be defrayed by drainage rates, be repaid to them by the person by whom such work ought to have been executed." The 309th section provides that the occupier in default of the owner may execute these works and deduct the expenses from his rent; and then lastly—for here the series of sections applicable to this subject closes, section 310 provides, "That if the owner of any premises made liable by this Act for the repayment to the Commissioners of any expenses incurred by them do not, as soon as the same become due and payable from him, repay all such expenses to the Commissioners, the Commissioners may recover the same from such owner in the same manner as damages may be recovered under this Act, or as any debt may be recovered by the law and practice of Scotland."

Now it seems to me that the expenses incurred by the Commissioners in doing this work form a debt against the party or parties who ought to have done it, and that that debt is to be recovered like any other debt.

But is it possible that this matter falls under the 286th section of the Police Act, which is expressly limited to matters the cost of which is directed to be provided for by private or district assessment? That, I think, is out of the question. It is the contemplation and intention of the Nuisances Removal Act, on which this action is raised, that no assessment shall be laid on for this purpose, but that the money shall be recovered from the parties. I am therefore of opinion that there was here no appeal to the Sheriff. The appellant might, no doubt, have suspended the notice in this Court, but not under section 285 or 286 of the Police Act.

But the Sheriff thinks that he might have taken some other course to make the Police Commissioners aware that he objected to the notice served upon him. It would be hard, however, to find that the appellant was barred from stating his defences now to the demand made upon him. He had presented a petition to the Commissioners of Police praying them "to cause the carriageway of the street to be paved along its whole length (so far as not already done) with whinstone blocks, in such manner as to them shall seem proper," of course at the public expense. This the Commissioners refused to do, and presented a notice requiring the appellant and the other owners of lands abutting on the street to do the work themselves, or to bear the expense of it if it were left to the Commissioners to do. It is vain to say that after this exchange of compliments the parties did not know what the question between them was. It was plainly this, Who was to pay for the work? There was no dispute at all that the work must be done. I do not say that suspension of this notice would have been incompetent, but I cannot think that the appellant is debarred from stating his defences now. If he had led the Commissioners into doing unnecessary work, or put them to unnecessary expense, that might have altered the case; but that is nowhere stated or suggested. The question simply is—Who is to pay? That question is well raised by this action, and the defender is entitled to be heard. The Commissioners must have known that they were acting under those sections of the Police Act, from the 307th to the 310th; they were not laying on a private assessment, and therefore by the form of their own action they are excluded from pleading that the proper course of resistance was by appeal to the Sheriff. But without founding on that, my opinion is that this is not a case where an appeal could have been taken under the 286th section, and therefore the ground of the Sheriff's judgment is gone.

Lord Deas—Besides the finding as to the appeal provided by the 285th and 286th sections of the Police Act, which has been so clearly dealt with by your Lordship, I was struck by one of the Sheriff's findings, viz., "nor did the defender take any proceedings in any Court for having the said statutory notice, containing said requisition and intimation, set aside or superseded, nor for having the said Police Commissioners prevented from proceeding to execute the said work on the faith and in terms of the said notice, and of the intimation contained therein;" which he follows up by some remark in his note, although it is a little too much mixed up with the question of appeal—that these parties having received notice of what was to be done took no judicial notice of it and intimated no objection. That seemed to me to be a good ground of judgment, and, as I remarked at the discussion, I was surprised that it was not brought before us or stated to us either by those whose interest it was to support the judgment or by those who appealed against it. But I now see that they quite properly did not do so, for this is not a case where such an equitable consideration applies, for, as your Lordship has pointed out, the question was, Who was to pay for the work? It was plain it must be done. That takes away the second ground on which the Sheriff's judgment might have been supported, and therefore I am of opinion that we must return to that of the Sheriff-Substitute.

Lord Ardmillan—This is a case of some nicety, but I agree with your Lordship, and I am satisfied that this party is entitled to be heard, as the Sheriff-Substitute says. If the objection had been to the work being done, that would have

been a very different matter, as Lord Deas says. But that is not the case here. All parties, Mr Mitchell among them, were satisfied that the work should be done, and the real question is as to the incidence of the cost. On that question there is no appeal to the Sheriff under the statute, and therefore we cannot hold that the party has laid by too long and is not justified in coming forward now with his defence.

Lord Mure—I concur in the opinion so clearly stated by your Lordship, and I am inclined to add that the view taken by the Sheriff-Substitute of the 64th section of the Act of 1856 is in my opinion a sound one, and that the Commissioners were only entitled to proceed with the work on one condition, viz., that the street had not before the adoption of the said Act (viz., the Act 13th and 14th Vict. cap. 33) been well and sufficiently paved and flagged, or otherwise made good. That was a condition precedent—if the street was paved they were not entitled to move. They served a notice upon the parties interested in 1871. No attention was paid to that, and no objection taken. Then the work was completed, and the present action was brought to recover the expense of it. They allege—"the street within the burgh of Dundee, commonly called Ann Street, was not well and sufficiently paved and flagged, or otherwise made good, previous to the adoption of the first-mentioned Act, 13 and 14 Vict. chap. 33;" and by that allegation they make their action competent. They are met by the allegation that "the said road or street had been made good before 1851." I am of opinion that there is no ground for preventing the defenders—because they did not take an appeal to the Sheriff—from stating this objection to the competency of this action.

The judgment of the Sheriff was accordingly recalled, and that of the Sheriff-Substitute, in so far as the competency of the defence stated by Mr Mitchell was concerned, affirmed. After hearing counsel on the proof as to the state of the road prior to the adoption of the Police Act, the Court unanimously were of opinion (1) that the burden of proof in respect of the lapse of time between the taking over of this road by the Police Commissioners and the raising of this question lay upon the Police Commissioners; (2) that they had failed to prove that the road had not been "made good" prior to the adoption of the Act, and they therefore affirmed the Sheriff-Substitute's interlocutor on the facts also, pronouncing the following interlocutor:—

"Sustain the competency of the appeal: Recal the interlocutor of the Sheriff dated 8th December 1875: Finds, in point of fact, that in 1871 the Police Commissioners for the burgh of Dundee served notices under section 64 of the Nuisances Removal, &c. (Scotland) Act 1856, upon the owners of property abutting upon the eastern portion of Ann Street, Dundee), including the defender (appellant), requiring them to pave the carriage-way of said street opposite their respective properties in manner therein specified, and on the owners failing to comply with the said requisition had the work executed under a contract: Find, however, also in point of fact, that the said Commissioners of Police have failed to prove that the carriage-way of said street was not made good prior to the adoption in the burgh of Dundee of the General Police and Improvement (Scotland) Act 1850: Find, in point of law, that the owners of property abutting on said street are not liable for the expenses of the foresaid works, but that the same must be defrayed out of the general police rates: Therefore, of new assoilzie the defenders from the conclusions of the action, and decern: Find the pursuer (respondent) liable in expenses both in this Court and the inferior Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report."

Counsel for Pursuer—Dean of Faculty (Watson)—Johnstone. Agents—Leburn, Henderson, & Wilson, S.S.C.

Counsel for Defender — Asher — Strachan. Agent—David Milne, S.S.C.

Saturday, June 3.

SECOND DIVISION.

[Lord Young, Ordinary.

TRAILL *v.* SMITH'S TRS. AND OTHERS.

Debtor and Creditor—Bond and Disposition in Security—Reduction—Fraud—Agent.

T in 1870 borrowed £1000 on heritable security through S. & S., who were agents for both A's trustees and B's trustees, by both of whom they were authorised to invest money. The real creditor was not at the time disclosed by S. & S., but at Martinmas 1870 they granted a receipt for interest on the loan in name of A's trustees. Receipts were granted in the same terms up to Martinmas 1872, inclusive. Up to that date no bond for the loan had been executed. In May 1873 S. & S. wrote to T, stating that by mistake the bond for the loan of £1000 had been overlooked, and that "it now falls to be taken in favour of the trustees" of B. T signed the bond in favour of B's trustees sent with this letter, and thereafter the receipts for interest were granted in name of B's trustees. In an action at the instance of T for reduction of the bond granted to B's trustees, and alternatively, if the bond was not reduced, for declarator that he was not bound to pay £1000 to A's trustees, the Court, upon the evidence, *Held* (1) that A's trustees actually lent £1000 to T; (2) that the bond which was executed was obtained by the fraud of S. & S.; and (3) that B's trustees could take no benefit from that fraud; and that accordingly T was entitled to reduction of the bond.

This was an action at the instance of Dr Traill of Woodwick, residing in St Andrews, against the trustees of the deceased John Smith, and the trustees of the deceased John Ballantyne. As against Smith's trustees, the summons concluded for reduction of a bond and disposition in security for £1000 granted by the pursuer in their