by reason of the husband's return for two months in 1879, I am of opinion that the claim should be sustained as regards all the charges and advances for the period from 11th September 1877 down to 15th May 1881. But I hold that the pauper having ceased to be chargeable at that date, and no fresh notice having been given when she became chargeable as an ordinary pauper on 9th July 1881, the claim cannot be sustained as regards the charges and advances made subsequently to 15th May 1881—*Beattie* v. *Greig* (2 R. 923)."

The defenders reclaimed, and argued—(1) There is nothing in common between desertion in the sense of the Poor Law Act, secs. 79 and 80, and desertion in the sense of the consistorial courts. (2) A woman deserted by her husband can acquire a residential settlement conditional on her husband's return.

Argued for pursuers—Suppose the desertion not to be proved, it could not be said in the husband's absence that his birth-settlement was chargeable, for he might have acquired another settlement. It was not for pursuers to prove what his settlement was. But desertion was established in point of fact.

Authorities for the defender—(1) *Gray* v. *Fowlis*, March 5, 1847, 9 D. 811; *Carmichael* v. *Adamson*, February 28, 1863, 1 Macph. 452; *Masons* v. *Greig*, March 11, 1865, 3 Macph. 707; *Beattie* v. *Greig*, July 9, 1875, 2 R. 923; *Greig* v. *Simpson and Craig*, May 16, 1876, 3 R. 642.

At advising—

Lord Justice-Clerk—This case, between three inspectors of poor, presents a question of some difficulty. But I regret to see these proceedings, because they are an example—and a very strong one—of that unnecessary and useless expense which is sometimes incurred in questions in which the immediate interests involved are in no proportion to the merits. It is unnecessary for me to resume the facts.

I am of opinion that Kirkcaldy is not precluded by the admission alleged to have been made to the Barony Parish from claiming relief from the parish of Dundee.

I quite agree that where an admission has been made by a parish, in a question with another parish which has been charged with liability, the parish making it must be kept to it, and cannot be allowed to revert from it, provided that there was no misrepresentation or concealment of the facts affecting the liability; and we have on several occasions applied this doctrine in the administration of the Poor Law Statute. But here no admission was made to the parish of Dundee, and I do not think that an admission made, as here, can come to the benefit of Dundee, which was not a party to the negotiations between the parishes of Kirkcaldy and Barony, and to which the admission was not made.

There remains the further question as to the extent to which the present claim for relief can be maintained against Dundee, and this involves the determination of the question whether the industrial settlement here acquired had not been lost or interrupted by the alleged return of the pauper's husband?

I am of opinion that it has been satisfactorily established that the pauper was deserted by her husband. The evidence is quite conclusive that he abandoned his wife in Glasgow. After living for some time in Glasgow, she went to Dundee, and lived there for eight years. As to the question how long the settlement in Dundee lasted, and whether the husband remained in desertion, I am of opinion that the desertion did not terminate. I think he came back, not in order to resume cohabitation, but in order to see if he could obtain any means from his wife.

In regard to the whole case, I think the Lord Ordinary's interlocutor should be affirmed. He has not dealt, however, with the period subsequent to 15th May 1881, and as regards that period I think some provision falls to be made.

Lords Young, Craighill, and Rutherfurd Clark concurred.

The Lord Ordinary's interlocutor was altered by deleting the words "and to no further extent" after the words "15th May 1881."

Counsel for Pursuers—Mackintosh—J. A. Reid. Agents—Curror & Cowper, S.S.C.

Counsel for Defender—Guthrie Smith—Kennedy. Agent—John Macpherson. W.S.

Tuesday, December 11.

SECOND DIVISION.

[Lord M'Laren, Ordinary.

ROBERTSON *v.* POLICE BOARD OF GREENOCK.

Property—Property in Burgh—Street—Building Line of Street—Powers of Magistrates to Regulate Building Line of New Buildings in order to Improve Street—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *secs.* 161 *and* 162.

By the General Police and Improvement (Scotland) Act 1862, sec. 162, the commissioners of police of a burgh to which the Act applies are empowered, "when any house or building any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof," is taken down in order to be altered or rebuilt, to require the owner to set it back to the line of the adjacent buildings as the commissioners may direct, for the improvement of the street, compensation being given to the owner for any damage thereby caused. The magistrates of a burgh were proprietors of one house in a street which had always stood 4 feet back from the general line of that street. They acquired for public purposes three other houses in the division of the street in which that house stood, and proceeded to erect on the site of the four houses a building which stood in the line of the house originally belonging to them. The greater part of that division of the street had its building line thus set back 4 feet. The proprietor of two other houses, structurally connected and immediately adjoining that which had always stood 4 feet back, proposed to take them down and erect a new building on their site, without setting them back 4 feet, so as to be in line with the magistrates' building. *Held* (1) that it was within the power of the magistrates to require the new buildings to be set back 4 feet so as to be in line with the other houses in that

division of the street, as its building line was now fixed; and (2) that the houses were to be treated as one, and that the proprietor was not entitled to take down first one and then the other with the effect of keeping the new houses up to the former building line.

By the 161st section of the General Police Act 1862 (which, as well as section 162, is incorporated with the Greenock Police Act 1877 by section 372 thereof) it is, *inter alia*, enacted that "the commissioners [of police] may, at a meeting to be held for the purpose, resolve to acquire lands or premises within the burgh for the purpose of widening, enlarging, or otherwise improving any of the streets, and they may resell any parts of such lands or premises which shall not be required for such purposes." The same section provides for the draining and repairing of property where there is a doubt as to the liability of the owners, and the execution of sanitary improvements in crowded districts.

By the 162d section of the General Police Act 1862 it is, *inter alia*, enacted that "when any house or building, any part of which projects beyond the regular line of street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the commissioners may require the same to be set backwards to or towards the line of the street or the line of the adjoining houses or buildings, in such manner as the commissioners may direct for the improvement of such street; provided always that the commissioners shall make full compensation to the owner of such house or building for any damage he thereby sustains." . . .

Laurence Bennett Robertson was proprietor, conform to disposition by the trustees of Robert Cowan and Jane Cowan, his wife, executed in 1880, of Nos. 2 and 4 Hamilton Street and 10 Cathcart Square, Greenock. Hamilton Street was about 40 feet wide, and was a street of considerable length, running into Cathcart Square, and the piece of ground on which the pursuer's houses stood was at the corner of Hamilton Street and Cathcart Square, No. 2 being the corner house, bounded on the east by Cathcart Square, to which, as well as to Hamilton Street, it had a frontage. The frontage of 2 and 4 Hamilton Street to Hamilton Street was 63 feet, and the frontage of the property to both street and square was valuable. The tenement forming No. 2 Hamilton Street and 10 Cathcart Square was built on a feu acquired in 1761 by John Campbell from Lord Cathcart, and the other tenement, 4 Hamilton Street, was subsequently built on the remainder of the feu, and on ground adjoining it, acquired by Campbell in 1766, the gable-wall separating 2 and 4 Hamilton Street being the old exterior western wall of 2 Hamilton Street. For many years prior to 1878, between which year and the date of this case they stood empty, the whole of the premises belonging at the date of this action to the pursuer were entered by a single entrance from Hamilton Street, and formed shops below and dwelling-houses above. To the west of 4 Hamilton Street stood No. 6, the old Town-House of Greenock, which was built in 1765 (and therefore before No. 4), and was 4 feet back from the line of No. 4 and of 8, 10, and 12, which were in line with No. 4. In 1878, it having been determined that new municipal buildings should be erected, the town acquired 8, 10, and 12 Hamilton Street that these buildings might be erected on the site of them and of the old Town-House, No. 6, the line of the new buildings to be the same as that of the old Town-House, and therefore 4 feet back from the old line of Nos. 8, 10, and 12 and of No. 4. These houses now mentioned, as well as 14 and 16 Hamilton Street, were in the division of Hamilton Street between Taylor's Close and Cathcart Square.

In 1878 Mrs Jane Robertson (then liferentrix of the property belonging at the date of this action to the pursuer) and the pursuer Laurence Bennett Robertson, her husband, with consent of Cowan's trustees, then the feudal proprietors, presented a petition to the Dean of Guild for authority to erect, instead of the buildings on the ground 2 and 4 Hamillton Street and 10 Cathcart Square, a tenement of shops and offices. The Dean of Guild granted the authority, but pending a reclaiming petition on behalf of the town against his interlocutor the Board of Police served a requisition on Cowan's trustees and on Mr and Mrs Robertson, founding on section 162 of the General Police and Improvements (Scotland) Act 1862 above quoted, requiring them, in virtue of the powers conferred on the Board by the Act, and for the improvement of Hamilton Street, to set backwards the new building about to be erected to the line of No. 6 (the old Town-House), full compensation, to be ascertained in the statutory manner, being provided. The Dean of Guild after considering the reclaiming petition adhered to his former interlocutor, but no steps were taken by the petitioners to take down the buildings, and by the elapse of two years and the death of Mrs Robertson the warrant fell.

In 1881 the pursuer Laurence Bennett Robertson, who had in 1880, as already stated, acquired the subjects, presented to the Dean of Guild a petition for sanction for a building he proposed to erect on the site of the corner house, 2 Hamilton Street and 10 Cathcart Square. He thus proposed to take down the existing house on that site, leaving No. 4 standing. The Board of Police objected, and served a requisition requiring him, as owner "of the house or building numbered 2 and 4 Hamilton Street and 10 Cathcart Square . . . and which house or building, or a part thereof, is about to be taken down in order to be altered or rebuilt by you," to set backwards the building to be erected to the line of No. 6. Compensation was also offered as before. The Dean of Guild dismissed the objections, and granted the warrant craved.

In 1881 No. 6 was taken down with a view to the erection of the new buildings on Nos. 6, 8, 10, and 12.

The requisitions by the Board of Police not having been withdrawn, this action against the Board of Police was raised by Robertson in November 1881 for declarator "that the pursuer is entitled, subject to the authority of the Dean of Guild of the burgh of Greenock, to erect a tenement or tenements of shops and offices on the ground bounded on the east by Cathcart Square, Greenock, on the west by the property of the town of Greenock, on the south by Hamilton Street, and on the north by the property of the town of Greenock, which ground is presently the site of the buildings numbers 2 and 4 Hamilton Street, and number 10 Cath-

cart Square, in Greenock; and that the pursuer, in erecting such tenement or other new building upon the said ground, or any part thereof, is not bound to set back such new building to the line of the house or building which was numbered 6 Hamilton Street, and has recently been taken down, or to any extent, but that he is entitled, subject to the authority of the Dean of Guild of the burgh of Greenock, to build with a frontage to Hamilton Street, in the line of the presently existing tenements, numbers 2 and 4 Hamilton Street, in line of street and according to stipulation of superior." The summons also concluded for declarator that the requisitions of 1878 and 1881 were *ultra vires* of the defenders, for interdict against their following them forth, and for reduction of them. The pursuer averred that his property was in the old line of the street, and that Nos. 14 and 16 were still in that line.

The defenders averred that the pursuer's buildings were now the only buildings in the section or division of Hamilton Street to which they belonged (*i.e.* that from Taylor's Close to Cathcart Square) which projected beyond the line of the old Town-House; that the pursuer's petition of 1881 bearing to refer only to No. 2 was intended to evade their requisition relating to the whole property of 1878; that the buildings were structurally connected so as to be all one house; that it was expedient to widen Hamilton Street, which (particularly at that part) was a very busy street.

They pleaded, *inter alia*—"(2) The defenders were and are acting within their statutory powers in requiring the proprietors of the subjects now vested in the pursuer to set back their new buildings in manner set forth in the requisitions of 19th July 1878 and 30th April 1881."

After a proof the Lord Ordinary (M'Laren) pronounced this interlocutor:—"Finds that the subjects numbers 2 and 4 Hamilton Street, Greenock, constitute one house or building in the sense of the statute founded on, and that the defenders are entitled to require the pursuer to set back the front thereof towards Hamilton Street to the line of the greatest projection of the present municipal buildings, which adjoin the said subjects: Therefore assoilzies the defenders from the conclusions of the action, and decerns, &c.

"*Opinion.*—This action of declarator and reduction is brought by the owner of a property in Cathcart Square and Hamilton Street, Greenock, for the purpose of having it declared, in the first place, that he is entitled to rebuild a part of that property without being under obligation to set back the front of his house towards Hamilton Street; and secondly, that two requisitions by the Police Board of Greenock, the defenders, the one dated in 1878 and the other in 1881, are not within the powers of the Police Board, and are not entitled to effect in a question as to the pursuer's right to build. The pursuer's contention is that he is the owner of two separate tenements, one of them being the corner house having a front to Cathcart Square and another front towards Hamilton Street, the other tenement being situated entirely in Hamilton Street, and adjoining the one I first described. Now, it is clearly established by the evidence that the corner tenement or corner part of the pursuer's property was erected as a detached house some time after the middle of the last century, and that what now serves the purpose of a gable or dividing wall, mutual to these two houses, was originally one of the exterior walls of the corner house which is now known as No. 2 Hamilton Street. I think that appears in various ways, because it is not a gable, but was the back wall of the house, and because traces of the harling or rough cast are found upon that site of the wall which enters into No. 4, proving that it was an exterior wall at the time it was put up. But then when the house No. 4 came to be erected advantage was taken of the existing wall for the purpose of a gable to No. 4, and it is also brought out that No. 4 is mainly built upon ground which was part of the feu of No. 2. That ground was insufficient for the erection of the new tenement, and additional ground was obtained from the superior to build the site. But in the main No. 4 was an additional building placed upon ground forming part of the subject No. 2. It is represented, I think correctly, by defenders that No. 4 is really an addition to or excrescence upon No. 2, that it never was at any time an independent house which would stand and be complete in itself without reference to another house, and was never held by a separate title. Then it is proved that at an early period both these houses came to be partly converted into shops, and about twenty years ago I think Mr Cowan, the tenant of one of these shops, added or took on lease another, and at a later period took a third, these shops being connected by internal communication. Until 1878, when the first proceedings were taken in the Dean of Guild Court for rebuilding, the whole of the ground or street floors of No. 4 and No. 2 Hamilton Street were occupied by the establishment of Mr Cowan and his partner, so that if the buildings were not separate in the beginning they did not become more so by the changes that were subsequently made. On the contrary, it appears that as regards the ground floor these two houses or buildings had come to be used as one possession. As regards the upper floors, which were occupied in separate apartments, it is proved that instead of separate stairs being maintained, access was had by one stair situated between the two houses, and with doors opening to both—another step towards the conversion of the two tenements, if I may so call them, into one. Then in 1878, before the first requisition was served, the then owners, Cowan's trustees, proceeded to take Nos. 2 and 4 down, and to rebuild a new block of buildings on the site of these two subjects. But they were stopped by a requisition from the Police Board. In 1881, the subjects having in the meantime been left vacant, the owners proposed to take down one of the subjects, the corner tenement, and to rebuild it, their agent stating to-day with perfect candour that he wished to do so in order to get the full benefit of their frontage, and that his constituents had not yet made up their minds what they would do with the other part of their property, and would not come to a decision upon that until they knew the result of this action. I do not think there is anything to be objected to in that course; it is a question of property, and the pursuers are quite entitled to try their right, and to proceed to build in that way which they think most favourable to the assertion of their right. Now, the requisition is founded upon the 162d

section of the General Police Act, which has been incorporated with the Police Act of the burgh of Greenock. Under that section it is enacted that when any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, then certain powers are given to the commissioners, and the question is whether they are within the hypothesis of the statute—whether this is a case of a house or building projecting beyond the front of the house or building on either side thereof, and about to be altered or rebuilt. The first difficulty that occurs is the interpretation of the word house or building for the purposes of the statute. House is a word of somewhat flexible meaning. It may mean—not to speak of meanings which are clearly inapplicable, such as family—it may mean either a habitation or a structure—an edifice with four walls and a roof, separated from other buildings. In statutes relating to the rights of occupiers a house is generally taken to mean a habitation; for example, in the interpretation of Acts relating to the franchise, a single room is held to be a house if it is the sole residence of the family. But in this case I think the meaning is a building or structure with foundation, walls, and roof, because the statute is here dealing with something that is to be taken down, and that, I think, would not on a fair reading be held to include a house in the more restricted sense, such as a storey or part of a storey. I think also that by the association of the word "building" with "house" I may take it as including a building that is occupied either for residence or for commercial purposes—in short, it means a tenement, using a word we frequently meet with in titles to denote what I am endeavouring to describe. That being so, am I to take it that Nos. 2 and 4 Hamilton Street constitute one tenement or two? I think they must be held to be one, because they, in the first place, have never been held as separate properties; they were one feu from the beginning, and they have continued so until the present day. Then No. 4 never was capable of maintaining a separate existence, because the wall which divides it from No. 2 is not a mutual wall, and if No. 2 were supposed to be taken out of the way, No. 4 would not be a house at all; it would only be the ruin of a house—three walls, and one side open to the air. And then, particularly, I think they are to be identified as one house, because looking to the state of possession we find that they were as much united as any double tenement could possibly be, the ground or shop floor being possessed by one tenant, and the upper portions being possessed by separate tenants, but with access from a common stair, so that if the two were not united from the beginning they certainly came, at the time when this question arose, into the position of being a double tenement in the sense in which that word "tenement" is generally used. Then, although I do not think the pursuers are to be held bound by what they attempted to do unsuccessfully in 1878, I cannot altogether overlook that their original intention was to deal with the subject as one and to rebuild it as one, especially when I am told by the witnesses that the full commercial value of the subject can only be got by pulling it down and rebuilding it as one.

"That being so, I have not much difficulty in applying the statute. It is a case of a building which undoubtedly projects in front of the house or building on one of the sides thereof, and is to be altered or rebuilt. It was maintained by Mr Dickson that 'either side' means both sides, and that unless there are houses on both sides which have a different frontage the statute cannot be applied. I do not think that is a fair and ordinary meaning of the word 'either,' and at any-rate in this particular case, where there can only be a house upon one side, I think it would be defeating the plain intention of the statute to hold it to be inapplicable, because although the house immediately adjoining this on the left has a different line of frontage, there is no frontage upon the other side, that other side being open street. I think that is not a construction of the statute which could possibly be applied to the case of a corner house where there is only one adjoining house. Where there is only one adjoining house I think the statute is satisfied if that house have a different line of frontage, and there is a requisition to set back according to that line. There seems to be a doubt whether the requisition of 1881 is still subsisting, because it was given with reference to proceedings in the Dean of Guild Court, and it appears that the period within which the Dean of Guild's warrant is operative has now expired. But as I am only dealing with the conclusions of the action, and the opinion that I have come to would lead to absolvitor from these conclusions, I am not embarrassed by that difficulty. The only other question is, How far are the Commissioners entitled to set the building back? What is the line to which they are entitled to require that the building shall be set back? I think it is the line in which the adjoining building intersects the street, that is, the base of the pillars. But as there is no declarator at the instance of the Police Board I cannot give any operative finding upon that subject.

"The judgment is absolvitor with expenses."

The pursuer reclaimed.

Argued for him—(1) On the facts—The houses formed separate tenements. In that case the statute could only be applicable to No. 2 Hamilton Street, and was consequently inoperative. Even assuming that the property formed one and the same tenement, only one part was being taken down, and that part the least important. (2) On the statute—The statute demanded as a condition of its application that "either" mean "both." (3) There was a speciality as regards corner tenements. (4) The Commissioners ought to have proceeded under sec. 161, not under sec. 162. (5) The pursuer's buildings were in the line of Hamilton Street, taken as a whole, and the defenders were not entitled to make a single division of it the test. (6) In any view, the Commissioners could not interfere till the whole building was taken down. They acted *ultra vires*.

Authorities — (3) *Burnet* v. *Lush*, Nov. 13, 1849, 12 D. 44; *Downie* v. *Grant*, Nov. 8, 1872, 11 Macph. 51; *Fraser* v. *Kennedy*, Jan. 9, 1877, 4 R. 266. (6) Per Lord Selborne, *Police Commissioners of Fort-William* v. *Kennedy*, July 8, 1878, 16 S.L.R. 765.

At advising—

LORD YOUNG—This case is not interesting other-

wise than as it regards the authority of the magistrates or commissioners of a burgh such as Greenock, under the General Police Act of 1862, to take measures to widen and improve the streets. The town in question is the town of Greenock, and the street in that town in question is called Hamilton Street. The old town buildings were in that street, and the Town-House had a line of its own standing a little way back from the other houses in the division of the street between Taylor's Close and Cathcart Square. It appears that the Magistrates and Council of Greenock recently built new municipal buildings, and that in the line of the old Town-House. It occupies the whole of one side of the division between Taylor's Close and Cathcart Square with the exception of Nos. 2 and 4 of the street, which are the property of the pursuer. The pursuer proposed to take down the tenements belonging to him, and to build a new tenement in the same line of frontage to Hamilton Street as the present buildings—that is, about four feet in advance of the municipal buildings. The Magistrates being of opinion that it was desirable to have the whole buildings in that division of the street in the same line, served him with a notice requiring him to set back his new buildings four feet upon the terms prescribed by the statute—that is, that he should be paid for any damage which he thereby suffered. In consequence of that, he gave up the project, and allowed both buildings to stand empty from 1878 to 1881 or 1882. Then he made a new proposal, namely, to take down one of the tenements, being No. 2 —being the half nearest Cathcart Square, if they are to be regarded as one tenement—and to erect a new tenement in the old line. The Magistrates served a new requisition. They said, "If you are taking down that building, be it a building in itself or the half of one, you must put it back to the general line of this division of the street." He thereupon brought this action, concluding for declarator in very general terms:—"That the pursuer is entitled, subject to the authority of the Dean of Guild of the burgh of Greenock, to erect a tenement or tenements of shops and offices on the ground bounded on the east by Cathcart Square, Greenock, on the west by the property of the town of Greenock, on the south by Hamilton Street, and on the north by the property of the town of Greenock, which ground is presently the site of the buildings Nos. 2 and 4 Hamilton Street and No. 10 Cathcart Square, in Greenock, and that the pursuer in erecting such tenement or other new building upon the said ground, or any part thereof, is not bound to set back such new building to the line of the house or building which was numbered 6 Hamilton Street, and has recently been taken down, or to any extent, but that he is entitled, subject to the authority of the Dean of Guild of the burgh of Greenock, to build with a frontage to Hamilton Street in the line of the presently existing tenements, Nos. 2 and 4 Hamilton Street, in line of street and according to stipulation of superior." Of course if he got that declarator he would be entitled to take down the whole building—the two tenements, if there are two, and the whole tenement if but one—and to erect in the present line of his buildings, four feet in advance of the municipal buildings, his own new buildings, which would then stand out alone in that division of the street. There is also a subsidiary conclusion for the reduction of the requisition made by the Magistrates upon the pursuer applicable to his proposal to take down the east end of the building, whether one tenement or not, that requisition being that the new building should be in the line of the municipal buildings. That, I say, is a subsidiary conclusion, but the general and principal conclusion is, that he is entitled to pull down and erect his new structure four feet in advance of the municipal buildings, and that the Magistrates have no authority to require him to do otherwise. If the Magistrates have any authority, it is under section 162 of the General Police and Improvement Act of 1862, which is in these terms—"When any house or building, any part of which projects beyond the regular line of the street, or beyond the front of the house or building on either side thereof, has been taken down in order to be altered or is to be rebuilt, the commissioners may require the same to be set backwards to or towards the line of the street, or the line of the adjoining houses or buildings, in such manner as the commissioners may direct, for the improvement of such street." Now, I consider the case in the first instance with reference to the larger and primary claim made by the pursuer, which I may repeat is, that he shall be found at liberty to take down the whole of the tenement and erect a new building, occupying the site of the old, four feet in advance of the municipal buildings. It is said that he is entitled to that—and so far as I can see it is the only argument—because his present structure is in the line of Hamilton Street. Hamilton Street it appears is a long street, and I think it is true that the present building is in a line with that long street. The Magistrates, however, say that they are entitled, according to the fair spirit and meaning of the statute, to regard this division where the municipal buildings are, as a street, and to require that all the buildings in that division or street shall be erected in the same line—the line of the municipal buildings—and that, the pursuer's property being the only one at present with regard to which the opportunity occurs, it must be put back. I am inclined to think that that is a sound contention. It is according to the general spirit and meaning of the Act, which is, among other things, for the improvement of streets. Hamilton Street may be a mile long, or it may be two miles long, but I do not think that precludes the municipal authority from dealing with a distinct division of it, especially that division of it which they have selected for the erection of rather handsome municipal buildings, as being included in the operation of this clause, which is for the improvement of the street and the beautifying of the town. There can be little doubt that it will be for the improvement of the town, or at all events of that particular portion of it, for the work is to be done in such a manner as the Commissioners may direct for the improvement of the street. I think it is not unreasonable therefore for them to direct that when this building in question comes down the new one shall be set back four feet for the improvement of the street, the proprietor having complete compensation for the four feet of building ground which he loses. And, indeed, that is a correct way of putting the case; he loses four feet of building ground, and full and complete compensation is made to him. No special case

can be made here in regard to the character of the ground in question, for the building has been standing empty since 1878, quite unused except as a place for sticking bills upon. It is therefore, in my opinion, a legitimate exercise of the power and authority of the Magistrates, now that it is proposed to take down the building and put up a new one, to require that that new one shall be in the line of the municipal buildings, which I think I am right in saying occupy the whole of the rest of this division in the street.

But then there is a proposal to take down only a part of it. Now, I must say that strikes me very much as it does the Lord Ordinary, that it is a mere device in order to concuss the Magistrates into a payment of more than full and complete compensation, which is all that clause 162 requires them to do in order to improve the street in the manner thereby contemplated. The idea may be thus expressed— the idea on which the pursuer acts. He says, "I deal with this as two tenements. They are both mine. I have been using them jointly, to a large extent at least, but I deal with them as two (and there is some ground in the titles for saying that they were separate at one time). I first take down the one —or if they are two, the half furthest removed from the municipal buildings—leaving the other, or the other half, sticking out into the street to the extent of four feet. I cannot put it back then, because that would be putting my building back from the line of the immediately adjacent house, namely, my own house. Then when I have got up my new house, or one half, I will take down the other, or the other half, and rebuild it in like manner, and I cannot be forced to put it back, because that would be forcing me to put it behind or back from that which I erected last year." Now, I am not disposed to give my countenance to that. I think this may be fairly dealt with as one building, the property of the pursuer—and that the Magistrates are in the reasonable exercise of the power committed to them by a statute for the very purpose of improving and beautifying the street in such manner as they think best, when they require that the new building shall be set back the four feet upon payment of the compensation which the statute provides, and I do not think it necessary for the purposes of this case to determine whether this is one building or two—indeed one is hardly to know what is to be the standard of one tenement or building or of two. They are the property of one man, and it may be borne in mind that a property or a house originally single may easily be divided into two simply by putting up a partition-wall, and making the two divisions the property of separate proprietors. In the same way it is unnecessary to say that two subjects standing on separate stances may easily be made into one. So that this matter is not one to be determined by an examination of the original feus and dispositions applicable to them. I look upon this building as the property of this pursuer, which he is dealing with as one subject, as a house or building within the meaning of clause 162 of the statute; and that although the Magistrates cannot interfere with it as long as it is left standing, yet when the pursuer proposes to take it down, either in whole or in part, they are within the fair and legitimate exercise of their power under the statute when they require him to put it back four feet in order to make it consistent with the harmony and beauty of this division or section of the street in which the municipal buildings and the pursuer's buildings stand. My opinion therefore is that the defenders ought to prevail, and be assoilzied from the conclusions of the action.

Lord Craighill—The pursuer alleges that he is owner of two separate houses, one of them being a corner house having a front to Cathcart Square and another front towards Hamilton Street, the other tenement being situated entirely in Hamilton Street and adjoining the one first described. The first of these houses, according to the date of erection, is No. 10 Cathcart Square and No. 2 Hamilton Street, and the second is No. 4 Hamilton Street. All of them are old, and the pursuer has it in contemplation, as had Mr Cowan, his predecessor in the property, to pull them down that others may be erected in their room. Power so to do was granted by the Dean of Guild of Greenock in 1878, but this warrant has expired, because it was not acted on within two years from the time when it was granted. In 1881 the pursuer, who by this time had become proprietor of the subjects, petitioned the Dean of Guild to sanction the erection conformably to a plan, of which his approval was asked, of a building "consisting of shops, offices, and requisite conveniences on the ground" occupied by No. 10 Cathcart Square and No. 2 Hamilton Street, all in terms of the Greenock Police Act 1877. The authority prayed for was granted; but nothing as yet has followed upon it, the pursuer having previously been served with a requisition by the Police Board of Greenock in which he, "as owner or reputed owner of the said house or building numbered 2 and 4 Hamilton Street and No. 10 Cathcart Square, or otherwise, and which house or building, or a part thereof, is about to be taken down in order to be altered or rebuilt," is required to set backwards the said building about to be erected or altered to the line of the adjoining houses or buildings, No. 6 Hamilton Street (the municipal buildings), and the line of street from the west side of said property to Taylor's Close. The right of the Board of Police to insist in such a demand is the subject-matter of the present action. The pursuer contends that the defenders have exceeded their powers in issuing this requisition, the clause of the Greenock Police Act of 1877, to which the defenders refer as their warrant, being, as the pursuer says, inapplicable to the circumstances of the case. The defenders maintain the opposite, and this controversy is the matter for determination in the present action. The Lord Ordinary has decided in favour of the defenders, and hence the reclaiming-note for the pursuer upon which the cause has come before this Division of the Court.

The power which the defenders claim is said to be conferred by section 162 of the General Police and Improvement (Scotland) Act 1862, which with other clauses of that statute has been made part of the Greenock Police Act 1877. That section enacts that when any house or building, any part of which projects beyond the regular line of the street, or beyond the house or building on either side thereof, has been taken down in order to be altered, or is to be re-built, the commissioners may require the same to be set backwards

to or toward the line of the street, or the line of the adjoining houses or buildings, in such manner as the Commissioners may direct for the improvement of such street. There are thus two cases provided for—one in which any part of a house or building projects beyond the regular line of the street; another, where such projects beyond the front of the house or building on either side thereof. But the Lord Ordinary has not said that the pursuer's buildings project beyond the regular line of the street, and his judgment is not rested to any extent upon this ground—nor could he, as I think, have reasonably offered such a reason for his decision, because the regular line of the street remains unaffected by the erection of the municipal buildings, which occupy merely the fraction of the street on which stood prior to 1881 the old Town-House and other two houses which were removed to make room for that tenement. The setting back of the new building may probably be an improvement to this part of the town, and will certainly bring more into view the municipal buildings; but this or any advantage cannot be obtained against the will of the pursuer unless the case is one provided for by the Greenock Police Act. And it is not provided for by the words now under consideration, because the criterion by which the projection of the existing house or building is to be judged of is not the line of the part or section of the street, but the regular line of the entire street. The defenders therefore must fail on the first of the grounds on which they seek to justify their interference with the building operations of the pursuer.

Their second ground is, that the house or building about to be taken down projects "beyond the front of the house or building on either side thereof," and the Lord Ordinary has given judgment for them upon this ground; but he has reached his conclusion only by finding that "the subjects Nos. 2 and 4 Hamilton Street, Greenock, constitute one house or building in the sense of the statute founded on." On this view of the fact, the pursuer's property projects beyond the municipal buildings which are on the west side; and according to one interpretation of the words "either side thereof," this would in certain circumstances undoubtedly be warrant for the judgment which has been pronounced. But it would not necessarily in all circumstances justify such a conclusion. Are the Police Board of Greenock to interfere when only a portion of the house projects, and that the part which is not contiguous to the building which is set back from the regular line of the street, or when the building which projects is a corner house? The Lord Ordinary has not thought it necessary to consider these questions, but they are worthy of consideration, and indeed must be considered if the fact be that No. 10 Cathcart Square and Nos. 2 and 4 Hamilton Street are one building in the sense of the statute founded upon. If, on the other hand, the pursuer's property is two houses or buildings, none of these questions, or any other question, except that to be afterwards noticed, calls for decision. With regard to the finding which is here the ground of judgment, I consider it to be erroneous, my opinion being that No. 10 Cathcart Square with No. 2 Hamilton Street and No. 4 Hamilton Street are not one, but two houses or buildings.

The first material consideration is, that No. 10 Cathcart Square and No. 2 Hamilton Street was built upon a separate feu from that on which No. 4 Hamilton Street was erected, and was built at a much earlier period. The facts touching this part of the case have been misapprehended by the Lord Ordinary, who gives as his reason for regarding the houses in question not as two separate properties but as one only, that "they were one feu from the beginning" and have continued so to the present day. This, as already stated, is a mistake. The eastmost feu was given off in 1761, and shortly after that time the house No. 10 Cathcart Square and No. 2 Hamilton Street was erected. The feu on which No. 4 Hamilton Street was built was not granted until 1776. There was thus an interval of at least fifteen years between the dates when the buildings were erected. During that time the house first built was a separate tenement, and the subsequent operations which resulted in the building of No. 4 Hamilton Street did not destroy the individuality of that first erected. No doubt, as the Lord Ordinary points out, the west wall of the house first built came to be the east wall of the later erection, and it may be that if No. 2 were supposed to be taken out of the way No. 4 would not be a house at all—that which was its east wall or gable having been removed—this being the second of the considerations by which the Lord Ordinary has been influenced in coming to the conclusion that the subjects in question constitute one house or building, but this reason is also obviously inconclusive. The same thing could have been said had the wall been a mutual gable, and had that gable been removed, which it might well be if the houses which it served belonged to one proprietor.

The Lord Ordinary's last reason is that the subjects "are to be identified as one house, because, looking to the state of possession they were as much united as any double tenement could possibly be, the ground or shop-floor being possessed by one tenant, and the upper portions being possessed by separate tenants, but with access from a common stair, so that if the two were not united from the beginning, they certainly came, at the time this question arose, into the position of being a double tenement in the sense in which the word 'tenement' is generally used." My view, however, is that the mere occupation of parts of two tenements as if these were portions of the same building, there being no structural change upon either, will not convert the two into one house or building in the sense of the statute founded on, or in any reasonable acceptation. The possession of to-day may cease to-morrow, and each house come to be used as if there was no contiguous tenement. What they were originally, they, notwithstanding the possession of a part of each by an occupant whose access was by a common entry, continued to be—that is, separate tenements.

All that remains to be considered is, whether, as the pursuer, though the eastmost or corner house is the only one for the taking down and rebuilding of which authority was asked in his petition to the Dean of Guild, contemplates at an early period after the rebuilding of this house has been completed also to take down and rebuild No 4 Hamilton Street, which is contiguous to the municipal buildings, his case ought not to be dealt with as it would have been if operations upon both houses were to be simultaneous. This,

it may be said, would be justified by the policy of the enactment, but certainly not by its letter; and therefore, as I think, the suggestion cannot be entertained. Proprietors are at liberty to follow their own course unless there be a limitation of their powers, and they are not bound so to order their arrangements as to bring their proceedings within the operation of the statute. On the contrary, they may, if they can, take down and rebuild at such times as they think most convenient for themselves, and neither the suspicion nor even an admission that they so act in order to keep themselves outside the statute will, if its terms are inapplicable, subject them to its operations.

Entertaining these views, though as to this last I cannot say that I have a confident opinion, I am obliged to differ from the opinion of Lord Young, and from that which I understand to be the opinion of the Court.

Lord Rutherfurd Clark—I agree with Lord Young.

Lord Justice-Clerk—I agree with Lord Young. The only difficulty which has arisen in my mind is the question whether the provisions of the statute apply to corner houses, and no doubt there is something that can be said on both sides of that question. I cannot say I have any doubt about it. I am of opinion that the Magistrates have acted with strictly reasonable care, and I do not think that the interest of this pursuer in the ground in question is more than can be met by the compensation directed to be paid by the statute.

The Court adhered.

Counsel for Pursuer—Solicitor-General (Asher, Q.C.)—Pearson — Dickson. Agents—Smith & Mason, S.S.C.

Counsel for Defenders—R. V. Campbell—M'Kechnie. Agents—Archibald & Cuningham, W.S.

Thursday, December 13.

SECOND DIVISION.

[Lord Lee, Ordinary.

SCOTT & NEILL *v.* SMITH & COMPANY.

Sale—Retention—Factor's Lien—Set-off.

Barley sold by a merchant on account of and as agent for D, a disclosed foreign principal, was objected to by the purchasers as not equal to sample, and pending a reference as to its quality, the purchasers, under an arrangement with the seller that they should sell the barley for behoof of whom it might concern, sold part of it. It was found in the reference that they were entitled to reject the barley, and the price they had paid was repaid them by the seller. They claimed to retain the price of the barley sold by them under the arrangement to meet a claim of damage against D, the foreign shipper, maintaining that the sale they had made under the arrangement was on his account. *Held* that the seller having, as D's factor, advanced the amount of the price by his repayment of it to the purchasers, had a lien over the barley therefor; that the sale of part of it was under his (the seller's) authority, and that the claim of retention by the purchasers could not receive effect against him.

This was an action for £46, 3s. 5d. at the instance of Scott & Neill, corn merchants in Leith, against J. B. Smith & Company, also corn merchants there. The facts of the case were summarised by the Lord Ordinary in his note as follows:— "The pursuers, as agents and for account of F. M. Duhne, of Hamburg, sold to the defenders 800 quarters of new Saale barley, guaranteed sweet and free from smell on arrival in Leith, at 37s. 6d. per quarter, payment by London bankers' acceptance at three months from date of bills of lading against shipping documents. It appears that in compliance with Duhne's instructions the buyers' and bankers' names were communicated to him on 18th January, and that on 22d and 23d January the barley was shipped partly per steamer 'Prague,' and partly by steamer 'Cumberland,' Mr Duhne drawing upon the defenders for the amount of the invoice, which was forwarded to the pursuers for them.

"On the arrival of the barley at Leith it was objected to as not conform to guarantee, and upon a reference to arbiters the defenders were found entitled to reject it. This was on 2d February. On 3d February the defenders returned the bills of lading to the pursuers, and the pursuers gave to them their cheque for £1432, 17s. 8d., 'in repayment of the amount of Mr Duhne's invoice.'

"Before the arrival of the barley the defenders had resold it to Messrs Younger & Company at 39s. 6d. per quarter, payable at three months, and on arrival it had been likewise rejected by them as not conform to sample.

"Pending the arbitration between the pursuers and defenders it was arranged that the defenders should, for the benefit of whom it might concern, endeavour to get offers from brewers for the barley, and on 2d February they received from the pursuers the letter No. 14 [*infra*], agreeing that any steps taken by them in disposing of the barley, 'with our consent,' should not prejudice their position in any way.

"Having got an offer for a sample from Messrs John Aitchison & Company, the defenders, under this letter, delivered to them 9 quarters on Saturday morning [3d February], before handing over the bill of lading; and on Monday, 5th, a further quantity of 16 quarters was got by them for Aitchison & Company under a delivery-order granted by the pursuers to the defenders.

"For the price of the quantity so disposed of the defenders on 7th February rendered to the pursuers the account sales [*infra*], amounting to £46, 3s. 5d., and at the same time, or the day before, they rendered to Mr Duhne through the pursuers, the account, bringing out as loss sustained through non-fulfilment of the contract £45, 13s. 2d., and for arbiters' fees paid £3, 3s.—in all, £48, 16s. 2d.

"The latter document was returned by the pursuers in an envelope bearing the words, 'Don't waste any more good paper.' The former was returned with the letter quoted in the defenders' statement [*infra*], in which the pursuers maintain