the landlord sufficiently indicate the character of the forfeiture intended.

Then, as to the question of the trustee's intimation to the landlord. The question of renunciation belongs to a different category of the law, and there seems room for a distinction between *de facto* renunciation or abandonment by the tenant, and renunciation or abandonment by agreement. If, as sometimes happens when a tenant is solvent, he proposes to renounce his lease, and his landlord accepts that proposal, I apprehend there could be no ground for claiming damages, and for this reason, that in the case supposed the landlord has discharged the tenant's obligations under the lease. In such a case it is not necessary that the landlord should sign the deed. Even in renunciations of heritable estate under the older law the superior did not need to give his consent in writing, the tenant renouncing through a notary in the presence of the superior, who merely takes delivery of the deed of renunciation. The question is, whether such a proposal of renunciation was intended by the trustee's letter. I cannot accept the view that it was so, because if such was the tenant's intention, he was calling on the landlord to surrender his undoubted right to damages in respect of the insolvency of the tenant, and if the tenant or the trustee really meant that this claim was to be given up, it was incumbent on him to make his meaning perfectly plain, which he has not done. I can only take the letter as a *de facto* renunciation of the lease without anything following on the part of the landlord importing a waiver of his rights. I am therefore of opinion that the landlord's claim is well founded.

The Court pronounced this interlocutor—

"The Lords having considered the reclaiming-note for the appellants . . . against the interlocutor of Lord Lee, dated 9th October 1889, and heard counsel for the parties, Recal said interlocutor: Recal also the deliverance of the trustee in the sequestration, and remit to him to rank the appellants for £809, 16s. 7d., and decern: Find the appellants entitled to expenses," &c.

Counsel for the Appellants (Reclaimers)—The Lord Advocate—Goudy. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Respondent — Low — Craigie. Agents—Philip, Laing, & Company, S.S.C.

Friday, November 29.

FIRST DIVISION.

[Sheriff of Lanark.

POLICE COMMISSIONERS OF HILLHEAD *v.* MARTIN AND BRUCE.

Burgh — Police — Road — Private Street — Notice — Temporary Repairs — General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *secs.* 150 *and* 154—*Acquiescence.*

Section 150 of the above Act enacts that where any private street is not "sufficiently levelled, paved, or causewayed, and flagged to the satisfaction of the Commissioners," it shall be lawful for them to cause it to be properly levelled, paved, or causewayed and flagged in such way and with such material as to them shall seem most expedient.

By section 154, if a private street is at any time put in good order and condition to their satisfaction, the Commissioners are empowered, on the application of one or more of the owners of premises fronting said street, to declare the same to be a street in terms of the Act, and for ever afterwards vested in them, and thereafter the said street shall be repaired and repairable by the Commissioners.

A street in a burgh was laid out as a private street in 1869. On October 12, 1883, the Commissioners gave notice in terms of the Act that they intended to have the street causewayed. Subsequently, however, yielding to the wishes of a number of the proprietors, they on November 12, 1883, resolved that, while they could not accept macadamizing as a mode of completing the street to their satisfaction in terms of the statute, they would, "as a temporary mode of meeting the requirements of the case, substitute macadamizing for causewaying for the centre of the street, reserving full right at any time hereafter either to order the street to be causewayed, or to order such further repairs or operations to be executed on the same, at the expense of the owners of property abutting thereon, as they may deem proper." Immediately after the work of repairing the street in pursuance of this resolution had been completed, and notice of the assessment had been given to the various proprietors, two proprietors who had not previously joined in any of the representations made to the Commissioners with regard to the street, called on them to take it over under section 154, in respect that it had been put in good order and repair to their satisfaction. The Commissioners deferred consideration of this application, but two years afterwards they yielded to a similar request on the part of a number of the other proprietors.

In an action at the instance of the

Commissioners against the two proprietors above mentioned—*held* (1) that in coming to the resolution of November 12, 1883, the Commissioners had not acted under the authority of the statute, and therefore that the assessment had not been validly imposed on the defenders; but (2) that the defenders were liable therefor, in respect that by their actings subsequent to the notice of assessment they had barred themselves from objecting thereto.

This was an action raised in the Sheriff Court of Lanark by the Clerk to the Commissioners of Police of the Burgh of Hillhead, as representing them, against John Martin and John Wilson Bruce, proprietors of certain tenements in Belmont Street, Hillhead, for payment of £115, 10s., their proportion of a private improvement assessment imposed upon the proprietors of the said street under the General Police and Improvement (Scotland) Act 1862, section 103.

The circumstances under which the claim arose were as follow:—Belmont Street was laid out and formed by the proprietors of the ground in the latter part of 1869. In June of the same year the General Police and Improvement Act 1862 had been adopted by the burgh.

On 12th October 1883 the Commissioners of the burgh issued the following notice—"Notice is hereby given, in terms of the Act 25 and 26 Vict, cap. 101, that the Commissioners of Police of the burgh of Hillhead have resolved that the street . . . known as Belmont Street, is insufficiently formed, levelled, paved, or causewayed or flagged. That the said Commissioners intend to have the said street, in so far as not already done, freed from obstructions, and properly formed and constructed, and also well and sufficiently levelled and causewayed with square-dressed causeway stones, and channelled with hammer-dressed kerbstones and gutters, all at the sight and to the satisfaction of Mr Thomas Wharrie, surveyor of the burgh. That accordingly plans of the said intended work and sections showing the level of the said street as it is proposed to be formed, have been prepared and lie for inspection within the chambers of Messrs Wharrie, Colledge, & Brand, C.E., 109 Bath Street, Glasgow. Further, that the said Commissioners will attend within the Burgh Chambers, Victoria Street, Hillhead, on Monday the 12th day of November 1883, at eight o'clock evening, for the purpose of hearing the owners of property in or near said street, and all other parties interested in the aforesaid intended work or operation, or likely to be affected or aggrieved thereby, or the agents of such persons; and of pronouncing judgment upon any objections which may be then brought forward, with certification to all who then fail to appear that the Commissioners will thereafter proceed with the execution of the said intended work at the expense of the parties legally liable therefor."

In consequence of this notice a deputation from a large number of the proprietors in Belmont Street attended the meeting of Commissioners on 12th November 1883, and presented a memorial signed by 61 residenters or proprietors in these terms—"That it is proposed to causeway the said street, called Belmont Street. That, apart from all questions of expense, this would be extremely inadvisable, in respect it would seriously increase the noise of passing vehicles and carts, and deteriorate the value of the memorialists' property. That the memorialists would respectfully suggest that the street should be properly macadamized and rolled, &c. . . . That the traffic on Belmont Street is very small."

Having heard members of the deputation the Commissioners came to the following resolution, which was entered in the minute of said meeting, and subsequently embodied in a circular and notified to the various proprietors—"The Commissioners . . . . . Resolved, 'that looking to the situation of the street, and the probable amount of traffic over it, they could not accept macadamizing as a mode of forming and completing the street to their satisfaction in terms of the statute, but that, as the proprietors interested are unanimous in desiring macadamizing, they would, in the meantime, and as a temporary mode of meeting the requirements of the case, substitute macadamizing for causewaying the centre of the street; reserving full right at any time hereafter either to order the street to be causewayed, or to order such further or other repairs or operations to be executed on the same, at the expense of the owners of property abutting thereon, as they may deem proper.'"

The defenders were not parties to the memorial, and though present at the meeting of 12th November 1883, they took no active part in the proceedings.

Immediately after the Commissioners had come to the above resolution the work of repairing the street was begun, and it was completed in October 1884. Upon the 15th October 1884 notice was given to the defenders that they were charged with the said private improvement assessment of £115, 10s. as the proportion of the cost of the work done on Belmont Street falling upon them in respect of their property there.

About the beginning of the month of November 1884 the defenders sent the following letter to the Commissioners—"We, being proprietors of properties fronting or abutting upon Belmont Street, Hillhead, in respect said street has now been put in good order and condition to your satisfaction, require you to declare the same to be a street as defined in the Police and Improvement (Scotland) Act (25 and 26 Vict. cap. 101), and to be for ever afterwards vested in you, as Commissioners foresaid, and to be repaired and repairable by you under the authorities and powers of said Act."

On 10th November this application was brought before a meeting of the Commissioners, and consideration of it was deferred.

On 29th October 1886 Messrs Craig & Risk, writers, Glasgow, wrote to the Commis-

sioners in these terms—"A number of the proprietors of lodgings in this street for whom we act think that it is now time that the street should be taken over by the burgh as a public street, seeing that the cost of the repairs executed by the Commissioners has been paid by them."

This application was submitted to the Commissioners on 8th November 1886, who acceded to the wish expressed by the proprietors. The minute of meeting of that date bore—"In virtue of the powers conferred upon them by the General Police and Improvement (Scotland) Act 1862, and particularly section 154 thereof, declared the said Belmont Street from the south end of the bridge over the Kelvin to the Great Western Road to be a street as defined in the said General Police and Improvement (Scotland) Act 1862, and to be for ever afterwards vested in the Commissioners, and that it should, with the exception of the footway, be repaired and repairable by the Commissioners under the authority and powers of the said Act, and of the Roads and Bridges (Scotland) Act 1878, and other Acts applicable thereto."

The pursuer pleaded, *inter alia* — "(3) The defenders having acquiesced in the steps taken by the pursuers, are barred from now challenging the same."

The defenders pleaded, *inter alia*—"(2) The operations in question not having been performed by the pursuers in virtue of any statutory power conferred on them, and the defenders not being responsible for the expense thereof, decree of absolvitor should be granted."

By section 150 of the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101), it is enacted as follows — "Whereas it would conduce to the convenience of the inhabitants, and be for the public advantage if provision were made for the levelling, paving, or causewaying and flagging of streets which have been laid out and formed by persons who have neglected to have the same properly levelled, paved, or causewayed and flagged, and for preventing such inconvenience in the future: Be it therefore enacted, that where any private street or part of a street is, at the adoption of this Act, formed or laid out, or shall at any time thereafter be formed or laid out, and is not, together with the footways thereof, sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the Commissioners, it shall be lawful for the Commissioners to cause any such street, or part of a street, and the footways thereof, to be freed from obstruction, and to be properly levelled, paved, or causewayed and flagged and channelled in such way and with such material as to them shall seem most expedient, and no such street shall be considered to have been sufficiently paved or causewayed and flagged unless the same shall be completed with kerbstones and gutters to the satisfaction of the Commissioners." And section 154 enacts—"If any private street shall at any time be made, paved, or causewayed and flagged, and put in good order and condition to the satisfaction of the Commissioners, then and on application of any one or more of the owners of premises fronting or abutting upon such street, it shall be lawful for the Commissioners to declare the same to be a street as defined in this Act, and for ever afterwards vested in the Commissioners, and shall, with the exception of the footway, be repaired and repairable by the Commissioners under the authority and powers of this Act."

The Sheriff-Substitute (GUTHRIE) on 12th January 1888 sustained the defenders' second plea, and assoilzied them.

The pursuer appealed to the Sheriff, who on 8th February 1889 issued the following interlocutor—"Finds that prior to and at 11th October 1883, Belmont Street, in the burgh of Hillhead, had been laid out and formed as a private street within the meaning of the General Police and Improvement (Scotland) Act 1862, but that the same had not then been levelled and completed to the satisfaction of the Commissioners in terms of section 150 of that Act: Finds that on the said 11th October 1883 notice by the posting of handbills was given by the Commissioners of their intention to have the street levelled and completed to their satisfaction in manner set forth in said notice, and that in the following month, on a representation from parties interested, the Commissioners resolved to modify their proposed scheme to the extent of substituting macadamizing for causewaying in regard to the centre of the street, and that notice of this modification was given by post circulars to the proprietors: Finds that the defenders Martin and Bruce, who are owners *pro indiviso* of a property abutting on the said street, and who have appeared in this action, were made aware of, but took no objection to the modified scheme: Finds that the work was afterwards executed in accordance therewith, and that the sum sued for is the amount applicable to the said defenders' property of a private improvement assessment imposed to meet the expense incurred in the execution of the work: Finds that the said assessment was validly imposed under the said Act, and that the said defenders are liable therefor, and decerns against the defenders as craved, &c.

"*Note.*—I have come to the conclusion that the pursuer, as representing the Police Commissioners of Hillhead, is entitled to enforce against the defenders the private improvement assessment sued for in this action . . . The proceedings were initiated by a notice bearing date 11th October 1883, which was published by the posting of handbills in terms of the Act intimating that the Commissioners intended to have the street, 'in so far as not already done, freed from obstructions and properly formed and constructed, and also well and sufficiently levelled and causewayed with square-dressed causeway stones, and channelled with hammer-dressed kerbstones and gutters' to the satisfaction of the burgh surveyor. Some criticism has been passed on behalf of the defenders on the terms of this notice. It is said that it does not bear in terms to be a notice under the 150th sec-

tion, and is so conceived as to have the appearance and character of a notice under the 394th section applicable to public streets. That criticism, however, is in my opinion unfounded. There is no specific form prescribed by the Act in which notices under the 150th section must be given, and as the notice in the present case specifies work authorised by the 150th as distinguished from the 394th section, it seems to me sufficient — *Youden* v. *Jackson*, 14 R. 1001. The notice given, however, was not fully carried out. An opportunity was afforded by it to parties interested to submit any objections they might have to a meeting of the Commissioners to be held on the evening of 12th November, and accordingly on that evening a deputation of proprietors and occupiers of houses in the street attended and presented a memorial numerously signed, praying that the street should be macadamized instead of being causewayed as intimated in the notice. For this modification of the Commissioners' proposals it was urged as a reason, that, apart from the question of expense, the causewaying of the street would, by increasing the noise of the traffic, deteriorate the value of the property. The two defenders who appear to defend this action both attended on the occasion, and although they neither signed the memorial nor spoke at the meeting, and say that they were only listeners, it is tolerably plain that they were listeners not merely interested but sympathising with the views of the memorialists. Not only did they by silence impliedly acquiesce in the representations of the memorialists, but it is said in evidence by one of them (Mr Bruce) that if the Commissioners had carried out their intention of square-dressing with granite sets he would have objected. The result of the interview was that by a minute passed on the same evening the Commissioners resolved to substitute macadamizing for causewaying for the centre of the street, and copies of their deliverance to that effect were sent by post circular to the proprietors. The two defenders Mr Martin and Mr Bruce say that they do not remember having received this notification, but I do not think that this want of recollection on their part can avail to overcome the presumption of their having received it along with the other proprietors in the street. The evidence of Mr Smith, the deputy burgh clerk, shows a charge in the burgh accounts for postage of circulars to the Belmont Street proprietors at the date in question. That the defenders were not in fact, left in ignorance of the Commissioners' change of intention is shown by the evidence of Mr Martin. It is objected, however, that apart from any question as to whether the defenders did or did not receive the intimation, the notice itself is informal. The previous notice it is said ought to have been withdrawn and a new notice substituted. In considering the force of the objection it is to be borne in mind that the Commissioners were simply yielding to the apparently unanimous desire of the proprietors in modifying in a certain particular the scheme of which they had given notice, and adopting a mode of completing the centre portion of the street which involved a smaller expense. It seems to me that in the circumstances it would be unreasonable to require any more formal notice than the copy of the Commissioners' resolution which was sent. It is true that that resolution contains a reservation of a right on the part of the Commissioners to order further repairs or operations to be executed at a future time, and such a reservation may have been beyond their powers. But that does not, I think, invalidate the operative part of their intimation, that there was to be a modification of the previous notice to the effect of substituting macadamizing for causewaying in regard to the centre of the street. I hold therefore that sufficient notice of the work was given under the Act, and that the defenders are liable for the assessment which was imposed to meet the expense."

The defenders appealed, and argued—This was an illegal assessment. The circular embodying the resolution of 12th November 1883 amounted to a withdrawal of the previous notice which had been given with regard to the street, and was not a valid notice itself, because no opportunity of appeal was given as provided by the statute—General Police and Improvement (Scotland) Act 1862, sec. 397. Under section 150 of the Act the Commissioners had no power to call on the proprietors for temporary repairs, but only to form and complete the street to their satisfaction. The resolution come to at the meeting of 12th November was consequently not within the statutory powers of the Commissioners under that section. The import of that resolution was that they stopped proceedings under the Act. The defenders never having agreed to this unstatutory proceeding by the Commissioners, were not liable in the assessment sued for.

Argued for the respondent—The notice of 12th October was valid, and the resolution of 12th November only modified the scheme of operations intended by the Commissioners. Sufficient notice had therefore been given to satisfy the statutory requirements. The minute containing the resolution was quite in terms of the statute, except that it contained a reservation not in terms of the statute. Though part was bad, that did not invalidate the whole. At any rate, the defenders had adopted the mode of repairing the street put in force by the Commissioners as a satisfaction of their powers under section 150 by applying to have the street taken over under section 154. They could not therefore object to bear their share of the assessment, as they were taking the benefit of the work done. Though the defenders' application was not granted at the time, that made no difference, as a subsequent application by other proprietors in similar terms was granted after being intimated to them.

At advising—

LORD PRESIDENT—When this case was before the Sheriff and Sheriff-Substitute a

number of pleas and objections were urged which are not now part of the case. The argument in this Court has been confined to the second plea-in-law for the defenders and what is said to be covered by the third plea for the pursuer. The first question is, whether the operations carried on by the Commissioners were under the statute, and had the authority of the statute? and the second question as stated in the pursuer's third plea is, whether the defenders, having acquiesced in these operations, are barred from now challenging them? I would not state the question in these terms, but I think the plea sufficiently covers the argument which was submitted under it.

The first question, then, is, whether the operations were made under the statute, or whether they are open to objection under the statute, and therefore whether the assessment imposed can be recovered or not? The original notice is admitted to be in terms of the statute. It sets out—"Notice is hereby given, in terms of the Act 25 and 26 Vict. cap. 101, that the Commissioners of Police of the burgh of Hillhead have resolved that the street . . . . known as Belmont Street, is insufficiently formed, levelled, paved, or causewayed or flagged. That the said Commissioners intend to have the said street, in so far as not already done, freed from obstructions, and properly formed and constructed, and also well and sufficiently levelled and causewayed with square-dressed causeway stones, and channelled with hammer-dressed kerbstones and gutters, all at the sight and to the satisfaction of Mr Thomas Wharrie, surveyor of the burgh." The inhabitants of the street, or a great many of them, were not inclined to have the street causewayed chiefly on account of the noise, and, considering that the street consisted of dwelling-houses, they thought that some other mode of formation was more expedient, and requested the Commissioners to reconsider their decision. It is perfectly plain that the Commissioners might have acceded to such a request, but if they made up their minds to do so on the motion of a certain number of proprietors, I think the course they ought to have taken was to have issued a fresh notice of their intention. What they actually did was this, they heard certain memorialists at a meeting on 12th November 1883, to which all parties interested were called, and then they resolved "that, looking to the situation of the street, and the probable amount of traffic over it, they could not accept macadamizing as a mode of forming and completing the street to their satisfaction in terms of the statute, but that as the proprietors interested are unanimous in desiring macadamizing, they would in the meantime, and as a temporary mode of meeting the requirements of the case, substitute macadamizing for causewaying for the centre of the street, reserving full right at any time hereafter either to order the street to be causewayed," &c.

Now, they proceeded under that resolution to form the street, and lay the centre with macadamizing instead of causewaying —a mode of formation which, according to the minute, "they could not accept . . . as a mode of forming and completing the street to their satisfaction in terms of the statute." It therefore appears to be very clear that what they did in macadamizing the street was a proceeding outwith and unauthorised by the statute, and done in the exercise of a discretion which they seem to have imagined they had under the statute. or in respect of a unanimous wish on the part of the proprietors, which as a matter of fact did not exist.

The next thing they did was to serve a notice upon the proprietors, and upon the defenders among them, to pay their share of the assessment laid on to defray the cost of the work done on the street, and if the matter had stopped there I should be clearly of opinion that the assessment was illegal and could not be recovered, because the Commissioners themselves confessed and recorded in their minute that what they were doing was not in terms of the statute. The case, however, does not stop there, and subsequent documents throw great light on the position of the parties. The defenders Bruce and Martin towards the end of 1884 served this notice on the Commissioners—"We, being proprietors of properties fronting or abutting upon Belmont Street, Hillhead, in respect said street has now been put in good order and condition to your satisfaction, require you to declare the same to be a street, as defined in the Police and Improvement (Scotland) Act (25 and 26 Vict. cap. 101), and to be for ever afterwards vested in you, as Commissioners foresaid, and to be repaired and repairable by you, under the authorities and powers of said Act." Now, the way in which the street had been put in "good order and condition" was by the operations which had been conducted, although without the statute, by the authority of the Commissioners. Therefore the defenders seem to me to confess that the street had been put in good order and repair to the satisfaction of the Commissioners, and that that had been effected by means of the improvements carried on under the order of 12th November 1883, though that was not in itself a statutory order. In the month of October 1886 Messrs Craig & Risk, on behalf of a number of the proprietors in Belmont Street, addressed a letter to the same effect to the Town-Clerk of Hillhead. This latter notice was not in such a statutory form as that sent by Bruce and Martin, but in substance it was the same. Now what was done with these notices was this—The application by Bruce and Martin was taken up on the 10th of November 1884, and the Commissioners deferred consideration of it in the meantime. But in November 1886 they resumed consideration of the matter. They seem to have made no reference to Bruce and Martin's application, but only to Craig & Risk's, and they proceeded to record the application by Craig & Risk in these terms—"The Clerk submitted an application by Messrs Craig & Risk, writers, on behalf of certain proprietors of property abutting on the street, to have the street taken over by the Commissioners as a public street, of

which he reported he had given notice to all the other proprietors in the street, requesting them, if they had any objection to state to the granting of the application, to give notice on or before Saturday 6th inst. of such objections, and that he had not received any objections." Mr Risk appeared, and was heard in support of the application, and thereafter the Commissioners, "in virtue of the powers conferred upon them by the General Police and Improvement (Scotland) Act 1862, and particularly section 154 thereof, declared the said Belmont Street from the south end of the bridge over the Kelvin to the Great Western Road to be a street, as defined in the said General Police and Improvement (Scotland) Act 1862, and to be for ever afterwards vested in the Commissioners, and that it should, with the exception of the footway, be repaired and repairable by the Commissioners under the authority and powers of the said Act, and of the Roads and Bridges (Scotland) Act 1878, and other Acts applicable thereto."

Now, I apprehend that under that minute this street was effectually made a public street under the 154th section of the Act. It is also, I think, quite clear that what enabled the Commissioners to do this was the work they themselves had done in repairing the street, and the question comes to be, whether the defenders are entitled to take benefit by the procedure under the 154th section, and at the same time refuse to pay their share of the expenses incurred by the Commissioners in putting the street into the repair which enabled them to declare it a public street under that section? I am of opinion that they are not. I think if they take benefit by what has been done they must also share the liability for the expense which has enabled that to be done. No doubt it is to be remarked that there is no record of a change of opinion on the part of the Commissioners between the resolution of 12th November 1883 and the minute of 8th November 1886, but I can understand that the Commissioners may have come to see that it was not altogether satisfactory to hold that macadamizing the street was not such a way of repairing it as would satisfy them. Experience may have satisfied them that their original idea was a mistake, and that the repairs originally made by them were quite sufficient under section 154—that macadamizing was not so unsuitable for the traffic as they previously supposed. Therefore, while I am of opinion that the original proceeding itself was beyond the statutory powers of the Commissioners, I think that the defenders are debarred from advancing that objection by their own subsequent proceedings.

I am afraid we must recal the Sheriff's interlocutor, because it contains a finding inconsistent with the opinion I have just pronounced, namely, that valid notice was given by the Commissioners of the modification of their original scheme. We will therefore recal the interlocutor of the Sheriff, and pronounce an interlocutor proceeding upon appropriate findings in fact.

LORD SHAND—It appears from a comparison of the proceedings in the Court below and the arguments we have listened to that we are not called on to decide here much that was matter of discussion in the Court below.

With regard to the questions argued before us, and with which your Lordship has dealt, I think, in the first place, that the chief blot on the proceedings of the Commissioners was not that they substituted macadamizing for causewaying, but that they resolved that they could not accept macadamizing as a mode of forming and completing the street to their satisfaction, but only as a temporary mode of meeting the requirements of the case. The result of that is to stamp the work as repairs only, and not as a mode of completing the street to the satisfaction of the Commissioners, which is the only thing the statute authorises them to do. I concur therefore in thinking that the resolution of the Commissioners was open to objection on the part of the proprietors. The latter were entitled to say, "This is an operation which is regarded as a mere repair, and if that be so, the Commissioners have no right or statutory authority to enforce an assessment in respect of it." If that was the true intention of the Commissioners, their only safety was to have taken the proprietors all along with them as a matter of legal obligation. But assuming, as I do, that the Commissioners had no right to enforce the assessment in question but for what followed, I agree that what followed bars the appellants from maintaining that they are not bound to pay their share of the assessment. It is not to be lost sight of that they were present at the meeting of 12th November 1883, they knew the result of that meeting, that they knew the work had been done and saw it done, and it is important also to remember that the notice of assessment was sent them along with a statement of the amount by letter dated October 15, 1884. Now, the appellants having received that notice, and knowing all that had been done, and the intention of the Commissioners, write a month after saying—"We, being proprietors of properties fronting or abutting upon Belmont Street, Hillhead, in respect said street has now been put in good order and condition to your satisfaction, require you to declare the same to be a street." Now, considering that that application is sent to the Commissioners, who had intimated their account for repairing the street, it seems to me to be the same as saying, "We are bearing a share of the expense of the repairs, and therefore take advantage of that expenditure to ask you to take over the road as a public street." Consideration of this application was deferred, but ultimately the request was granted on the view, I cannot doubt, that the proprietors were unanimous. It appears to me that this is no mere case of acquiescence on the part of the appellants, but is a taking of benefit from the expenditure on the road to have it taken over as a street, and I think they could only do that on condition of paying their share of the assessment imposed to repay the expense

of the operations upon the road.

LORD ADAM—I concur in thinking that the assessment as originally imposed was illegal, and I think so because the Commissioners under section 150 have no power to order any works or operations except such as will produce the street formed and completed to their satisfaction. Now, the minute of the Commissioners bears that these repairs were not intended to produce that result. They say themselves that the work was only regarded as a temporary repair. That resolution therefore was, I think, illegal, and the assessment which followed on it not one which could be enforced.

The matter, however, does not rest here. The work was completed before the 15th October 1884, and then a notice of assessment was sent to the appellants for payment of their share of the expense of the operations. Shortly after, the appellants applied to the Commissioners to have the street declared a public street, "in respect said street has now been put in good order and condition to your satisfaction." I think if the Commissioners had dealt with that letter at the time, and agreed to take the street over, it would have been very difficult for the appellants to refuse to bear their share of the expense of the work done. It is quite true that the Commissioners did not at once accede to the application, and I can easily see a reason for their delaying, because the application was only by two proprietors, and they may well have hesitated till they knew something more of the wishes of the proprietors. They did not, however, refuse the application, but deferred consideration of it. On receiving a memorial from a number of the proprietors of the street, consideration of the application was resumed, and the result was that it was resolved to take over the street as a public street. The proposition now made is that though the operations enabled the Commissioners to produce a street with which both they and the proprietors are satisfied, yet the appellants, who have got the benefit, are not bound to bear their share of the expense of these operations. I agree with your Lordship that they must pay their share of the assessment.

LORD M'LAREN—The question in this case is, whether the Commissioners have exercised their power under sec. 150 of the General Police Act of 1862 in a formal and lawful manner. Their first view was that causewaying was necessary in order to complete the street to their satisfaction, and a notice of the operations intended, to which no objection can be taken, was given to the proprietors. A number of the proprietors objected to the particular mode of forming the street which had been adopted, and the Commissioners gave effect to their representations. In their resolution acceding to this request the Commissioners sought to guard themselves against admitting that the operations they were going to undertake would be a final exercise of their powers, and the language they adopted was such as to place them outside the statute altogether.

However, the defenders, after the operations on the street had been completed, and very soon after they had received a notice of assessment in respect of them, called upon the Commissioners to take over the street as a public street. Their request, I think, comes to this, that if the Commissioners would take over the street as public they would not insist in their objections to the assessment. Their interest to object would in that case be undoubtedly gone, because they never could be again called upon to pay an assessment for putting the street in good order. And I think their application and the subsequent granting of it, take away their right to object. Sec. 154 presumes that the street has been put in order to the satisfaction of the Commissioners, and I think it is impossible to maintain two such inconsistent propositions as that the Commissioners were bound to take over the street, and at the same time to say that what had been done to put it in a condition enabling them to take it over had not been done in the true exercise of their statutory authority. I think therefore that the defenders are justly liable in their share of the assessment.

The Court pronounced an interlocutor to this effect:—

"Recal the interlocutor of the Sheriff appealed against: Find that on 12th November 1883 the Commissioners resolved, that looking to the situation of Belmont Street, and the probable amount of traffic over it, they could not accept of macadamizing as a mode of forming and completing the street to their satisfaction in terms of the statute, but that as the proprietors interested were unanimous in desiring macadamizing, they would in the meantime, and as a temporary mode of meeting the requirements of the case, substitute macadamizing for causewaying for the centre of the street, and instructed the surveyor to prepare and issue schedules accordingly, and remitted to the Streets Committee to proceed with the work: Find that the work was thereafter executed in accordance therewith: Find that on 15th October 1884, the Commissioners gave notice to the defenders John Martin and John Wilson Bruce that in terms of the General Police and Improvement (Scotland) Act 1862, sec. 103, they were charged with the reimbursement of £115, 5s. 10d. as the amount applicable to the said defenders' property of a private improvement assessment imposed to meet the expense incurred in the execution of the work: Find that upon 10th November 1884 the said defenders made application to the Commissioners requiring them, in respect the said street had been put in good order and condition to the satisfaction of the Commissioners, to declare the same to be a street as defined in the said Act, and that of the same date the said applica-

tion was submitted to the Commissioners, who deferred consideration of the matter in the meanwhile: Find that thereafter on 8th November 1886 the Commissioners, in virtue of the powers conferred on them by the said Act, and particularly section 154 thereof, declared the said street to be a street as defined in the said Act, and to be for ever afterwards vested in the Commissioners, and that it should, with the exception of the footway, be repaired and repairable by the Commissioners under the authority and powers of the said Act, and other Acts applicable thereto: Find that the foresaid assessment imposed upon the said defenders was not validly imposed under the Act, but find that the said defenders by their said actings subsequent to the said notice of assessment have barred themselves from objecting to the said assessment, and are liable therefor: . . . . Decern against the defenders as craved," &c.

Counsel for the Pursuer (Respondent) — Guthrie — Younger. Agents — Morton, Neilson, & Smart, W.S.

Counsel for the Defenders (Appellants)— The Lord Advocate—Salvesen. Agents— Sturrock & Graham, W.S.

Friday, November 29.

FIRST DIVISION.

[Court of Exchequer.

SMILES (SURVEYOR OF TAXES) *v.* MERCHANT COMPANY OF EDINBURGH.

Revenue—Inhabited-House Duty—Exemption—Customs and Inland Revenue Act 1878 (41 *Vict. cap.* 15), *section* 13, *sub-section* 2.

By the above sub-section it is provided that "Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted" from inhabited-house duty.

The secretary of a Merchant Company had four rooms assigned to him as an office in the premises occupied by the company. Besides transacting in these rooms the legal business falling to him as solicitor of the company, he also carried on there his private business as a law-agent.

Held that the company's premises did not come under the exemption contained in the above sub-section, in respect that they were not occupied solely for the purposes of the trade or business of the occupier.

At a meeting of the Commissioners for the general purposes of the Income-Tax Acts, and for executing the Acts relating to inhabited-house duties for the county of Edinburgh, held at Edinburgh on the 28th January 1889, and at an adjourned meeting held at Edinburgh on the 10th May 1889— The Merchant Company of Edinburgh appealed against an assessment made upon them for the year 1888-89, in the sum of £31, 17s. 6d., being inhabited-house duty at the rate of 9d. per pound on £850, the annual value of the premises occupied by them at 14 Hanover Street, Edinburgh.

There were several offices in the premises, one of which, consisting of four rooms, was occupied by Mr A. Kirk Mackie, S.S.C., secretary to the company. Mr Mackie, besides transacting on the premises all the conveyancing and other legal business falling to him as solicitor of the company, also carried on his private business as law agent and conveyancer in the rooms allocated to him in the company's offices. No rooms were set apart specially for Mr Mackie's private business.

The assessment was made under 14 and 15 Vict. cap. 36, and rule 5 of Schedule B of the relative Act 48 Geo. III. cap. 55.

The appellants contended that the premises were occupied for the purposes of business in the sense of the Act 41 Vict. cap. 15, section 13, sub-section 2, the business being the management of the Merchant Company, and charitable institutions, schools, &c., therewith connected, and maintained that the premises came under the exemption provided by 41 Vict. cap. 15, section 13, sub-section 2.

The Surveyor of Taxes Mr James S. Smiles maintained the contrary.

The Commissioners determined that the premises were business premises, and came under the exemption provided by 41 Vict. cap. 15, section 13, sub-section 2.

At the request of the Surveyor of Taxes, who expressed dissatisfaction with the above decision, the present case was stated for the opinion of the Court of Exchequer.

By section 13 of 41 Vict. cap. 15, it was enacted—"With respect to the duties on inhabited houses for the year commencing, as respects England, on the 6th day of April, and as respects Scotland, on the 25th day of May 1878, and for any subsequent year, the following provisions shall have effect. . . . (2) Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said Commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

Argued for the Surveyor of Taxes—The business carried on by the company was not truly business for the purpose of making profit in the sense of the Act. but was merely the administration of large accumulations of trust funds. The exemption therefore given by the Act did not apply. The fact that part of the funds administered was a Widows' Fund did not alter the case—*Incorporation of Tailors of Glasgow* v. *Inland Revenue*, May 26, 1887,