LORD KINNEAR—I am of the same opinion. But I agree with Lord Adam that there is no element of judicial compact in this case. If there had been any question of contract arising out of the proceedings in the Dean of Guild Court there might have been some force in Mr Craigie's argument on the reservation by the petitioners of their whole rights and pleas contained in their minute of restriction. But there can be no contract between a Court charged with the duty of deciding questions of legal right and the suitors before it. What I do think of importance is that the Dean of Guild Court may make such conditions as to the building line as are competent, and may insert these conditions in the warrant. In this case the warrant was granted upon clearly expressed conditions, and although the interlocutor proceeds in respect of a restricted demand as shown upon a plan docqueted by the petitioner, the conditions as to air space are not imposed by virtue of any conventional stipulation by him, but in the exercise of the inherent authority of the Dean of Guild Court. The applicant was not bound to build under the authority so granted unless he pleased, but he could not build otherwise, and he could not build under that authority and reject the conditions on which it was granted. It appears to me that the clause in the Act of Parliament would be futile if after the Dean of Guild has granted authority to build on certain conditions imposed for the purpose of enforcing the Act, the person who has obtained such authority were to be allowed to encroach on those conditions. I think the petitioners are not entitled to encroach upon the open space, seeing that it was made a condition of their getting authority to build that the space should remain open, and for this reason I think the interlocutor appealed against should be affirmed.

The Court dismissed the appeal.

Counsel for the Appellants — Salvesen, K.C.—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Clyde, K.C. —R. S. Horne. Agents—Simpson & Marwick, W.S.

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*Saturday, January* 23.

## SECOND DIVISION.

[Sheriff of Stirling and Dumbarton.

## SPEIRS & KNOX *v.* MARSHALL'S TRUSTEES.

*Road—Street—Paving by Local Authority —Right of Relief — Bondholder Subsequently Entering into Possession—Owner in Default—Public Health (Scotland) Act* 1897 (60 *and* 61 *Vict.* c. 38), *secs.* 39 *and* 150.

The Public Health Act 1897, section 39, authorises the local authority to pave a private street (if the owners of houses fronting the street fail to do so on requisition), and thereafter to recover the expenses from the "owners in default." Section 150 entitles the local authority to recover "any costs and expenses" for which the owners of premises may be liable from "any person who then or at any time thereafter occupies such premises."

A county council, acting as the local authority under the Public Health Act 1897, served a requisition on the proprietor of a tenement fronting a private street calling upon him (along with other owners) to pave said street. The requisition not having been obeyed, the county council executed the work, and by decree in the Sheriff Court recovered the proportionate part of the cost from a firm of house factors who managed the tenement in question, on the ground that they fell within the definition of "owners" in the Act. The house factors having obtained an assignation of the rights of the county council, brought an action concluding for reimbursement of the payments so made against the holder of a bond and disposition in security, who in terms thereof had entered into possession of the tenement. The bondholder had entered into possession after the requisition to pave the street, but before the county council had allocated the expenses on the different proprietors. *Held*, on a construction of the terms of the Public Health Act, that the pursuers were entitled to decree.

The Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), section 39, enacts that where any street within a certain category is not levelled, macadamised, and made good to the satisfaction of the county council, "such authority may by notice addressed to the respective owners of the premises fronting, adjoining, or abutting on such street," order them to do such works as are required. The section provides further —"If such order is not complied with the said authority may, if they think fit, execute the works mentioned therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default."

Section 150 of the Act enacts as follows— "It shall be lawful for the local authority, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under this Act, either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by this Act."

In March 1899 the County Council of Dumbarton issued notices under section 39 of the Act to the proprietors of properties in Temple Gardens, Temple, including numbers 1 and 3 thereof, calling upon them to level and macadamise the streets abutting on their properties.

These notices having been disregarded by all the proprietors concerned, the County

Council executed the works required in terms of the statute.

The works were completed in the end of April or beginning of May 1900.

John Coubrough, who was proprietor of Nos. 1 and 3 Temple Gardens when the notices referred to were issued, was sequestrated in April 1900, and thereafter the defenders of the present action, the trustees of the deceased Thomas Alexander Marshall, as bondholders over Coubrough's property in Temple Gardens, entered into possession thereof.

The pursuers of the present action, Messrs Speirs & Knox, house factors, Glasgow, acted as factors for 1 and 3 Temple Gardens on behalf of Coubrough, and thereafter on behalf of Marshall's trustees.

In January 1901 Messrs Speirs & Knox received notice from the County Council intimating the amount assessed upon the properties in question in respect of the works referred to, and for this sum the County Council obtained decree in February 1903 in an action in the Sheriff Court at Dumbarton at their instance against Speirs & Knox. This action was duly intimated to Marshall's trustees.

The present action was raised by Speirs & Knox against Marshall's trustees, for recovery of the sums paid by them as factors for 1 and 3 Temple Gardens.

On 24th July 1903 the Sheriff-Substitute (P. J. BLAIR) granted decree in terms of the conclusions of the pursuer's petition.

On appeal the Sheriff (LEES) adhered on 23rd October 1903.

The defenders appealed, and argued—Section 39 of the Act imposed liability for the works there specified upon those owners who received orders to execute the works; and that liability did not attach to subsequent owners coming into possession after the works had been executed—*Currie* v. *M'Gregor*, November 16, 1871, 44 Scot Jur. 68; *The Queen* v. *New River Company*, 1879, 4 Q.B.D. 309. Section 150 did not extend the liability, but merely empowered local authorities to recover the expense of works executed by them not only from "owners in default" in the sense of section 39, but alternatively from the occupiers. The defenders were not "occupiers."

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK—I think the Sheriff's judgment is right. There is no doubt that under section 150 of the Act the public authority has the right to recover payment from the person in charge of the property. But it is now said that by the terms of section 39 parties who paid the assessment, but were not liable to do so except as persons from whom the public authority had right to recover, are not entitled to demand relief from the present owners. I do not agree with this reading of the Act. Section 39 no doubt imposes the primary liability upon the "owner in default"—that is, the owner to whom the notice was sent. But this does not mean that the liability may not be transmitted to a subsequent owner, and if, as in this case, house factors in charge of the property have paid the cost of the repairs, they are entitled to recover the money from the owner, even if he has acquired or entered into possession of the property only after the repairs were executed.

LORD YOUNG — I have read the judgment of the Sheriff in this case, and have listened to the arguments against that judgment. My impression was that the judgment was right, and nothing which I have heard has altered that impression. I confess that the defence has rather surprised me, because the whole justice and equity of the case is with the pursuers. They are professional house factors, and acted for the author of the present defenders, who had disponed the title of the property to the defenders but still remained in possession. When the defenders came into possession of the property the pursuers continued to act as factors upon the employment of the defenders, just as they had acted before on the employment of the defenders' predecessor. As such factors the pursuers were called upon by the County Council to pay the cost of repairing the street, which they paid—and properly paid—for I think they were bound to do so. When they come to claim relief they seek it against the successors of the person for whom they acted at the time when the repairs were executed, against the parties who had then the title to the premises and could have obtained possession at any time. Under these circumstances to refuse payment and to defend this action seems to me very unreasonable, and on the whole matter I am of opinion that the appeal should be dismissed with expenses.

LORD TRAYNER—I am of the same opinion. Section 39 of the statute no doubt places the primary obligation on the "owners in default," and if this provision stood by itself I think the defenders would be within their rights in refusing payment. But section 150 confers on the County Council the right to recover the payment due by the owner in default "either from the owner or from any person who then, or at any time thereafter, occupies such premises." There can be no doubt that the defenders are "occupiers" within the sense of the Act, and are as such responsible for the debt of the original owner. I am dealing, I may say, with this action as if it were an action at the instance of the County Council, from whom the present pursuers hold an assignation of all their rights of recovery under the statute. I am accordingly of opinion that the Sheriff's judgment should be affirmed.

LORD MONCREIFF was absent.

The Court dismissed the appeal.

Counsel for the Pursuers and Respondents — Salvesen, K.C.—Guy. Agents — Alex. Morison & Co., W.S.

Counsel for the Defenders and Appellants—Campbell, K.C.—Younger. Agents —Carmichael & Millar, W.S.