did know, or that they ought to have known, that there was great risk of interfering with the mineral tenants. The nature of the ground itself suggested this. Still further, the pursuers knew that in the immediate neighbourhood of the viaduct there was an old coal waste, and they must have known that this waste was likely to communicate with the existing workings, and that if they worked the freestone down to the waste, and allowed water to get into the waste, it was almost inevitable that the water should find its way into the existing coal-workings. They entered into this agreement, then, with quite sufficient knowledge that they must incur risk.

In the third place, it is clearly proved that it was quite possible to take out freestone out of this very ground without injury to the mineral tenant. No doubt the precautionary measures necessary for this purpose might have cost a good deal of money. But if, after entering into this agreement, the pursuers had found that the cost of the precautionary measures were too great,—that the value of the stone to them was insufficient to justify so great an expenditure,—it was quite within their option not to take any stone out. They had not come under any obligation to pay a rent, or to work under the agreement at all. As far as they were concerned, the agreement was purely permissive. If they found the risk too great, or the expense necessary to avoid the risk too great, they had nothing to do but to give up working.

Keeping these facts before us, we come to the construction of the agreement. By it the landlord gives permission to the contractors to take the stone out of these lands upon the condition that they shall pay at a certain rate for what they took. He was quite entitled to do this in a question with his mineral tenants. It cannot be said that he incurred any liability to his mineral tenants by allowing some one else to do what he was entitled to do under a reservation in the lease to them, viz., to take out freestone. No doubt he was not entitled himself to take out the stone in such a way as to injure them, but he was quite entitled to take out the stone in such a way as not to injure them. And the question is, Whether, by this agreement, he authorised the pursuers to work out the stone without reference to the interests of the mineral tenants, and in such a way as to injure them? *Prima facie*, this is a very unlikely obligation for a man to undertake. If the pursuers, in the full knowledge of the circumstances, intended to reserve a right of relief, it was their duty to insist upon an express obligation to this effect. There is no such express obligation, and nothing in the agreement from which I can infer any such obligation.

If it could be shown that the defender was directly liable to Mr Taylor Gordon, that might create a right of relief *ex lege* in favour of the pursuers, for they would then be in the position of having stood between the defender and a claim which was primarily exigible from him. But can it be maintained by Mr Taylor Gordon that Mr Bell has done anything in violation of his rights? He simply gave permission to another to take the stone; he did not prescribe any mode of working. There was no direct obligation against the defender at the instance of Mr Taylor Gordon. That throws us back on the supposed obligation of warrandice or relief in the agreement of December 1868.

For these reasons, I entirely agree with your Lordships, and with the result at which the Lord Ordinary has arrived.

The Court adhered.

Counsel for Pursuers — Solicitor-General and Johnstone. Agent—T. J. Gordon, W.S.

Counsel for Defenders—Watson and Mackintosh. Agents—Tods, Murray, & Jamieson, W.S.

Friday, November 8.

FIRST DIVISION.

[Lord Gifford, Ordinary.

MICHIE'S TRUSTEES *v.* GRANT.

Property—Street—Aberdeen Police and Water Works Act 1862 (25 *and* 26 *Vict. c.* 203) § 334.

The "Aberdeen Police and Water Works Act 1862" empowers the Police Commissioners to allow, upon such terms as they think fit, any building within the limits of the Act to be set forward, for improving the line of street. *Held* that, on a sound construction of this enactment, the Police Commissioners have a discretionary power, for the purpose of improving the street, to allow a person to build beyond the boundary of his property and to encroach upon the *solum* of the street, and that an owner of adjacent property is not entitled to object to such an encroachment if sanctioned by the Commissioners, unless he can show that the change is otherwise than an improvement to the street, or causes substantial injury to his own property.

The pursuers, the trustees of the late George Michie, possess under a long lease a large tenement, consisting of shops and dwelling-houses, at the head of Flourmill Brae in Aberdeen. Flourmill Brae runs east, or rather north-east, from St Nicholas Street. To the north or north-west of Flourmill Brae lies a piece of ground of irregular shape, which may be described as bounded on the west by St Nicholas Street, on the south by Flourmill Brae, and on the west by a continuation of Flourmill Brae that turns northward. This ground was in 1867 purchased by the defender from the Magistrates of Aberdeen. At that date it was occupied by a flour-mill and other buildings. A portion of the buildings projected with a sharp angle into Flourmill Brae. By his disposition Mr Grant was taken bound to remove this projecting corner, so that the street should be in no part less than 25 feet.

For time immemorial the line of buildings on the north side of Flourmill Brae receded at the east end, so as to form a wide entry opposite the pursuer's property.

In February 1871 Mr Grant, who had purchased the property with the view of pulling down the existing buildings, and of constructing in its place a large block of buildings, consisting of warehouses, shops, and dwelling-houses, employed Mr Souttar, architect in Aberdeen, to prepare a plan. According to this plan, it was proposed that Flourmill Brae should be straightened, and the line of Mr Grant's buildings set forward at the eastern part of Flourmill Brae, and set back in other places. It will thus be observed that the result was to encroach upon that street at its eastern or wider end, substituting a square, or nearly square, corner for the receding curve which had hitherto been the boundary of the buildings. On the other hand,

Mr Grant proposed to throw into the street not only the projecting corner of his property before mentioned, but a portion of it facing the continuation of Flourmill Brae turning northward.

The "Aberdeen Police and Water Works Act 1862" is divided into thirty-four parts, some of which are further sub-divided.

Part 24 relates to the "construction and maintenance of sewers." Under the sub-division entitled "Drainage of Houses" occurs the following clause:—"296. Before beginning to build any new house or building, or to rebuild any existing house or building, within the limits of this Act, the person intending to build or rebuild such house or building shall give to the Commissioners notice thereof in writing, and shall accompany such notice with a plan showing the level at which the foundation of such house or building is proposed to be laid, by reference to some level ascertained under the direction of the Commissioners, and also showing the line of the proposed new house or building in reference to the line of the front of the adjoining buildings on both sides."

Part 25 relates to the paving and maintaining, forming, naming, and improving of streets. One of the sub-divisions of this part is headed "Improving the lines of streets, and removing obstructions," and contains, *inter alia*, the following clauses:—

"333. It shall be lawful for the Commissioners from time to time to cause any of the streets to be enlarged, widened, or otherwise improved, and any new streets to be opened up and formed, and for that purpose they may agree with the owners of any lands within the limits of this Act for the purchase thereof, and they shall resell any parts of the lands so purchased which shall not be wanted for such purpose.

"334. The Commissioners may fix and lay down the line of any house or building to be erected or re-erected in any territory within the limits of this Act, after the date at which this Act shall come into operation within such territory, and may require such house or building to be set back, or the corner thereof, where such house or building is at the corner of a street, to be rounded off to the height of the first storey or floor at least, and in such manner as the Commissioners shall direct, for the purpose of widening or otherwise improving any street; provided that the Commissioners shall make full compensation to the owner of any such house or building for any loss or damage he may thereby sustain in the manner provided by the said Lands Clauses Consolidation Acts.

"335. Within fourteen days after receiving notice in manner provided by this Act, with the plan showing the line of any house or building proposed by the person intending to build or rebuild the same, the Commissioners may signify the line which they shall have fixed or laid down for such house or building.

"336. If such house or building be begun or erected with any line different from that fixed and laid down by the Commissioners, they may cause such house or building to be altered or taken down as the case requires, and the expense incurred by the Commissioners in respect thereof shall be repaid to them by the person failing to comply with the provision aforesaid, and shall be recoverable as damages.

"337. If the Commissioners fail to signify in writing, within fourteen days after receiving such notice and plan as aforesaid, that they have fixed and laid down a line different from the line shown on such plan, the person giving such notice may, notwithstanding anything herein contained, proceed to build or rebuild the house or building therein referred to according to the line shown on such plan, provided that such building or rebuilding be otherwise in accordance with the provisions of this Act.

"338. The Commissioners may allow, upon such terms as they think fit, any building within the limits of this Act to be set forward for improving the line of the street in which such building or any building adjacent thereto is situated."

In accordance with the provisions of the "Aberdeen Police and Water Works Act 1862," Mr Grant's plans were submitted to the Commissioners of Police, and laid before the Street Committee, who, on 14th February 1871, resolved to recommend the Commissioners to approve of the same. The report of the Street Committee was approved of at a general meeting of the Commissioners held on 20th February.

On 22d February Mr Charles Michie, one of the pursuers, addressed a letter to the chairman of the Street Committee, in which he expressed surprise that the Commissioners had sanctioned the said plan, denied their right "thus to hand over any part of Flourmill Brae to Mr Grant," and gave notice that legal measures would be adopted on the part of the pursuers to protect their rights as proprietors. A meeting of the Commissioners was held on 20th March 1871, at which Mr Michie's letter of 22d February was read and considered. The minute of the meeting bears, 'that it was stated that the opinion of the law-agent having been taken on the point raised in Mr Michie's letter, he had suggested that an answer should be sent to the effect that the Board, in fixing the line of the proposed buildings, performed a duty imposed on them by the Police Act, and that they could not interfere in questions between private parties arising out of these proceedings." The Commissioners then resolved that an answer to the said effect should be sent, and an answer to the said effect was accordingly, on or very shortly after 20th March 1871, sent to Mr Michie.

Mr Grant's buildings were then proceeded with. On 8th January 1872 Michie's trustees raised an action against Mr Grant to have it declared that the defender has no title to encroach upon any part of the *solum* of the street called Flourmill Brae, or to erect any buildings thereon, or to exclude the pursuers from the full use and enjoyment thereof, which they have hitherto enjoyed as an access to their premises situated at the end of the street. There were also conclusions of interdict and removal of the building, in so far as it extends into the *solum* of the street.

On record, the pursuers did not aver any specific injury to their premises from the defender's encroachment, beyond a general statement that it would have the effect of impairing their access.

Mr Grant pleaded, *inter alia*—"(3) The action is excluded by *mora*, taciturnity, and acquiescence on the part of the pursuers. (4) The action cannot be maintained, in respect that the defender's buildings have been constructed upon the lines and in accordance with the plans approved of by the Commissioners acting under the Aberdeen Police and Water Works Act 1862, as above mentioned. (5) The defender is entitled to absolvitor, in respect that the erection of his buildings upon the said lines, and in accordance with the said plans, has not

been, and will not be, productive of any loss or damage to the pursuers or their property, but has been, and will be, a great public improvement. (6) At all events, the action cannot be maintained, in respect that the defender's operations are *innocuæ utilitatis*."

The Lord Ordinary allowed a proof.

Evidence was led by the pursuers to show that the value of their property would be depreciated. It was stated that one of the advantages which it had enjoyed from the receding curve in Flourmill Brae was that their northmost shop was seen by persons going along St Nicholas Street and looking up Flourmill Brae; and, as St Nicholas Street is one of the chief business streets in Aberdeen, it was represented as a great advantage that the pursuers' shops could be seen therefrom. The encroachment made by Mr Grant at the corner would now prevent the northmost shop being seen from St Nicholas Street. The pursuers also adduced witnesses to prove that their premises would be darkened to a greater extent than if Mr Grant had built within the old boundary.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh*, 29*th March* 1872.— . . . Finds that the defender David Rait Lyell Grant had and has no right or title to encroach or build upon any part of the *solum* of the street called Flourmill Brae Street of Aberdeen, or to erect any buildings on the said *solum*, or to exclude the pursuers from the full use and enjoyment thereof; and to this effect finds and declares in terms of the declaratory conclusions of the libel, and decerns: Finds that the defender, the said David Rait Lyell Grant, by the buildings recently erected by him, and which were in the course of erection when the present action was raised, has encroached upon the *solum* of the said street called Flourmill Brae Street of Aberdeen; and finds that the said encroachment is injurious to the property of the pursuers situated in or at the end of the said street; and, before further answer, and with reference to the views stated in the annexed Note, appoints the case to be enrolled, that the decree of declarator and findings now pronounced may be applied, and the case exhausted; reserving meantime all questions of expenses.

"*Note.*—It is not without great reluctance, and after a good deal of difficulty and hesitation, that the Lord Ordinary has found himself obliged to pronounce the decree of declarator and the findings contained in the preceding interlocutor.

"The questions of law involved in the declarator are attended with considerable difficulty, and there will be great hardship if the defender should be compelled to take down the projecting angle of his building, which is complained of as an encroachment. On the other hand, however, the pursuers are entitled to vindicate their absolute rights, and the defender has really himself to blame for the embarrassment and probable expense to which he may be exposed.

"The grounds of the Lord Ordinary's judgment are, shortly, the following:—

"(1) The Lord Ordinary holds it to be completely proved that from time immemorial the line of Flourmill Brae Street of Aberdeen, at and opposite the pursuers' property, ran in the curved line represented by the blue tint on the plan, No. 6 of process. It is not disputed that from time immemorial the whole space outside that curve was part of the public street, and was causewayed and used as such. This was not seriously contested by the defenders.

"The effect of this curve was to orm opposite the pursuer's property a wide or bell-mouthed entry leading from Flourmill Brae into Barnett's Close, and to give to the pursuers' property more light and space than it would enjoy if the curve had been converted into a projecting angle narrowing the street at that place. Among other advantages which the pursuers' property derived from the curve was, that a part of the pursuers' westmost shop was seen by persons passing along St Nicholas Street and looking up Flourmill Brae; and as St Nicholas Street is one of the chief business streets of Aberdeen, it is said to be of great advantage that the pursuers' shop could be seen therefrom.

"It seems to follow that the pursuers have right and interest to maintain the *solum* of Flourmill Brae, and to prevent any encroachment thereon unless the party making such encroachment can instruct a good and sufficient right to do so.

"(2) The defender purchased his property in 1867 from the Lord Provost, Magistrates, and Town-Council of Aberdeen. He purchased it conform to a signed plan, No. 11 of process, which shows precisely the curve in question as the line of Flourmill Brae Street; and in the disposition the defender's subjects are described as bounded on the south-east and south 'by the street or road called Flourmill Brae.' Still farther, the defender's subjects are described in the disposition as tinted red upon the signed plan, and the red tint terminates with the curve in question. It is plain, therefore, that the defender, by his title, got no right to encroach or to build upon any portion of Flourmill Brae. The whole *solum* of the street, that is, all outside the curve, is, both by description and by plan, excluded from the defender's title. All this is quite clear.

"(3) The defender got no right, and could get no right, from the Commissioners of Police of Aberdeen to encroach and build upon the *solum* of Flourmill Brae Street.

"The defender's case was, to a large extent, rested upon the authority which he maintained he had derived from the Police Commissioners acting under 'The Aberdeen Police and Water Works Act, 1862;' and there is certainly a great deal of difficulty in interpreting some of the clauses of that Statute. The proceedings of the Police Commissioners are not very regular, and their minutes are in several respects inaccurately expressed. It appeared in evidence that at least some of the Comissioners were not fully aware of the circumstances, and the proceedings were in absence, the pursuers of the present action not being heard. The real question, however, is, Whether the Commissioners, under their statute, had power to make over to the defender, for the purpose of his building thereon, a portion of the *solum* of Flourmill Brae, without the consent of the pursuers, or of any of the proprietors of that street?

"The Lord Ordinary thinks the Police Commissioners had no such power. They are not vested, either by the statute or otherwise, with the *solum* of the street. The vesting clause merely includes paving materials, lamps, &c. They can only remove obstructions, that is, enlarge the *solum* of the street, by paying compensation; and, although it is difficult to construe the 338th section, the Lord Ordinary thinks that a power to allow buildings to be set forward does not infer a power to alienate any part of the *solum* to the prejudice of those who

have formerly enjoyed it. It would be difficult to say where such a power would end; and if under the 338th section the Commissioners could substitute for the wide curve which the pursuers beneficially enjoyed, a projecting angle, to a considerable extent obscuring and shutting up the pursuers' property, they might also narrow the whole street, no matter by what title the proprietors held it. It is little apology that by way of compensation for the encroachment upon Flourmill Brae the defender gave as much or more ground at the foot of Barnett's Close. This is virtually improving the close at the expense of the street, and the Lord Ordinary cannot find warrant for this in any part of the statute. On a construction of the statute, therefore, the Lord Ordinary feels himself compelled to hold that the Commissioners of Police could not make over to the defender a portion of the *solum* of Flourmill Brae, and could not give the defender right to encroach thereon.

"(4) It is clearly proved, and indeed is not disputed, that the defender has encroached upon the *solum* of Flourmill Brae Street by his buildings, erected in 1871 and 1872. There is some difference as to the exact extent of the encroachment, arising, it appears, from some variation between the building as executed and the original plan, but the discrepancy is immaterial. The Lord Ordinary is also of opinion that the encroachment is to some extent injurious to the pursuers, although probably the pursuers and their witnesses have exaggerated the resulting injury.

"*Lastly*, the Lord Ordinary is of opinion that the pursuers are not barred by anything which they have done or abstained from doing, or by anything which has taken place, from insisting in the present action.

"Next to the question upon the Aberdeen Police Act, the plea of bar, or of acquiescence, formed the most important plea relied on by the defender, but the Lord Ordinary does not think the plea well founded.

"There never was acquiescence in the proper sense of that term. From the very first the pursuers objected to the encroachment. They objected strenuously, and their objection was never withdrawn. They threatened interdict before the defender began to build, and the threat of interdict was never withdrawn. The defender's plea really is, that because the pursuers threatened an interdict, but did not bring it for three months, they are now barred from in any way challenging the defender's illegal encroachments. But this is carrying the doctrine of acquiescence farther than has ever been done. Three months' delay in bringing an action—the threat of an action never being withdrawn—is hardly consent or acquiescence. Farther, the pursuers were not bound to take out an interdict, which always or often involves a risk of being found liable in damages. The pursuers were entitled to vindicate their rights by declarator, and if the defender, after challenge, went on with his building, he did so at his own risk.

"After all, supposing the date of the challenge only 9th December, being the date of Messrs Edmonds & Macqueen's letter, the utmost sum which it would have cost to put the defender's buildings back was only £200, according to his own witnesses, and this is less than the damage which the pursuers' witnesses say has been sustained by the pursuers' tenement. It is vain for the defender to say that the rounding-off his building by the old curve would dislocate his whole scheme of building. It would only angle off two rooms, or a room and closet in each flat of the back tenement. The back tenement is rounded at the corner as it is, and it would have been no great hardship to round it to a greater extent by keeping the line of the old curve of the street. Of course the defender may rail-off as his own, enclose and use as he pleases, the compensation ground which he proposed to throw into the foot of Barnett's Close.

"Logically, perhaps, the Lord Ordinary should have ordained the projecting corner to be taken down and set back. He has a strong impression, however, that it would be more equitable and more for the interest of both parties that the defender, instead of taking down the projecting corner, should make pecuniary compensation to the pursuers for any injury their property has sustained. Having in view a possible amicable adjustment on this footing, the Lord Ordinary, while pronouncing the decree of declarator and the findings contained in the preceding interlocutor, has *quoad ultra* continued the cause. If the views of the Lord Ordinary are well founded, the pursuers are entitled to expenses."

The defender reclaimed.

Argued for him—Sect. 338 of the statute can have no intelligible meaning unless it gives the Commissioners power to allow a proprietor, upon conditions, to encroach upon the *solum* of the street.

Argued for the respondents—If the appellants' construction of sect. 338 were sound, it is impossible to say where such a power might end.

At advising—

LORD PRESIDENT—The parties in this case are proprietors of ground adjacent to the Flourmill Brae in Aberdeen. When Mr Michie's property was acquired does not exactly appear, and is of no consequence in the present question. Mr Grant's property was acquired by him in 1867 from the Magistrates of Aberdeen. It consists of an irregular piece of ground of considerable extent lying on the north or north-west side of Flourmill Brae. At the date of its acquisition it was occupied by a mill and granary. These buildings at one place abutted on Flourmill Brae in an inconvenient way. Accordingly, it was part of the arrangement between the Magistrates and Mr Grant that this projecting portion should be removed within five years after his entry. The effect of this was to make Flourmill Brae not less than 25 feet wide in any part. Mr Grant desired to make a certain further alteration in the line of his property and the street (which is represented by the red line on the plan before me). This he could not do without some authority from those in whom the administration of the public streets is vested. The question is, Whether he has obtained such authority? and, if so, Whether the persons who gave him authority had power to give it? This depends upon the construction of the "Aberdeen Police and Water Works Act 1862." It is said that if the line sanctioned by the Police Commissioners is carried out, and the buildings on Mr Grant's property advanced to that line along Flourmill Brae and the street, apparently without a name, which turns from it at right angles towards the left (in going from St Nicholas Street), the effect will be to injure Michie's property on the other side of that unnamed street. It is said that it will have the effect of preventing persons going along St Nicholas Street from seeing the property at a distance. This is a curious kind of injury, and one

that seems a little fanciful. Looking at the proposed alterations of Mr Grant, with reference not only to his own property and the street, but to the property of the pursuers, it appears that Mr Grant's proposal is a great improvement on the locality. However, this does not enter very deeply into the question. If it could be shown that the change sanctioned by the Police Commissioners was injurious to the public or a disadvantage to the street; or even if it could be shown that great injury arose to one or more proprietors, there would be grounds for interfering different from those stated by the pursuers.

The real question is, Had the Police Commissioners power to sanction the proposal, that proposal being to advance the buildings in Flourmill Brae at one place, but, in compensation of that, to throw into the street at another place a considerable portion of what had been Mr Grant's property?

It is said that the proceedings of the Police Commissioners, even supposing them to have power under their statute, were not regularly carried through. It seems to me that the minute very distinctly signifies their approval of the proposed plans, and that is all that is necessary.

The question then comes back to be, Have they power to allow a proprietor, situated as Mr Grant was, to occupy a portion of the *solum* of the street in one place, and to require him at the same time to set back his buildings at another place? Have they power to do that for the purpose of improving the street?

There are two portions of the statute which run a good deal into one another. The 24th part, beginning with sect. 277, relates to the construction and maintenance of sewers. In section 296 it is required—(*reads*). This part of the statute goes on to provide about the levels, having in view the drainage of the house in relation to the drainage of entire street. But the notice, besides showing the level, is also to show "the line of the proposed new house or building in reference to the line of front of the adjoining buildings on both sides." That part of the notice is of no use in reference to the levels or drainage, and is introduced plainly with reference to the next part of the statute, the 25th, which begins with section 307, and relates to the paving, maintaining, forming, naming, and improving streets. That part is subdivided into smaller divisions, with various headings. One of these is "improving the lines of streets, and removing obstructions." It is under this last set of clauses that the question before us immediately occurs. In some of these clauses reference is made back to the notice required by sect. 296. Sections 333 and 334 are as follows—(*reads*). By section 334 then, the Commissioners are empowered to interfere with the property of an owner for the purpose of widening or improving the street. The Commissioners may require him to "set back" his building, so as to leave a portion of his property outside so as to form the street. Very properly, compensation is required to be given in such cases. By sect. 335 the Commissioners may signify the line fixed by them within fourteen days after receiving notice. Sect. 336 gives a very important power to the Commissioners. No building can take place without notice to them, and if anything is done without that notice, it must be undone. Section 337 allows the owner to proceed if the Commissioners fail to signify within fourteen days after the notice a line different from the line shown in the plan submitted to them. Then comes sect. 338, the one of greatest importance in the present question. It appears to me that sect. 338 is the counter part of sect. 334. In sect. 334 the Commissioners are empowered to require a building to be set back. In sect. 338 they are empowered to allow a building to be set forward. What is the meaning in these two sections of "set back" and "set forward?" The natural meaning is to construe them with reference to the line which forms the boundary between the private property and the street. It can hardly be the meaning of sect. 334 that they can require an owner to set back his building to within his own boundary, so as not to encroach upon the street. There would be no need for an enactment to this effect, and certainly no need of compensation to the owner. The Commissioners would merely be checking an encroachment. Thus the words "set back" cannot mean anything else but to retire within the boundary of his property.

Does "set forward" mean that an owner, who has not built up to the extreme verge of his property, may be allowed to come up to the verge on such terms as the Commissioners may think fit? It surely would be most unreasonable that a man should not be allowed to do this except on such terms as the Commissioners may think fit. The clause is susceptible of only one other meaning. If "set forward" does not mean to set forward up to the limits of the owner's property, it must mean to set forward beyond the limits of the owner's property. That is the construction contended for by Mr Grant; and not only do I think that it is the necessary meaning of the words, but that the power conferred, although it requires to be exercised with great discretion, is not unreasonable. This very case suggests a good occasion for the exercise of the power. Why should not the irregularities in a line of street be corrected by putting back the property of one, and putting forward the property of another? Keeping in view the object of the clause,—the improving of the street—this necessarily imports that in the one case the street must be encroached on, and in the other private property invaded. Mr Grant says—"Allow me to encroach upon the street at the corner where Flourmill Brae turns to the left; I shall leave, notwithstanding the encroachment, a broad and handsome street; and further on to the north I shall surrender you a piece of ground which will enable you to widen and improve the street there." This is very like the case contemplated by sect. 338. I am therefore unable to concur with the Lord Ordinary. I think that the proceedings were quite within the statutory powers of the Commissioners.

It is said that if this is allowed it would be difficult to say where the power is to end. It is said that the whole buildings along a line of street might be advanced several feet into the street; and various other suppositions are made. The answer is, that Commissioners acting under a statute are not likely so to exercise their powers. Such proceedings would be a flagrant abuse of their powers. But if they did act thus, they are liable to be restrained by this Court. They would not be exercising statutory powers for statutory purposes, viz., the forming and improving of the street. Where it is shown that the power is being exercised for a different purpose, or to the effect of doing something which is the reverse of improving the street, the Commissioners may be restrained. And I am

not prepared to say that there might not be a case of individual hardship, especially where no power of compensation existed, in which the Commissioners might not be restrained. I do not think that a street could be so altered as to do material or irreparable damage to an owner. If any such case arises, it will be dealt with according to the well established principles of equity. Here I see no grounds for interfering with the discretion of the Commissioners.

Lord Deas—The question is, Whether the Police Commissioners had the power to do what they did? It was thought expedient that the statute should place large powers in the hands of the Commissioners for the purpose of improving the town. Section 334 empowers the Commissioners to require any building to be set back. Section 338 empowers them to allow any building to be set forward. I agree with your Lordship that the words "set back" and "set forward" unquestionably imply set back from the street and set forward upon the street. The Lord Ordinary seems to think that they cannot set back a building except on compensation, and that the setting forward cannot be done at all. If we read section 338, as I take it, the setting forward of a building necessarily implies the alienation of a part of the street to the owner whose property is set forward. The Lord Ordinary thinks that "a power to allow buildings to be set forward does not infer a power to alienate any part of the solum to the prejudice of those who have formerly enjoyed it." But surely it may be possible to "alienate a part of the solum of the street" without it being "to the prejudice of those who formerly enjoyed it." If the Commissioners are entitled to set back a building on a money compensation, can it be said that they are not entitled to set back a building in one part in consideration of allowing it to be set forward in another part? Does not that power expressly come under section 338? If the power is abused the Court would restrain it. I think we should very soon find out where it is to end. Because they may do a reasonable thing, it does not follow that they may do an unreasonable thing.

The question here is, Whether there was a fair and reasonable exercise of the power, or whether it was so injurious to one individual, although of benefit to the general public, that it cannot be allowed? For I admit that if the pursuers could show substantial injury to their property, it would not be a sufficient answer to say that it would be a public benefit. Is there any such substantial injury to the pursuers' property so as to entitle them to object? This is attempted to be made the subject of evidence. With a plan before us we are quite as competent to judge as to the injury as the pursuers' witnesses. I cannot hold that there is any such injury as to justify us in restraining the Commissioners in the exercise of their statutory powers.

Lord Ardmillan—I entirely concur with your Lordships. I remark, first, that if the Police Commissioners had the power to sanction the alteration, they certainly exercised that power. Then had they the power? This is a very fair question to try. I think they had. In the administration of the powers vested in them, it cannot be denied that in setting back a house they are really taking from an owner either the property or the beneficial enjoyment of a part of his property. On the other hand, if they permit a house to be set forward, they are necessarily occupying a portion of the street with the property put forward. This they are entitled to do on conditions. If these are extravagant or corrupt, they will be restrained. But if nothing but what is reasonable and fair appears, then they have the power. We are not to presume an abuse of power. If any of the things suggested were done, nay more, if the rights of one individual were so injuriously affected as to be beyond the limits of compensation competent to the Commissioners, it would be for this Court to interfere. In this instance I have no doubt that the Commissioners acted fairly and judiciously.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender, with expenses.

Counsel for Pursuers — Watson and Asher. Agents—M'Ewen & Carment, W.S.

Counsel for Defender—Solicitor-General, Balfour, and Robertson. Agents—Tods, Murray, & Jamieson, W.S.

Saturday, November 9.

FIRST DIVISION.

CAROLINE MARY MACKIE, PETITIONER.

Minor—Curators—Allowance—Authority of Court.

Circumstances in which the Court exercised its authority over the curators of a minor to the effect of fixing the allowance to be paid for her maintenance.

Miss Caroline Mary Mackie and her curators *ad litem* presented a petition to the Court, praying them to ordain her trustees to fix her annual allowance for education, maintenance, &c. at £175 The trustees objected to have any specific sum fixed, but were ready to pay all reasonable expenses incurred by the young lady. The ground of their objection was the existing uncertainty as to the petitioner's ultimate fortune, which was still in doubt and subject to intricate questions of accounting, though it was certain not to be less than from £2000 to £3000, and might be as much as £8000. The Court held that a specific allowance ought to be given, and fixed the sum at £155.

Counsel for Petitioner—Asher. Agents—Jardine, Stodart, & Frasers, W.S.

Counsel for Respondents — Balfour. Agent—Charles S. Taylor, S.S.C.

Saturday, November 9.

SECOND DIVISION.

[Sheriff-Court of Ayr.

KILMARNOCK GAS COMPANY *v.* SMITH.

Lease—Rent—Retention—Sequestration—Relevancy.

A Gas Light Company granted a lease of certain premises adjoining their works, with right to the whole secondary products which should flow into the tenant's cistern. During the currency of the lease the tenant refused the rent for a certain half-year, and the Compaay raised a process of sequestration against him. The tenant's defence was, that