the rights of suing that he has against the Duke of Montrose for the purpose of getting a declarator of the liability of the Duke to relieve the teinds from any augmentation.

That plainly is the meaning of the additional article. The appellant, on the other hand, maintains, that he put himself under obligation to take these extraordinary proceedings, if they were capable of being taken, in order to impose upon himself another obligation of maintaining in a different character an action against the Duke of Montrose in respect of the personal contract.

The appellant does nothing but this: He insists, "I have not got complete relief, therefore the contract has not been fulfilled; complete relief is not to be regarded as something resulting probably from the obligation of Sir William Drummond Stewart, but what we are to look to is, what is the amount of obligation that Sir William Drummond Stewart put upon himself, and what he did put upon himself was nothing in the world more than to bring that action which he did bring, which he prosecuted in fact, with the concurrence of the pursuer, to the extent of having it declared, that the Duke as superior was bound to exonerate the land."

By the result of that action, in my opinion, he implemented the obligation which he had incurred, and I cannot but regard the proposition which the appellant has put forward at your Lordships' bar as a very extravagant one. Therefore I have no hesitation in concurring in the advice given to your Lordships by my noble and learned friends, that the appeal be dismissed with costs.

LORD COLONSAY.—My Lords, having arrived at the conclusion at which your Lordships have arrived as to the manner in which this appeal should be disposed of, I have scarcely anything to add. My views as to the construction of this contract contained in the articles of roup are in accordance with those that have been stated. I think Sir William Drummond Stewart has implemented this contract by following out the action which he brought, and obtaining judgment as to the liability of the Duke of Montrose. Again, if it were necessary to express any opinion upon the subject, I should concur in the opinion suggested by two of your Lordships, that the obligation in the feu contract 1705 was an obligation against the superior of the lands, and was not in the nature of those personal obligations which were made the subject of discussion in the previous cases. Finding it in a feu contract of this kind, I hold that is a contract as between superior and vassal, and that it ought to be dealt with as such, and that it did not import any personal obligation. I do not think it necessary to say more than that I concur with your Lordships in thinking that this appeal should be dismissed with costs.

The interlocutor affirmed, and appeal dismissed with costs.

Appellant's Agents, Gillespie and Bell, W.S.; Grahames and Wardlaw, Westminster.—*Respondent's Agents*, Dundas and Wilson, C.S.; Loch and Maclaurin, Westminster.

FEBRUARY 28, 1870.

JOHN ARCHIBALD CAMPBELL, *Appellant*, *v.* THE PROVOST, BAILIES, AND TOWN COUNCIL OF LEITH, *Respondents*.

Police and Improvement Act, 25 and 26 Vict c. 101—Private Street—Notice to Pave—Construction—*The Police Commissioners of a burgh, acting under the Police and Improvement Act, 1862, having resolved that a certain private street should be paved, etc., gave notice of their intention under the 394th section.*

HELD (reversing judgment), *That the proper course was for the Commissioners to charge the owner on his default with the expenses under the 151st section as a private improvement assessment, in which case notices under the 397th section ought to be given.*

SEMBLE, *The district assessments referred to in the 98th and 185th sections refer chiefly to sewerage expenses.*

This was a note of suspension and interdict to prohibit the Leith Police Commissioners from interfering with a street called Prince Regent Street. The appellant, the late John Archibald Campbell, was the owner of certain property in Leith, between Commercial Street and Madeira Street, one part of which was called Prince Regent Street, and the other end of which, being

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[1] See previous reports 4 Macph. 853: 37 Sc. Jur. 546: 38 Sc. Jur. 445. S. C. L. R. 2 Sc. Ap. 1: 8 Macph. H. L. 31: 42 Sc. Jur. 310.

near North Leith Church, was open and unenclosed, and used chiefly for depositing logs of timber. The Police Commissioners having considered this street was not sufficiently paved and flagged, proceeded to deal with it under the Police and Improvement Act, and considering that it came under the definition of a private street, and not a public street, they directed their surveyor to prepare plans for paving it. They duly posted a notice in a conspicuous place at each end of Prince Regent Street, in terms of the 394th section, stating their intention to cause it to be paved, and stating a day when all parties interested would be heard by the Commissioners. At the time appointed nobody interested appeared to object, and the Commissioners ordered the work to be proceeded with. The 150th and 151st sections of the Act made all the expenses of paving a private street payable by the owners of the property abutting on such street, in proportion to the extent of their frontage. The appellant had not received any notice of these intentions or proceedings; and as the proposed works would cost several hundred pounds more than the entire value of the ground, which was trifling, he presented a note of suspension and interdict, praying the Court of Session to suspend the proceedings, and prohibit the Commissioners from interfering with North Junction Street. In his reasons for the suspension, he averred, that the Police and Improvement Act, 1862, had not yet come into force in Leith at the date of the resolutions of the Commissioners; that the Commissioners were not entitled to proceed with the paving of Prince Regent Street, seeing that they had not given notices of their intention, pursuant to the 394th section, and other sections; that no such street as Prince Regent Street existed in that part of the suspender's property, which was below Madeira Street and Great Junction Street; and that all the proceedings of the Commissioners were null and void, and *ultra vires*. The Commissioners, in answer to the suspender, alleged, that the street in question fulfilled the definition given of a private street in the Police Act 1862, which they had power under the 150th section to cause to be properly paved; that they had proceeded according to the Statute and given due notice, and that no objection was made within the time allowed; and, moreover, that their proceedings were well founded, and that the Act provided, that the only appeal against the decision lay to the Sheriff, but which procedure had not been adopted by the suspender; that, therefore, the suspender had no right to appeal to the Court of Session; but if he had, then the proceedings were valid and regular, and in conformity with the Police Act. The Lord Ordinary (Ormidale) held, that the street was a private street, and that due notice had not been given according to the 397th section of the Act, and that the proceedings were irregular, and the interdict was made perpetual. Afterwards, the Second Division held, that though the street was a private street, yet that no notice under the 397th section was required; for that section applied only to public streets, and therefore the interdict was recalled and judgment given for the Commissioners. The Court refrained from saying whether the Commissioners were bound even to have given the notices required by the 394th section. All that they decided was, that the notices required by the 397th section did not apply to the case.

The suspender now appealed.

The appellant in his *printed case* gave the following reasons for his appeal:—1. Because Prince Regent Street was not a private but a public street. 2. Because, before disposing of the second plea in law for the complainers, the facts relating to Prince Regent Street and to the operations, if any, under the local Act applicable thereto, ought to have been ascertained, and because the respondents were acting *ultra vires* and contrary to law in the proceedings, which they took as under the General Police Improvement (Scotland) Act, 1862, the same not being then available or in operation so far as concerns Prince Regent Street, and the proposed operations thereon complained of. 3. Because, assuming that proceedings under the 150th section of the Statute were within the competency of the respondents as regards Prince Regent Street, the proceedings complained of were not taken or followed out in terms thereof, in respect that they did not give the notices prescribed by the Statute as applicable thereto. 4. Because notices were not given by the respondents of their intention to do the work forming the subject matter of complaint either in terms of the 394th, or of the 397th section.

The respondents in their *printed case* gave the following reasons for affirming the judgment:—1. Because the suspension and interdict at the instance of the appellant was incompetent. 2. Because the street in question is a private street according to the definition of the Statute 25 and 26 Vict. c. 101. 3. Because the works ordered by the respondents to be executed on said street were such as they were authorized to order by virtue of the powers conferred on them by said Statute. 4. Because, in making said order and in all their procedure, the respondents acted in conformity with the said Statute.

Sir R. Palmer Q.C., *Anderson* Q.C., and *Pattison*, for the appellant.—The judgment of the Court below was wrong, for this was not a private street within the meaning of the Statute. This street has been dedicated by the owner to the public, and known as such as far back as 1813, and the witnesses so remember it. It was also recognized as a public street in two local Acts of Parliament passed in 1827 and 1848. The former Act, 7 and 8 Geo. IV. c. 112, defined certain boundaries, and enacted that the Commissioners should be bound to pave, etc., certain streets within those limits, and among others, Prince Regent Street. In the second Act of 11

and 12 Vict. c. 123, this street was described as an existing street, and the public funds were expended in lighting it. The street in question does not fulfil the description of a private street as contained in the Act. Therefore the notices prescribed by the 394th section, even if such notices had been given in this case, do not apply to the operations of the Commissioners under § 150. If, then, this was no public street, the proceedings were *ultra vires*, because the notices required by the 397th section were not given before dealing with a public street. Even if this be deemed to be a private street, the notices required by the 150th section were not duly given. Nor did the notices given comply with the 394th section, for they were not in a conspicuous place, and were not put up at each end of the street.

Mellish Q.C., *Jessel* Q.C., and *Maclachlan*, for the respondents. — The contention of the appellants here is inconsistent. They at first contended in the Courts below, that this was a private street, and it was solely on that ground that they applied for interdict. Now they argue that it is a public street and not a private street. The street is a private street, and the evidence shews it is one street from Commercial Street to Madeira Street. Whether it is a private street within the meaning of § 3 is a question of fact, and the evidence proves that it is a private street fulfilling all the terms of the definition. The question also, whether it was sufficiently paved, was decided in the negative by the evidence. There is evidence that the street, though originally laid out, was never maintained as a public street out of the police or road trust funds. If the street is private, then the only question is, if the notices required by the 150th section were given. It is not decided that such notices were given. The notices given also complied with the 394th section, which applies to private streets. The notices under § 397 were not necessary, because that section only applies to works which are to be provided for by private improvement assessment, and this case does not come under that head. According to the Act, private improvement assessment is the mode of payment for work which the Commissioners have undertaken, only because the owner would not undertake it when required to do so, whereas the liability of the proprietors for works done in private streets is for works which the owners are never asked to do, but which the Commissioners do at first hand. The interlocutor of the Court below was therefore right, and ought to be affirmed.

Cur. adv. vult.

LORD CHANCELLOR HATHERLEY.—In this case the appellant, Mr. Campbell, complains of certain interlocutors pronounced by the Court of Session in Scotland, with reference to the proceedings of the respondents, the Leith Commissioners, with regard to a street called Regent Street, in Leith. The Commissioners were proceeding in the year 1863, under certain powers, vested in them by an Act of Parliament regulating the police and government of the town, dated in 1862, and the course of proceeding was this: A certain line of road (to use an unambiguous word) was formed by Mr. Campbell as long ago, apparently, as the year 1813, and marked out for houses; certain houses were built, and the line of road was carried to an extent greater or less according to the views that may be taken of the original controversy between the respondents and the appellant. But it is sufficient for me here to say, that, regard being had to all the proceedings in this case which has had the disadvantage of being complicated, in the first place, by a very obscure Act of Parliament, and in the next place, by so very irregular and obscure pleadings in the cause, the only course now left to your Lordships, as it appears to me, is to consider that the Commissioners proceeding to do the Acts complained of were proceeding under the view which was enunciated in the resolutions which they came to upon the subject, namely, the view of keeping this street as a private street, and that the appellant in his original application for an interdict in respect of their proceedings, must be taken, upon the whole of the pleadings, to have acquiesced in the view of its being either a private street or no street at all, (that was part of his statement,) and that the case must be regarded as if it was an established point before us, that the street must be dealt with by the Commissioners, if at all, as a private street. That will clear the way with reference to a good deal of difficulty which might otherwise be occasioned by the singular definitions contained in the Act of the "private and public street," of which definitions it is now unnecessary to say anything beyond this, that they certainly would not have been of any great assistance in arriving at a conclusion.

But, however, dealing with it now as a private street, the act complained of is this, that proceeding to take certain steps towards paving and causewaying and flagging this road, the Commissioners did not give notice to Mr. Campbell of those proceedings pursuant to the clause in the Act which the appellant contends is the clause properly to be referred to upon that subject, and that, therefore, their proceedings, being without the regular and proper notice, are *ultra vires*. And accordingly he asked, in the first instance, for an interdict which the Lord Ordinary accorded to him in the words in which he asked for it, preventing any proceedings either with Regent Street or with the piece of land beyond it, which he contended formed part of it, either by flagging or causewaying it, pursuant to certain resolutions to which the Commissioners had come. The Lord Ordinary thought him entitled to that interdict. The Court of Session, upon reclaiming note on the part of the respondents, thought differently, and reversed the decision of the Lord

Ordinary. Three interlocutors are appealed from, which altogether produced this effect. The first two were interlocutors which put the cause in the way of being tried; the last was a final and conclusive order or interlocutor reversing the decision of the Lord Ordinary. And, accordingly, the Commissioners would be left, under that reversal, to take their proceeding under the notices which they had given.

Now, the notices given are these, and I will state them before proceeding to consider the Act itself, and how far the resolutions and proceedings of the Commissioners fall within the powers and authorities vested in them by the Act. It seems that on 11th June 1863 the Commissioners met and made the following minute: "The plan and specifications for paving Prince Regent Street prepared by Mr. Proudfoot were laid before the meeting, and the committee considering that the said street being a private street as defined in the Act, formed or laid out, is not altogether, with the footways thereof, sufficiently levelled, paved, or causewayed and flagged to the satisfaction of the Commissioners, resolved to cause said street and the footways thereof to be freed from obstructions, and paved and causewayed, and flagged and channelled according to said plan, and the clerk was directed to give the statutory notice in terms of the Act with reference thereto." The minute of 17th July 1863 then follows. The clerk stated, that the following notice had been duly put up of the date it bears. "In terms of the Police Act: Burgh of Leith.—Whereas Prince Regent Street, North Leith, being a private street as defined in the General Police and Improvement (Scotland) Act, 1862, formed or laid out at the adoption of said Act by the Magistrates and Council of the said burgh, is not, together with the footways thereof, sufficiently levelled," etc., (I do not read all the words,)," notice is hereby given, that it is the intention of the said Commissioners to cause said street and the footways thereof to be freed from obstructions, and to be properly levelled," and so on in the words that I read before from their former resolution, "according to a plan thereof, to which reference is hereby made, which plan may be seen within the Town Hall, Constitution Street, Leith; and notice is further given, that on the 17th day of July next, at 11 o'clock, forenoon, within the Town Hall aforesaid, all parties interested in such intended work, will be heard thereupon by the Commissioners." And then, no person appearing to be heard in regard to it, the meeting agreed to proceed with the work, and ordered its execution.

These notices were put up at the one end of the street, and at the other end of the street. There is some complaint which we have not, any of us, thought material to consider with reference to one of these notices,—Was it in a sufficiently conspicuous place? But notices were put up at one end of the street, and at the other end of the street, and were therefore obviously intended to be notices put up in compliance with the 394th section of the Act, which directs such notices to be given. There are no parts of the Act which require notices to be given otherwise than either by the 394th section or the 397th section of the Act, and the question is, whether, this being a private street, a notice purporting, as this evidently does purport, to be a notice under the 394th section is sufficient.

Now, in the Court below, it seems to have been thought either that this notice, under the 394th section, might be deemed to be sufficient, or (which I think appears rather to have been the view taken by the learned Judges) that in regard to this particular private street, notice would not be requisite under the 397th section of the Act. And it therefore becomes necessary to consider in what respect notices are necessary before proceedings of this character can be taken, namely, proceedings to level and to pave a private street, and to charge the improvements upon the persons who own the property along the length of that private street, and to charge that in the manner which it is proposed to be charged by the provisions of the Act, to which I shall presently refer, namely, the 150th and following sections, so as to comply in effect with all that the Act requires to be done in order to give due notice to the persons charged.

Now the 150th section of the Act is that section under which this action of the Commissioners was first contemplated. It is that section, and that alone, which gives them the power of dealing with this street as a private street in the manner proposed, and that and the following section indicate the consequence which would flow from that section being so acted upon by the respondents. The 150th section states this, "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 inconveniences in 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 obstructions, and to be properly levelled, paved, or causewayed, and flagged, and channelled in such a way, and with such materials, 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 kerb stones and gutters to the satisfation of the Commissioners." By

that section, therefore, if they are dissatisfied with the state of a private street, they are authorized to put it into a satisfactory state, and this with or without the approbation or consent of the proprietors of the street.

Then the 151st section says the whole of the costs, charges, and expenses incurred by the Commissioners, in respect of private streets, shall be paid and reimbursed to them by the owners of the lands or premises fronting or abutting on such street, as the same shall be ascertained and fixed by the Commissioners or their surveyor. The Act proceeds to give further directions which, I think, are not material to be considered. And the 154th section provides, that when this has once been done, it shall be lawful for the Commissioners to declare such a street to be a street as defined in the Act, which means a public street, and for ever afterwards vested in the Commissioners, and shall, with the exception of the footway, be levelled and repairable by the Commissioners.

Now that being done, and the expenses having been charged upon the owners of the land or premises fronting or abutting on the street in proportion to the extent of their respective premises, the question arises, by what species of rate it is necessary that that shall be done. Of course, if there be one single proprietor of the whole length of street, it would be improper to call any species of demand on him by the name of a rate. It would properly be a demand to be recovered in such a suitable proceeding as the Act might authorize, or as might otherwise be competent to the Commissioners, and would be recoverable in damages like any other legal demand, against any other individual. Of course, when you come to the case of several persons becoming chargeable, as they are here described by the 151st section, the owners of the lands or premises fronting or abutting on each street, then it is necessary that something more in the character of a rate should be introduced, and, accordingly, in looking into the clauses of the Act, one does find provisions, as it appears to me, for a proceeding of this description, and for the mode of assessing the proper payment to be made for a work of this kind.

In § 103 the Act tells us what are private improvements and what is to be done in respect of the payment for such private improvements. The 103d section says, "Where by the provisions of this Act the owner or occupier, as the case may be, of any premises, is directed, or fails to do any work, matter, or thing in relation to the same, and the work, through the failure or delay of the owner or occupier to execute it, shall be done by the Commissioners, or where expenses are incurred by the Commissioners for or in respect of any premises in order to carry out the provisions of this Act, the Commissioners shall charge the owner or occupier of the premises with the said expenses or special rates therefor, over and above any other assessments or rates to which such owner or occupier may be liable under this Act, and such expenses or special rates shall, for the purposes of this Act, be called the private improvement assessment."

Now, pausing here, I think it appears sufficiently plain in considering those clauses which I have just read, namely, the 150th and 151st sections, that the 150th is speaking of an act which has been neglected by the owners, which the owners ought to have done, but have not done, namely, paving and levelling and flagging the road which they have for their own purposes made in front of their property. The section is speaking of an act which they have neglected or failed to do, and which therefore may be done by the Commissioners, as the section duly provides. It is therefore precisely, within the words of this 103d section, an act which the owner has failed to do, and which the Commissioners are empowered to do. And where expenses are incurred in respect of this provision under the 103d section, in that case, as appears clearly by the 151st section, expense must be incurred by the Commissioners in doing that act which the owner has neglected or failed to do, and therefore it appears to me, that this is a case which falls precisely within the very words of the 151st section as well as within its spirit, and an act which they may deal with by making a demand on the owner if there be but one, or by making a rate if there be more owners than one, for the words are very express, "they shall charge the owner or occupier of the premises with the said expenses, or special rates therefor."

Now it was argued before us, that this 103d clause had reference to certain acts which might be done by the Commissioners with regard to individual or single owners, who might not have properly introduced water into their houses in such manner as would be desirable for the health of the town, and who might therefore require to have a communication made with the main water pipe, and that if they neglected to make it the Commissioners were authorized to make it, and to charge them with the expenses, and other acts of a similar character. I give that one as a specimen. There are many others in the subsequent part of the Act which I need not specially refer to. It was said, that that would be an instance of a private improvement assessment, but that in this case the paving and flagging of this private road, and charging it upon the owners of the land in proportion to the space they occupied along the road, would not be what might be properly called a private improvement assessment. Certainly, the learned counsel who argued this point felt considerable difficulty, and candidly avowed it, in finding himself embarrassed with the words, "special rate," and also in finding himself embarrassed with the words, "private improvement assessment." It is one thing to charge a single owner or occupier with the expense which may be done under the 103d, but it is a different thing where there are more occupiers

than one to charge them in the manner required by the Act, so as to throw the burden properly and rateably upon the persons who are to be affected by it. In the latter case the Act terms it a private improvement assessment.

Now there is a schedule at the end of the Act, Schedule E, and all the rates which are leviable under the Act are directed to be put into the schedule in the form there mentioned, with the exception of one distinct rate, to which I shall have to make a short reference presently, but the other rates are directed to be inserted in this way: Description of objects: General Sewer Rate or Special Sewer Rate, and Private Improvement Assessment: The way in which the whole is carried out: The description of the objects, the names of the owners and occupiers, and the date at which the rate is to be payable are given, and all their qualifications and directions as to the rates are applicable to a private improvement assessment exactly in the same manner as they are applicable to a general sewer rate or to a special rate, and the Act accordingly contemplates one general and complete process of rating.

Then that being so, we find here for what purpose a private improvement assessment rate may be made, namely, in a case where the neglect of the owner has thrown some obligation or duty upon the Commissioners which they have to perform, and where consequently they have incurred expense in so performing it.

That will constitute a private improvement assessment, and it appears to me that, beyond all doubt, this which the Commissioners are now purporting to do in the case before us, namely, to repair a private road which the owner has neglected to repair, and to expend money in order to make that reparation, would involve the necessity of assessing the owner as directed by the 151st section, and, as there were more owners than one, then it would clearly not be a sum to be recovered from one individual, but would be a private improvement assessment.

Now, the greater part of the argument on the part of the learned counsel who argued this case on behalf of the respondent, was this: Inasmuch as he was driven of course to acknowledge, that something must be understood to be meant by private improvement assessment, he pointed out, that in cases where individuals had neglected to lay on the water or to make other improvements which are required, the Commissioners are empowered to do it at their expense, he was driven to contend, that the 103d section applies to an improvement of that character, that is to say, in other words, that a notice must be given in respect of a work of comparatively trifling expense, such as the inserting of a service pipe into the main pipe, and yet that, on the other hand, where the expense of flagging and paving a street is to be carried into effect at the expense of the inhabitants, they are not entitled to a notice in respect of a work to be so done, or that, if entitled at all, they are only entitled under § 394. For reasons to be presently noticed, it appears to me, that § 394 has no application whatever to such a subject. The consequence therefore would be, that where a large charge was to be incurred, and many persons would be affected by it, they would have no notice whatever, although for a comparatively unimportant matter, at a trifling expense, due notice would have to be given.

The 397th section says this:—"And in respect to appeals as to all other matters and things which the Commissioners are by the police provisions of this Act empowered to do, or to perform, or to authorize to be done and performed, and the cost attending which falls by this Act to be provided for by way of private improvement assessment, the Commissioners shall, where not otherwise hereby directed, give notice of their intention to do or perform, or to authorize to be done or performed, such matter or thing either by public advertisement in some newspaper circulating in the burgh or in the county in which the burgh is situated, or by posting handbills in conspicuous places in the burgh, or by notice in writing to be transmitted by the post office or delivered personally, or at their dwelling houses, to the individuals having interest, as the Commissioners shall think proper; and upon these notices being given, and upon that condition alone, they are entitled to act."

These provisions are very reasonable with reference to a variety of charges which might be incurred with regard to the private improvement assessment. If it be a case of an act affecting a single individual, or possibly a case in which only two or three persons are concerned, it might well be, that a notice left at their dwelling houses would be the most proper and suitable mode of proceeding. If it affects a long line of street, (and this appears to be a somewhat long line of street,) they would probably think it desirable to give some more extensive notice, some notice which would be more secure of reaching the proprietors, who might be persons living at a distance; they would give some more diffused and general notice. But it is unnecessary to consider the character of the notice here, because the Court below has conclusively stated the opinion, (in which I entirely concur,) that nothing approaching to a notice required by this section has been given at all; and that, I think, is scarcely disputed by the learned counsel for the respondents. If such notice be necessary, none such has been given. Accordingly, if I am right in saying, that this improvement is a proper subject matter for a private improvement assessment, and if the 397th section accordingly applies to it, the decision of the Court below cannot be sustained.

That decision, however, has been attempted to be sustained in two ways; one by saying, that

this section has no reference at all to the matter in question, inasmuch as the work to be done is not work falling within the description of a private improvement assessment, and that, if the character of the assessment be not the ordinary assessment under the Act, it falls more readily, it is said, under the head of a district assessment, treating this single street in this particular case as being a district within the meaning of the Act; and that, as regards district assessments, no special notice appears to be directed.

Now, with regard to district assessments, they seem to have been made mainly with reference to the construction of sewers. I do not say, that they might not apply to other purposes also on account of the definition in the Act, which, like many other definitions in the Act, is not by any means very clear and precise when applied to other clauses of the Act. The definition in the Act of a district assessment tells us this:—"The expression 'district assessment' shall mean any assessment or charge (other than a private improvement assessment) which is confined only to a portion or district of any burgh." So far, therefore, it would be just to say, that if this which I have been considering is not a private improvement assessment, it would be included under that head of "district assessment," because district assessment seems to take in everything else which does not extend to the whole burgh. But the intent of a "district assessment" seems to have been of a very different character. It seems to have had reference to assessments which were made under the power of making sewer rates. These powers are contained in the 98th and following clauses, the 98th section expressly directing, that there shall be assessments in respect of the said special sewer rate and general sewer rate hereby authorized to be levied on the owners of all lands or premises within the burgh or within separate and distinct districts; "and in every case in which the Commissioners shall see fit to make the said assessments or either of them on separate and distinct districts, they should cause every such district to be described and defined as hereinafter provided." Here, I believe, in common with one of your Lordships, I was under the misapprehension of thinking, that a fresh difficulty had arisen, because one did not find for a long time any account of how it was provided, that districts were to be made. But if we proceed to the 185th section, which is certainly far apart from this one, (being nearly ninety clauses forward,) one does find how districts were to be made; and I cannot but think, that these district assessments were mainly intended with respect to the sewerage of the several particular districts of the town; so that those rates should be made for the several particular districts into which, in respect of those rates, the town should be mapped out, instead of the rates being made over the whole town. However, there is the definition, and I am obliged to say, that it appears to me to be necessary, that I should be satisfied, that the rate in question is a private improvement assessment rate. If it were not so, it might possibly fall under the head of a district assessment.

But now I come to the second argument in support of the decision of the Court below, which is this, that the 394th section would be sufficient to justify the notice which has been given, if any notice be required. Now really, that appears to me entirely incapable, I had almost said of argument, but certainly incapable of being sustained upon any sound basis, because § 394 is simply this, that "before fixing the level of any street which has not been theretofore levelled or paved, and before making any sewer where none was before, or altering the course or level of, or abandoning or stopping, any sewer, the Commissioners shall give notice of their intention, by posting a printed or written notice in a conspicuous place at each end of every such street through or in which each work is to be undertaken." Now there is no doubt involved in the levelling of a street something which is connected with fixing the level, and in that sense, and in that sense only, I suppose the Commissioners would say, that they thought it necessary, that they should give some notice under the 394th section. But if that be so, there is a great deal more that is required to be done in this case. There is not only the levelling, which of course would be a comparatively small part of the expense, but there is the flagging and paving, and the whole proceeding connected with the making of the road which is to be done, and which, under the 151st section, is to be charged upon the inhabitants; and therefore, if this be an improvement assessment, a notice made under the 394th section would be of no avail whatever. That notice is of course a very proper notice to be given when the level has not been fixed with respect to the advantage or disadvantage of the owners of the houses on each side of the street, by reason of the level being either raised too high or sunk too low for the convenience of the houses when built, but it is a notice which can have no effect whatever with reference to the very material and serious expense of paving and flagging the streets.

It is for these reasons, my Lords, that I have come to the conclusion, that the rate is a private improvement assessment rate, and that for that purpose the notice required by the 397th section should have been given. But it would be improper not to notice such observations upon this subject as were made by the learned Judges in the Court below. Therefore I will just for a moment notice the remarks of the Lord Justice Clerk. He says, "That is the notice which the suspender says should have been given in this case, and which, it is admitted as matter of fact, was not given. But then it is to be observed, that this section 397 applies only to matters done by the Commissioners, the cost of which falls to be provided for 'by way of private improve-

ment assessment.' If then the matter which the respondents here proceeded to do under the 150th section is not a matter of that kind, the 397th section does not apply. Notices under that section do not require to be given, and the objection fails. Then, is this a matter, the expense of which falls to be provided for in the way pointed out in the 397th section? The first thing to be considered is in what way the expense of matters undertaken under the 150th section is to be provided for? That is very clearly set forth in the 151st section, which provides, that the whole of the costs, charges, and expenses incurred by the Commissioners in respect of private streets, shall be paid and reimbursed to them by the owners of the lands or premises fronting or abutting on each street, in proportion to the extent of their respective premises. From this it appears, that the great principle of providing for the expense of a private street is, that it shall be apportioned among the owners of the respective premises fronting or abutting on the street. Now what kind of assessment is that? Speaking generally, there are three kinds of assessment under this Act. First, there is what may be called the general assessment over the whole burgh, of which it is not necessary to say anything at present. But then there is another, which is called the district assessment; and while the interpretation clause does not give us any explanation of the general assessment, it tells us, that the expression 'district assessment,' shall mean any assessment or charge (other than a private improvement assessment) which is confined only to a portion or district of any burgh. Now certainly when Commissioners proceed to improve a private street, an operation which may cost a good deal of money, and lay the assessment on each house fronting the street, that does look very like a district assessment. But then we must look to the limiting words, and endeavour to ascertain what is a private improvement assessment. The interpretation clause does not give us much information. It simply says, that the expression shall mean any assessment or charge on any person, for private improvement expenses under this Act. But fortunately we have, in a different part of the Act, a very distinct explanation of this matter." His Lordship then refers to the 103d section which I have already read, and he says, "Observe what is the subject matter of this clause. It is, that when an owner or occupier is ordered to do a piece of work in relation to his premises, and fails to do it, and the Commissioners do it for him, the Commissioners are to charge the owner or occupier with the expense."

Now the learned counsel for the appellant made a very just observation upon that, that his Lordship there reads the section not exactly as it is written; he reads it as if it were "when an owner or occupier is ordered to do a work *and* fails to do it." That is not what the clause says. It is "when he is ordered to do a work or fails to do it." It is the disjunctive, "or when he fails to do the work," and the Commissioners have to do it for him. In this case it may well be, that there has not been a distinct order upon Mr. Campbell to do the work which he has disobeyed, and it has therefore fallen upon the Commissioners to do it, but there has been a distinct neglect on the part of Mr. Campbell, and other persons interested in this property, to flag and pave the street, and it has fallen upon the Commissioners to do that under the 150th section of the Act. He clearly, therefore, is in the position of one who, though he may not have been ordered to do it, and failed, is in the position of one who has failed to do it, and it has been done by the Commissioners.

Then the Lord Justice Clerk says, "There is not a word here as to apportionment. The assessment authorized is one upon individuals." But it is upon individuals in a certain rateable proportion, according to the certain rated amount of property they occupy. It is therefore a matter properly assessable. And it appears to me plainly to fall within the very words of the 103d section, which directs what shall be a private improvement assessment, distinctly pointing out, as it seems to me, the two cases of there being either a single owner or occupier, or if you have to read the words "owner and occupiers" in the plural where it comprises many, then it is to be by assessment. Of course, the question of assessment does not arise until you have more than one person interested. You do not talk of an assessment upon a single individual, but where there are many, then the assessment, as a private improvement assessment, has to be provided for.

I believe the other learned Judges took much the same view of the Act, although one of them does say, that in construing the 394th section in any possible way to authorize acts of this description to be done under the notice which was here given, he is offering some degree of violence to the words of the clause. It appears to me, that no reasonable construction put upon that clause can justify what has been done under the provisions of the Act. And that, in truth, therefore, the proper notice not having been given, the proceedings of the Commissioners were irregular.

I ought, perhaps, just to notice one point which was raised by Mr. Jessel, after the view which your Lordships have taken in not allowing the counsel for the appellant to go into the question of its being a public street. The view which he suggested was, that the appellant was in a condition in which he must fail entirely, if it should turn out, that the road was a public road, because then he would have no right to interfere with any proceedings on the part of the Commissioners. I do not think, that that view of the case is correct. Whether it be a public road or a private

road, the Commissioners are affecting to do this under a notice in which they announce, that it is a private road, and that they intend to proceed under that notice. The case, therefore, is one of an ordinary class, with which we have had a good deal to do in the course of the decisions which have taken place with respect to the powers of public companies or public bodies entrusted with the execution of a duty involving on their part large powers, which powers may affect most seriously the interests of those who are subject to their jurisdiction. In all matters regarding their jurisdiction, they are, of course, allowed to exercise those powers according to their judgment and discretion, but in all cases where they exceed those powers, they are immediately arrested by interdict or by injunction, as the case may be, according to whether it is in England or in Scotland, it not being a sufficient answer on their part to say you will have your remedy at law if the powers are exceeded. But the Courts will hold a strict hand over those to whom the Legislature has entrusted such powers, in order to take care, that no injury is done by the extravagant assertion of them.

Therefore I submit to your Lordships the propriety of coming to this conclusion in the present case, that there shall be a declaration, that it appears to this House, that the notice given by the Commissioners in respect of the improvements contemplated by them ought to have been a notice in conformity with the requisitions of the 397th section of the Act of 1862, but that the notice actually given by them was not such a notice; and on this ground reverse the interlocutors of the Court of Session appealed from, and affirm so much of the interlocutors of the Lord Ordinary as interdicts the respondents from acting upon, or carrying into execution, the resolution of the Commissioners embodied in the minutes of the 11th of June and 17th of July 1863; and that there should be no expenses in respect of this appeal to either party, or in the Court of Session, regard being had to this, that both parties have been in the wrong, the one, no doubt, substantially in the wrong (that is the respondents) in respect of their attempt to do the acts complained of without due notice, but a vast amount of confusion having been introduced into this case by the appellant having been also clearly in the wrong as regards a considerable portion of the case which he made on his original application for the interference and assistance of the Court.

I cannot entirely part with this case without saying how deeply I regret, that a litigation of this kind should have been carried on now for about six years and a half, in which all parties seem to have been litigating on points of a very small character, because this whole question of whether or not the notice was a due notice was one which might easily have been avoided and cured on the part of the respondents, if there had been only a reasonable compliance with the suggestion which was made as to the propriety of giving another notice, which could in no way have damaged or interfered with the powers which they might have been called upon to exercise. And on the other hand, this litigation might have been properly brought to a close much more quickly if the appellant, the pursuer, had clearly and distinctly ascertained the exact right and position which he was entitled to claim, and had brought that before the Commissioners, instead of causing, as he unfortunately has caused, considerable additional trouble and waste of time by raising claims of a totally different character from those ultimately produced before the Court, thereby preventing that reasonable course of things which might, in as many days perhaps as this case has occupied years, have settled the whole matter. Therefore, I humbly move your Lordships, that the interlocutors of the Court below be reversed, with the declaration I have proposed.

LORD CHELMSFORD.—My Lords, I entirely agaee with my noble and learned friend on the woolsack. He has entered into the whole case, and has examined so carefully and thoroughly every question which is involved in the argument at the bar, and has expressed so clear and satisfactory an opinion upon each question, that I feel, that I cannot usefully add anything to what he has said. I agree entirely in the mode in which he has disposed of the case, and particularly with regard to the expenses.

LORD WESTBURY.—My Lords, I entirely concur. The appellant argued, that this was a public street. That was not consistent with the pleadings, as against the Commissioners he is estopped from denying that it is a private street. With regard to the rate for the contemplated improvement, I think your Lordships are of opinion, that it should be a private improvement rate, and therefore the case comes within the 397th section, and my noble and learned friend on the woolsack has conclusively shewn, that the notice given was not in conformity with the provisions of that section. On that ground, and on no other, your Lordships are disposed to reverse the interlocutors of the Court of Session and to affirm a portion of the Lord Ordinary's order. I regret very much, that the ratepayers will have to pay the expenses of a most unpardonable and improper litigation.

LORD COLONSAY.—My Lords, I concur in the result which has been arrived at, and I shall only say a few words in reference to a view suggested by one of the Judges in the Court below, as to the probability of this being a proceeding which fell more under the rule of what is called "district assessment." Very plainly it is not a general assessment. It is plainly a course of operations with respect to which private parties were to pay. The question comes to be, whether

it is of the nature of those which are to be comprehended under the term "Private Improvement Assessment." Now, unless it comes under private improvement assessment, it must be (as it was said below) a district assessment. Now what is a district assessment? The interpretation clause of the Act says, that the expression "'district assessment' shall comprehend" so and so. The expression "district assessment" does not occur anywhere with reference to operations to be performed under the 150th section of the Act. Where are these words to be found? They are to be found in certain clauses applicable to sewerage, and some matters of that kind. It is difficult to find, where a district has been pointed out and arranged and defined, how it is to be denominated. We find that in another part of the Act, at a great distance, in the 185th section. But what does that say? It says the districts are to be formed, with a reference to what? With reference to a very small class of matters—with reference to drainage alone. They are called drainage districts. I do not find the expression "district assessment" anywhere in the Statute applicable to improvements to be performed under the 150th section. Therefore I think "district assessment" is out of the question.

Then comes the question whether this ought to be a notice under the 397th section, or under the 394th section, or whether there need be any notice at all. It is very difficult to suppose, that such proceedings as these were intended to be authorized without any notice at all. Where such proceedings are of the nature of improvements of a private street, one would naturally expect to find, from the manner in which the expenses are to be defrayed, that they were to be comprehended under the assessment for private improvements; but certainly the 394th section, which relates to streets, relates to a limited class of operations not comprehending all that is directed to be performed under the 150th section. I cannot hold, that the 394th section was a proper section under which to give notice. Where it is a matter in which several parties are interested, I think the provisions of the 397th section are very important, in order that all parties, both owners and occupiers, might find out how far their interests were involved. But the 394th section, unless you do extreme violence to its words, appears to me to be applicable to public streets, and not to comprehend operations to be performed under the 150th section.

The following *order* was pronounced:—"That it appears to this House, that the notice to be given by the Commissioners in respect of the improvement contemplated by them ought to have been in conformity with the requisitions of the 397th section of the Act of 1862, but that the notice actually given by the respondents was not such a notice: And for this reason *reverse* the interlocutors of the Court of Session appealed from, but such reversal is not to be held to affirm the interlocutors of the Lord Ordinary, save so far as such interlocutors interdict the respondents from acting upon or carrying into execution the resolutions of the respondents embodied in the minutes of the 11th of June and 17th July 1863. *No expenses* to either party, either in the Court of Session, or in this appeal."

Appellant's Agents, Campbell and Lamond, C.S., W. Robertson, Westminster—*Respondents' Agents*, J. C. Irons, S.S.C.; Simson and Wakeford, Westminster.

MARCH 14, 1870.

GILBERT RAINY TENNENT, *Appellant*, *v.* PATRICK TENNENT and Others, *Respondents*.

Partnership—Fraud—Undue Influence—Reduction of Deed—*G., a partner with his brother C. in a business which the father gave them, and in which he retained a large interest, became involved in debt, whereupon the father made an agreement with the sons, agreeing to pay G.'s debts, and G. to cease to be a partner on receiving certain sums, but a power being reserved to the father to replace G. in the business after two years. G. was never replaced in the business, and afterwards raised an action to reduce the agreement on the ground of inadequacy of consideration and fraudulent representations.*

HELD (affirming judgment), *That no sufficient facts were proved to warrant the reduction of the agreement.*

SEMBLE, *When a deed is sought to be reduced for inadequacy of consideration, the inadequacy must be such as to involve the conclusion, that the party either did not understand what he was about, or was the victim of some imposition.*

Proof, Parole—Writ or Oath—Fraud—Trust—Statute 1696, c. 25—*Where a Trust deed is entered into, which is alleged to be a sham, and made for a particular purpose, it is competent to prove this allegation by parole evidence; per* LORDS WESTBURY *and* COLONSAY.

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[1] See previous report 6 Macph. 840; 40 Sc. Jur. 408. S. C. L. R. 2 Sc. Ap. 6; 8 Macph. H. L. 10: 42 Sc. Jur. 408.