the former law; and therefore there is no casualty exigible in terms of the 15th section of the statute. No doubt the clause in the original feu-right prohibiting subinfeudation and irritating rights granted in contravention, is intended to secure the superior in the more rapid payment of casualties, but whatever remedies may be competent to the superior now or at a future time, it is impossible to say that at present a casualty is exigible.

Lord Ormidale—I concur. It was, I think, almost conceded by the defender that the pursuer is duly infeft under the statute, and the pursuer is willing, as the condition of redemption, to pay all the casualties already due and exigible, of which there seem to be none. With regard to the argument which has been submitted on the provision of the feu-disposition, I must say I entertain great doubt whether a declarator of irritancy would be competent. The contract between superior and vassal contains no special provision applicable to the case of singular successors. But it is not necessary to express any opinion on that point.

Lord Gifford—This case is no doubt an important one as it affects the operation of the Conveyancing Act of 1874; but I have no doubt whatever that the Lord Ordinary is right. First, as regards the title to redeem, it is said that no one but a vassal can redeem, but it is clear that an unentered proprietor can redeem, for every proprietor who is infeft can redeem, and infeftment is defined by the Act to consist in registration. I assume that the pursuer's infeftment was an *a me* one. He is nevertheless infeft, and in title to sue an action of redemption, provided the feu-right was granted before the statute. Second, The mere fact of the pursuer raising an action of redemption does not of course make any casualty exigible which was previously not exigible. No declarator of non-entry is competent, for the fee is full; and for the same reason no action for payment of casualty is competent. Third, What are the terms on which the pursuer is entitled to redeem? There are two cases provided for by the statute. The first is where casualties are exigible only on the death of the vassal, whether consisting of relief or of composition. That provision applies to the present case, and the pursuer, being a singular successor, is therefore entitled to redeem on paying the amount of the highest composition, estimated as at the date of redemption, with an addition of 50 per cent. The second case is where casualties are exigible on the occasion of each sale or transfer of the property, as is often made matter of express contract—for instance, in all the south-side feus on the Grange estate and elsewhere. The rate is then 2½ times the casualty, estimated as aforesaid. But that provision clearly does not apply to the present case.

The Court adhered.

Counsel for Defenders — Asher — Jameson. Agent—John Carment, S.S.C.

Counsel for Pursuer—M'Kechnie. Agents—J. & A. Hastie, S.S.C.

Thursday, February 22.

SECOND DIVISION.

[Sheriff of Renfrew and Bute.

POLICE COMMISSIONERS OF KINNING PARK *v.* THOMSON & COMPANY.

Burgh—Street—Property—The General Police and Improvement (Scotland) Act 1862, (25 *and* 26 *Vict. cap.* 101).

Circumstances in which *held* that a street in a burgh which had adopted the General Police and Improvement (Scotland) Act 1862, was a "private street," and that the owners thereof were entitled to put up posts and a chain across the street so as to prevent through traffic by carts and carriages.

This was an appeal in a petition for interdict at the instance of William Lucas, clerk to and as representing the Police Commissioners of the burgh of Kinning Park, constituted under the General Police and Improvement (Scotland) Act 1862, and representing them also in their capacity of local authority under the Public Health Act 1867, against William Thomson & Company, engineers, Kinning Park, near Glasgow, who represented the whole feuars in Smith Street, Kinning Park.

The petition set forth that prior to the erection of the district into a burgh in 1871 Smith Street had for many years been laid off and used as a street, and it had since been used for cart and other traffic, and that the Commissioners had caused it to be paved, causewayed, and flagged. The respondents, however, had, by placing posts and a chain across one end of the street, caused an obstruction which prevented free ingress and egress, especially of cart traffic, and was prejudicial to the rights of the Commissioners and dangerous to the lieges. These obstructions had been removed by the Commissioners, but had again been erected, and interdict was therefore craved. The defence was that Smith Street was a private street, the property of and formed for the convenience of the proprietors on either side, and that the ports and chain had been put up with the consent of the superior and of all the feuars interested.

A proof was taken, and it appeared that the street had been paved, &c., to the satisfaction of the Commissioners by the owners of the premises fronting the street, and that thereafter the respondents called upon the Commissioners to declare the street to be a public street, but they declined to do so.

The Sheriff-Substitute (Cowan) granted perpetual interdict as craved, but on appeal the Sheriff recalled the interlocutor, and issued the following judgment, the findings of fact in which were not disputed by the appellants:—

"*Edinburgh, 11th October* 1876.—The Sheriff having considered this process, sustains the appeal for the respondents: Recals the interlocutor appealed against: Finds in fact that Smith Street is a street within the burgh of Kinning Park, originally laid out at the expense of Alexander and William Smith, who obtained right to the ground through which it runs by the disposition, No. 17 of process, dated 15th and 17th November

1866: Finds that the line of the said street was laid off in the year 1870, but until the year 1875 the street was not properly formed, but was, on the contrary, a roughly-made course, with obstructions on it to free passage: Finds that until the year 1874 no houses were erected along the said street, there being merely wooden sheds, and it was only in that year that stone buildings were begun to be erected: Finds that the respondents are the owners of premises feued to them at the said street: Finds that the Commissioners for the burgh of Kinning Park did, in the exercise of statutory powers, in the month of September 1875, issue an order to the owners of the lands or premises fronting or abutting on Smith Street to cause said street and footways thereof to be freed from obstruction, and to be properly levelled, causewayed, flagged, and channelled, conform to plans and specifications prepared by their surveyor: Finds that in consequence of this order the feuars in Smith Street did remove all obstructions on the said street, and did flag and pave the same, and that these operations were completed in the month of October 1875: Finds that a few days after the said operations were completed posts were put up and chains drawn by means of said posts across the street, so as effectually to prevent all traffic on the street by carts and carriages, and that this was done by the respondents and the other feuars: Finds that said posts and chains were allowed to remain up for about four months, and were then taken down by order of the Commissioners, and that after being down for two weeks they were a second time erected, and were a second time removed by the Commissioners shortly before the presenting of the petition for interdict: Finds that until the month of October 1875 there was no impediment by means of chains across the street to the passage of carts and other vehicles along the said street, but that the same was open and was used by the public, in so far as the unformed condition of the street prior to September 1875 permitted: Finds that the said street connects the Paisley Road, which forms the highway between Glasgow and Paisley, and Park Street, which is a private street within the burgh of Kinning Park: Finds that the expense of cleaning and lighting of Smith Street is borne by the Commissioners of Kinning Park, but that the expense of watching and of keeping the street in repair is borne by the feuars on each side of the street: Finds that the said street is the property of the superiors Alexander and William Smith and their feuars, and is a private street within the meaning of the General Police and Improvement (Scotland) Act 1862: Finds that the Commissioners of Kinning Park have declined to declare the said street to be a public street within the meaning of the said statute, section 154: Therefore finds in law that they are not entitled to interdict against the respondents as craved: Dismisses the petition: Finds the respondents entitled to expenses: Allows an account thereof to be given in, and remits the same to the Auditor to tax and report.

"*Note.*—The Commissioners of Kinning Park do not seem to appreciate correctly their legal responsibility and duty. They were entitled under the 150th section of the statute to call upon the owners (as they did) on each side of the street to remove obstructions and to pave it. It was right and proper that any street, whether public or private, within the burgh should be put in such a condition as to render passage along it free from danger. But their power to insist on such precautions for the safety of persons living in this private street, or having occasion to go into it, did not give to them the powers and authority which they would have had over a public street, nor take away from the owners of the private street the right of protecting it by barricades or chains across, which the law gives them. If the Commissioners desire to have such powers, this may be obtained in the manner pointed out by the 154th section, which enacts as follows:—'If any private street shall at any time be made, paved, or causewayed and flagged, and put in good order and condition to the satisfaction of the Commissioners, then, and on application of any one or more of the owners of premises fronting or abutting upon such street, it shall be lawful for the Commissioners to declare the same to be a street, as defined in this Act, and for ever afterwards vested in the Commissioners, and shall, with the exception of the footway, be repaired and repairable by the Commissioners under the authority and powers of this Act.'

"The street has been put 'in good order and condition' to the satisfaction of the Commissioners by the owners of the premises fronting the street, and the Commissioners have been called upon by the respondents to declare the street to be a public street, but they have declined to do so, because the consequence of such a declaration would be that the street must be kept in repair by the Commissioners, and not by the owners along the street. It is difficult to see the fairness or justice of this conduct on the part of the Commissioners. If the street is to be used by the whole people in the district, and cut up by a heavy traffic brought upon it by strangers, it would require very clear enactment to fix the liability for the expense on the few persons who may happen to be the owners along the street at the time.

"The Commissioners think that they can continue this burden on the shoulders of these owners, and that they (the Commissioners) have a discretionary power to relieve them of it or not according to their own will and pleasure. Now, this is an entire misconstruction of their position. The words 'it shall be lawful,' occurring in the 154th section, mean, with reference to a matter of this kind, that the Commissioners *must* do the thing if the conditions on which it is to be done exist, viz., the street being put in good order and condition. Similar words in the General Turnpike Act were thus interpreted by the Lord Justice-Clerk (Inglis) in *Walkinshaw* v. *Orr*, 28th January 1860, 22 D. 631:—'By the 61st section it is enacted "That the trustees of all turnpike roads shall have power, and they are hereby authorised, to widen and extend all such roads, so that the same shall be in all places 20 feet in width of clear passable road." Such words as these are capable of two constructions, according to the subject-matter and the context. They may mean either that the parties invested with the power may exercise it or not according to their discretion, when the circumstances occur in which it may be exercised, or that in those circumstances they are bound to exercise it. Now, I hold it to be a general canon in the construction of the statutes that where powers are conferred in a statute for the public benefit they must be

exercised, and the enactment is imperative. This is a case in which the power is given clearly for the public benefit, and therefore, *prima facie*, it appears to me an imperative enactment.'

"This doctrine, that the words 'it shall be lawful' and 'may,' occurring in a statute, mean 'shall' and 'must' when the statute has reference to the carrying out any beneficial purpose for the public, is supported by many authorities, and among others are the following:—*Rex* v. *Flockwood* (inclosure), 2 Chil. 251; *M'Dougall* v. *Paterson*, 21 Law Journal, C.P. 27; *Crake* v. *Powell*, 21 L.J., Q.B. 183; Chapman, 19 L.J., Ex. 228; *Newport Bridge*, 29 L.J., M.C. 52; Dwarris on Statutes, 604–671; Smith's Constitutional Law, 438–439; Sedgwick's Constitutional Law 724, 727–729; *Beckett* v. *Campbell*, 2 Macph. 485.

"That the street in question is the private property of the feuars there can be no doubt, and if so, it does not cease to be such merely because they had not barred the passage through it between the years 1870 and 1875, when it was in an embryo condition. The doctrine of 'dedication' of a road to the public by allowing the public to use it for a time is unknown to the law of Scotland, except in the shape of acquisition by the public in virtue of the positive prescription. The street therefore being a private street, the owners of it are entitled to protect themselves from the burden of the traffic now sent through it, and which moreover does not belong to their district, but is brought through their street in order to evade tolls. No doubt the barring-up the street may produce inconvenience, as described by the witnesses for the petitioner, but this inconvenience may be put an end to in a moment by the Commissioners simply doing their duty, declaring the street to be a public street in terms of the requisition made upon them. Once it is made a public street there is an end to all chains and barricades. The respondents, besides the right to protect their private street by closing the ends of it in the way in which such streets in towns are usually protected, have also a direct action against the Commissioners of Kinning Park to compel them to do their duty by taking over the street and making of it a public street, and bearing the expense of it in future. It certainly is a very odd circumstance to find a burgh without one of its streets a public street, and not one of them repaired from the public rates. This condition of things is not very creditable to the Commissioners, and was certainly not anticipated by the Sheriff when this burgh was formed."

Against this interlocutor the petitioners appealed to the Court of Session.

Authorities—*Wallace* v. *Police Commissioners of Dundee*, March 9, 1875, *ante* vol. xii. 361; *Cargill* v. *Magistrates of Portobello*, December 11, 1863, 2 Macph. 244.

At advising—

Lord Justice-Clerk—The true question here is certainly one of very general importance, viz., Whether a street which was private property and was not sufficiently paved and flagged by the owners before the adoption of the General Police Act in the district becomes a public street in the sense of the Act by the mere adoption of the Act? The appellants have put their case as high as this, that public traffic could not be excluded from a private street in a burgh which has adopted the Act. Now, the Act refers to two classes of streets—public and private—and I am of opinion that under that Act there is no such thing as a public street which is not also a public thoroughfare, and, on the other hand, that no private street is a public thoroughfare. By the interpretation clause it is declared that "the word 'street' shall mean a public street, and shall extend to and include any road, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh used either by carts or foot-passengers, not being a private street, and not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path, or bank." The clause then further declares that "the expression 'private street' shall mean any road, street, or place within the burgh (not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank), used by carts, and either accessible to the public from a public street, or forming a common access to lands and premises separately occupied, and which has not been before the adoption of the Act well and sufficiently paved and flagged by the owners of premises fronting or abutting on said street, and which has not been maintained as a public street." The result of that is that a "street" is simply a public thoroughfare, while with regard to private streets, defined as above, there are two conditions—(1st) that they have not been well and sufficiently flagged by the owners before the adoption of the Act; and (2d) that they have not been maintained as public streets. Sections 146, 147, 148, and 149 of the Act relate to the improvement and formation of streets, to the placing of fences and posts on the side of footways, to the restoration of pavement, flags, or materials displaced or altered by private persons, and to construction and paving of footways. All these sections plainly refer, I think, to the case of public streets. They stand in contrast to the 150th section, which deals with private streets, and which ought to have been founded on in this application. That section has a separate preamble—"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." And it then proceeds to empower the Commissioners to cause such streets to be freed from obstructions and to be properly levelled, &c., and provided with kerb-stones and gutters, to the satisfaction of the Commissioners. Now, in this limited jurisdiction of the Commissioners there is nothing whatever to destroy the inherent right of a proprietor to exclude the public from his property over which it is not pretended that they have acquired any right-of-way. The interference with private property is limited to cases involving the safety of the public who may be tolerated by the proprietor in a use of the ground or who may require to use it in respect of some duty or business in the neighbourhood. I am therefore clearly of opinion that the Sheriff's view of this matter is right. Another question remains behind, Whether when the street is properly flagged, and the feuars apply to the Commissioners to declare what was formerly a "private street" to be a "street"

within the meaning of the General Act, the Commissioners are or are not bound to do so? I observe that on the suggestion of the learned Sheriff the feuars did make such an application on 7th September 1876, and that it was refused by the Commissioners, but without stating any reason founded on the statute. I give no opinion whether or not they were entitled to refuse.

LORD ORMIDALE concurred.

LORD GIFFORD—I concur. The question is simply, Whether the Police Commissioners have a right to turn all private streets into public thoroughfares for carts? This is a very startling doctrine, and would put an end to a great many squares, closes, *culs de sac*, and places protected by posts and chains, and would also be inconsistent with the provisions of many local Acts. The truth is that the Commissioners have very large powers over private streets, but not to make them public thoroughfares, which would in justice throw the liability of their maintenance on the public rates. Now this is a private street belonging to the feuars, who could shut it up at both ends and exclude both the public and the Commissioners of Police. The 150th section is not founded on by the petitioners, but even if it were I should be of opinion that the posts and chain, against the erection of which an interdict is asked, are not obstructions in the sense of that section.

The Court pronounced this interlocutor :—

"Find that the street in question was laid out in 1870, and was occupied for some time by temporary erections, but was not built upon till 1874: Find that in 1875 the petitioners, in terms of the Police Statutes founded on, required the respondents to put the roadway of the said street in proper repair, as required by the 150th section of the statute, which has been done: Find that the said street is a private street in terms of the statute, and is not a public thoroughfare or passage: Find that the public have no right of passage along the same excepting at the will of the proprietors thereof: Therefore dismiss the appeal; affirm the judgment of the Sheriff complained of; find the appellants liable in expenses; and remit to the Auditor to tax the same and to report, and decern."

Counsel for Appellants—Brand. Agent—Adam Shiell, S.S.C.

Counsel for Respondents—Moncreiff. Agent—Robert A. Brown, L.A.

HIGH COURT OF JUSTICIARY.

Friday, February 23.

APPEAL—GREIG *v.* TAYLOR.

Police (Scotland) Act 1857, *sect.* 24—*Conviction—Constable—Public-house.*

A publican was convicted on a charge of harbouring or entertaining three constables, or permitting them to abide or remain in his house to the neglect of their duty, but the conviction did not show which alternative offence had been committed.

Held that the conviction was ambiguous, and must be quashed.

Held, further, that one of the constables having been in plain clothes, the conviction was bad as regarded him, and must be quashed *in toto*.

Observations (*per curiam*) on the meaning of sec. 24 of the Police (Scotland) Act 1857.

This was a case stated by the Magistrates of the Police Court of Airdie in a complaint in which the appellant Greig, a public-house keeper, was charged by the Procurator-Fiscal with an offence against the Police (Scotland) Act 1857 (20 and 21 Vict. cap. 72), in so far as at the time and place set forth he did knowingly harbour or entertain in his house James Menzies, Alexander Town, and David Miller, police-constables of the Airdrie district, and being then constables within the meaning of the Act, or did permit them to abide or remain in his house, to the neglect of their duty. The Case stated that on the date in question, between the hours of 10 and 11 P.M., two of the constables in their uniform, and while on duty, and another of them in plain clothes, entered the appellant's premises and purchased and consumed without sitting down a small quantity of drink, and were in the premises only four or five minutes. On these facts the Magistrates found the charge proven, and fined the appellant 10s. The question submitted was, Whether the Magistrates were right in their interpretation of the Act, the 24th section of which provides—"If any victualler or keeper of any house, shop, room, or other place for the sale of any liquors, whether spirituous or otherwise, shall knowingly harbour or entertain any constable appointed under this Act, or permit such constable to abide or remain in his house, shop, room, or other place, to the neglect of his duty, during any part of the time appointed for his being on such duty, every such victualler or keeper as aforesaid being convicted thereof shall forfeit and pay any sum not exceeding £5.'

At advising—

LORD YOUNG—I am of opinion that there was no legal evidence of an offence under sec. 24 of the statute, and that the facts were not sufficient to support a conviction. In the first place, however, I observe that the charge is not conform to the Act of Parliament, which in sec. 24 refers to constables "appointed under this Act." The charge no doubt describes the constables as "within the meaning of the Act," but I am not sure what that means, and the fact of appointment ought certainly to have been stated. Then the facts stated are quite inconsistent with the idea of the constable in plain clothes being on duty, and as the conviction is a general one relating to the three constables, and imposing an indivisible penalty, this is probably sufficient for quashing the conviction. But I desire further to express the opinion that sec. 24 does not prohibit a publican from serving a constable in uniform with a glass of spirits or beer, or it might be of ginger beer or soda-water. This might be good policy, but it is not the law under this statute. The words are "harbouring or entertaining," and these expressions and the words which follow are probably exegetical of one another, so that the