selves, and then the settlement of the last instalment of the price of the bridge occurs. Then a year after that there was in addition the payment of the £100 which had been retained, and which payment was believed and intended by both parties to be a final and conclusive settlement of accounts between them. And looking to what I believe to be the fact, viz., the absence of fraud on the part of the contractors, or representations so far as they were concerned conducing in any way to the settlement of accounts between the parties—that settlement having been made by Haldane and Blyth & Cunningham—I am of opinion that the pursuers cannot now question that settlement or open up these accounts. Haldane, undoubtedly, as your Lordship has observed, knew everything that occurred, although when first examined his evidence did not come up to that, but undoubtedly when he was re-examined at a later stage of the case he stated that everything was known to him. And the next question is, what was his position? He was no doubt clerk or inspector of works under the contract. But he occupied a very peculiar position, for he was not appointed by the principal engineers to that duty, but was the servant of the pursuers, having been selected by them, and was in direct communication with them from time to time. And indeed they so far interfered with the performance of his services in connection with the bridge contract that he could not give his full time to that work. He was employed by the pursuers to perform a similar duty at another important contract, which necessarily took him away from the bridge for a very considerable part of his time. But looking to the fact that he was resident engineer, and acted in that capacity all through the work, it appears to me, concurring with your Lordship, that the pursuers are not now entitled in this matter of the settlement of accounts—a settlement of accounts acquiesced in so far as Haldane is concerned—to say now, and in a question with the contractors, that they are not bound by it, looking to the circumstances that have since come to their knowledge, especially those connected with the pier No. 3. But it seems to me that Haldane's knowledge on that subject must be their knowledge, and as he knew precisely how matters stood, and was their servant when this settlement took place, and acted for them in it, I think the accounts cannot now be opened up to the effect of asking damages for bad workmanship in connection with pier No. 3. That claim is, I think, precluded by the settlement of accounts which occurred so long ago, and on these grounds I express my opinion that the judgment of the Lord Ordinary should be recalled.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming-note for the Ayr Road Trustees against Lord Adam's interlocutor of 20th March 1883, Recal the interlocutor in so far as it decerned against the defenders W. & T. Adams, and William Adams and Thomas Adams, individual partners, for the sum of £1000 sterling: Sustain the second plea-in-law for the said defenders: Assoilzie the said defenders, and decern; and find the reclaimers (pursuers) liable in expenses to the said defenders, and remit," &c.

Counsel for Pursuers—J. P. B. Robertson—Dickson. Agents—Gordon, Pringle, Dallas, & Company, W.S.

Counsel for Messrs Adams—R. Johnstone—Kennedy. Agents—Campbell & Somervell, W.S.

Counsel for Messrs Blyth & Cunningham—Trayner—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Friday, December 14.

FIRST DIVISION.

[Lord M'Laren, Ordinary.

THE MERCHANT COMPANY OF EDINBURGH v. CORMACK AND OTHERS (GEORGE SQUARE GARDENS CASE).

Property—Property in Town—Common Interest—Regulation of Right of Proprietors of Houses having Common Interest in Ornamental Garden Ground—Usage.

By the titles of houses in a square in Edinburgh, the superior conveyed their respective houses to the various feuars "with a right and interest in the centrical area" in the middle of the square, "jointly and in common with the other proprietors of other houses . . . the proprietors always inclosing, smoothing, laying, and keeping the same in good order and in an ornate manner." There were also various provisions for securing that the houses in the square should continue to be dwelling-houses of a superior class. The proprietors appointed a committee, who took charge of the garden in the middle of the square, and made, *inter alia*, a regulation, which was acted on for more than forty years, to the effect that the use of the garden should be personal to the families and households of proprietors and their tenants, and should not extend to the pupils attending any day-school opened in any of the houses. In 1882 the governors of a public body having established a large day-school in the square, claimed the right to admit to the garden, subject to such regulation as should be fixed, the masters and pupils attending the day-school. *Held* that the right of proprietors in the "centrical area" was one not of common property but common interest; that the proprietors were entitled to make the rule they had made for the management of the garden; that the right of the pursuers must be determined according to the past possession and administration; and therefore that the rules and usage following on them for more than forty years disentitled the pursuers to the access claimed.

The Merchant Company of Edinburgh, as Governors of George Watson's Hospital, acquired by purchase on 11th March 1876 the house No. 5 George Square, Edinburgh. They made considerable additions to it, and used it as a day-school for girls, called the George Watson's College for Ladies, in connection with the Hospital No scholars resided in the house, nor was anyone left in charge of the premises after school hours.

The Merchant Company had previously been for some years tenants of the house for the same purpose. They also acquired No. 6 which they let to a tenant. The house No. 5 was situated upon the north side of George Square, in the centre of which is a large piece of ornamental garden ground, enclosed by an iron railing, and used by the inhabitants of the Square as a garden and pleasure-ground. In the contract of feu between James Brown and Walter Scott of Harden, dated in 1770, by which the subjects were conveyed by Mr Brown to Mr Scott, the house was conveyed with "a right and interest in the centrical area in the middle of the said intended great Square, as delineated in the plan thereof, jointly and in common with the other proprietors of other houses now building or to be built in the said Square, which right to the centrical area is to commence and take place at Martinmas 1772, the proprietors of the Square always inclosing, smoothing, laying, and keeping the same in good order and in an ornate manner." A similar clause was inserted in the titles of the other houses in the Square.

The proprietors in the Square, in or about April 1819, selected from their number a committee to manage the garden ground in the way of planting of trees, laying out the gardens, and framing regulations for their preservation and maintenance.

The earliest extant table of regulations for the said gardens contained, *inter alia*, the following rules:—"II. No proprietor shall lend or transfer his keys to non-proprietors upon any account, except to his tenants. IV. Proprietors or tenants entitled to access to the garden, and members of their families, may introduce non-proprietors into the garden, but only when along with themselves, and no children belonging to schools in the Square shall be admitted unless boarded with a proprietor and tenant." The table of regulations in which these two rules first appeared bore no date, but they were incorporated into the subsequent tables for 1843, 1845, and 1880.

It appeared from the minutes kept by the various committees of management that these regulations had always been strictly enforced, and especially the rule relating to the exclusion of children attending any school in the Square who were non-resident in any house having a right of access to the gardens. In particular, in the year 1835 a meeting of the proprietors having considered a letter by the Principal of the Ladies' Institution for the Southern District, which then occupied No. 55 George Square, "requesting permission to a certain extent for the scholars attending that institution to have access to the centre area," agreed that permission could not be granted, the meeting thereby confirming the action of the committee who had previously refused admission to the scholars, as distinguished from the family of the Principal.

On 4th May 1882 application was made by the Governors of George Watson's Hospital to the Garden Committee for six keys for the gardens in respect of the house No. 5 purchased by the Governors in George Square, in order, as stated in the letter of application, "that the gardens may be used to a limited extent by the head-master and pupils." The application was refused on the ground that the parties for whom the keys were asked were neither proprietors nor residenters in the Square.

The Governors, after a correspondence with the clerk to the proprietors in George Square, thereupon raised against the other proprietors in the Square an action of declarator "that the pursuers, as proprietors of the house No. 5 George Square, Edinburgh, have, in terms of their titles, right and interest, as an accessory to their said house, to the garden in the central area of the said Square in common with the other proprietors of houses in the said Square; and that the pursuers have right to such access to the said garden as is consistent with the maintenance of the said central area as a garden in good order and in an ornate manner, and with the fair exercise of the rights of access thereto belonging to the other proprietors of houses in the said Square: And it ought and should be found and declared, by decree foresaid, that the pursuers are entitled to have their right of access to the said garden judicially regulated and protected as against the defenders, and that the following regulations, or such others as our said Lords may direct, are to be observed for the exercise of the pursuers' said right of access, *videlicet*, that the pursuers, so long as they employ the said house No. 5 George Square as a day-school, known as George Watson's College for Ladies, may exercise their said right of access by themselves, or by allowing their head-masters, teachers, or pupils in attendance at the said school to enter and use the said garden in the same manner as the said garden is now entered and used by the other proprietors in the said Square, their families and tenants, but so that not more than ten persons connected with the said school, or such other number, less or more, as our said Lords may determine, shall be within the said garden at any one time." There was also a conclusion for interdict against the defenders keeping the garden closed against the pursuers or their head-master, teachers, and pupils.

The pursuers, *inter alia*, averred that they were the proprietors of the largest and most valuable subjects in the Square, and in that capacity they contributed the largest proportion of the expense of keeping the central area as a garden in good order and in an ornate manner. Their last annual contribution, paid on the 11th April 1882, and applicable to Nos. 5 and 6, was £9, 7s. 6d. They further averred that the regulations framed in July 1880, being the latest series of regulations, were not made known to them until shortly before the present action was raised. They also alleged that, as the individuals who were for the time Governors of the incorporation could take no personal benefit from the corporate property, the restriction insisted upon by the defenders was equivalent to a refusal to allow any exercise of their rights in the garden.

The defenders averred that in the original charters it was contemplated that the subjects conveyed should be used only as dwelling-houses of a superior class. Various restrictions were introduced, and shops and manufactories of all kinds were expressly forbidden. They further detailed the refusal of the application on behalf of a school in 1835 as above narrated. They further explained that the present pursuers, before purchasing the house No. 5 George Square in 1876, had for several years been tenants of the subjects, and so were aware of the rules regulating the access to the gardens, and no application

for access was ever made until 1882.

The pursuers pleaded—"(1) The pursuers having a right, in common with the other proprietors, in the garden of George Square, they are entitled to access and use of the said garden in common with the other proprietors. (2) The pursuers being contributors to the maintenance of the common subject as a garden, they cannot be excluded from such use thereof as is practicable to them as an incorporation by the head-master, teachers, and pupils of their school. (3) The use to be made of the garden by the pursuers is matter for regulation by the Court, having regard to the common rights of the pursuers and defenders respectively."

The defenders pleaded—"(2) The pursuers and their authors having for forty years, or time immemorial, taken part in and acquiesced in the management of the George Square gardens by the proprietors in the Square, are barred by their own actings, and by *mora* and acquiescence, from insisting in the present action. (3) The action being an action for the purpose of obtaining a right of access to the gardens for persons who are neither proprietors nor residenters in the Square, the pursuers have no right, title, or interest to sue. (4) On a sound construction of their titles the pursuers have no right of common property in the George Square gardens, but only a right of common use of or servitude over the same. (6) The use of the said gardens by the proprietors in George Square having for the last forty years been confined to themselves and their tenants, or other persons resident in houses in the said Square, and having been exclusive of the use thereof by persons not resident in the Square, and in particular by persons attending schools in the said Square during the day only, the defenders are entitled to absolvitor. (7) The right of access claimed by the pursuers for teachers and pupils attending their schools during the day being inconsistent with the rights of parties, and detrimental to the defenders' property and the amenity of the George Square garden, the defenders ought to be assoilzied."

On 3d July 1883 the Lord Ordinary (M'LAREN) sustained the defences and assoilzied the defenders.

"*Opinion.*—The Merchant Company, as Governors of George Watson's Hospital, have established a school for girls in a dwelling-house in George Square, which they purchased for the purpose. In this action they claim a right of access for their teachers and pupils to the garden in the central area of the Square, subject to regulation by the Court. If a *pro indiviso* right of property in the garden had been vested in the pursuers in common with the other proprietors of houses in the Square, I should have considered the claim to be well-founded. The enjoyment of a right of common property must always be subject to reasonable limitations, so that one proprietor may not obtain an excessive benefit at the expense of his co-proprietors. But I should not think it within the competency of a body of proprietors to convert a right of common property into one of mere personal use, and thus to deprive a corporate body, who cannot make use of the garden in person, of all benefit of the common property.

"In the case under consideration the superior has not made over the garden or central area of George Square to the feuars in property. It remains, along with the carriage-way, the property of the superior, each feuar being invested by his feu-contract or charter with a right and interest therein in common with the proprietors of the other houses, and taken bound to concur with them in maintaining the central area in its condition of garden and ornamental ground.

"In the case of *Lady Willoughby d'Eresby* against certain feuars of Callander I had occasion to consider the nature of the rights of feuars in relation to land laid out by the superior for the accommodation of the body of proprietors, but not conveyed to them. Although the case is apparently not reported, I understand that my judgment was affirmed in the Inner House subject to certain alterations made by agreement of parties in relation to the extent of ground to be taken for the enlargement of the parish church. In that case the main question was, whether the adjacent feuars had (without any title to the *solum* of the square) such a right and interest in the square as would enable them to prevent the superior from making a small encroachment on it for a purpose of public utility, namely, the enlargement of the church. I held that the feuars could not without a title acquire the absolute usufruct of the square, but that a use of a more limited character might be acquired by the superior's appropriation of the land to common purposes, and that evidence of past occupation and past assertion of right on the part of superior or feuar was admissible to explain the nature and extent of the use. I see no reason to alter the opinion then formed. In the present case the feuars' right to the use of the central area is recognised in their title-deeds, while in the *Callander* case it was inferred from the appropriation of the area to the uses of a square and from long possession. But as the George Square titles in no degree define the use which the feuars are to make of the garden, or prescribe a system of management, I must, as in the case referred to, be guided by the facts of past possession and past administration in determining whether the use claimed by the pursuers is within the measure of their rights.

"This being so, I can have no difficulty in determining what my decision should be. The minutes of the proprietors, which extend over a period of more than forty years, confine the privilege of the garden to occupiers and their families, and exclude children attending schools within the Square. These minutes, in my opinion, and the usage following on them, define the pursuers' rights, and disentitle them to the declarator concluded for in the present action."

The pursuers reclaimed, and argued—(1) The right conferred by the feu-charter over the garden ground was one of common property, or (2) of common interest, which in a case like the present was almost equivalent to common property. Before they could be lawfully excluded from these gardens the other proprietors would need to show some damage to have been done to the gardens by the pursuers or those whom they represented. The right claimed here resembled a common interest in water, and the law in that analogous case was laid down in *Morris* v. *Bicket*, May 20, 1864, 2 Macph. 1084. The present was a case in which the Court should interfere to regulate the rights of parties, as in the cases of *Menzies* v. *Macdonald*, March

10, 1854, 16 D. 827, and 2 Macq. 463; and of *Paterson* v. *Magistrates of St Andrews*, March 13, 1880, 7 R. 712, and 8 R. 117. The garden was a pertinent of the house, and so long as the house was lawfully used the pursuers were entitled to use the pertinent. There was nothing in the usage proposed which was at variance with the usage adopted by the other proprietors. If the number for whom admission was claimed at one time seemed to the Court to be too many, it was a matter for the discretion of the Court to fix a number.

Counsel for the defenders were not called on.

At advising—

Lord President—It appears that in 1876 the Merchant Company of Edinburgh, who are also Governors of George Watson's Hospital, purchased a large house in George Square, and turned it into a school for girls. It is entirely a day-school, and after school hours it does not appear that anyone resides on the premises, not even a porter or person in charge of the buildings; therefore, so far as the house is concerned, it has no inhabitants. What the Merchant Company desire by the present action is to secure the use of the garden or centrical area of the Square for the use of their teachers and pupils. It is not contended that they are to be entitled to have access to the gardens for the whole 850 pupils at one time, but it is maintained that they are entitled to have some access to this centrical area.

Now, the Lord Ordinary has found that they are not entitled to have any such access as they here claim, and I must say that I entirely agree with him. The title-deeds to the houses in this Square all contain certain clauses relating to the rights of the proprietors over this centrical area. Specimens of these feu-contracts are before us, the earliest of which is dated in 1770, and the way in which the right to the garden ground is conferred is thus expressed—"And also a right and interest in the centrical area in the middle of the said intended great Square, as delineated in the plan thereof, jointly and in common with the other proprietors of other houses now building or to be built in the said Square, which right to the centrical area is to commence and take place at Martinmas 1772 — the proprietors of the Square always inclosing, smoothing, laying, and keeping the same in good order and in an ornate manner. . . . And declaring that the said Walter Scott and his foresaids are not to have right, without consent of the proprietors of the neighbouring houses, to raise the lumheads of the house hereby feued higher than they presently are, unless the lumheads of such neighbouring houses shall be raised; and also declaring that the said Walter Scott and his foresaids, possessors of the said dwelling-house, coach-house, back court, and pertinents thereto belonging, shall be perpetually restrained from dealing in or the occupation of any trade or merchandise, whether foreign or inland, in wholesale or retail, of goods and vivors of any sort or denomination, and from baking and brewing for sale, and from the occupation of any kind of handicraft."

Now, I have read this latter part of the clause because it shows, I think, that the intention of the superior was that the houses in George Square should be occupied as dwelling-houses of a superior kind, and this appears, I think, from the exclusion of certain kinds of trades and occupations.

The right to the centrical area is not a right of common property, but of common interest, and therefore it follows that as these proprietors are not under any restrictions as to the mode of managing their common interest, it should be left to them to regulate the use of the garden ground in such a way as to carry out the general instructions contained in the feu-contracts.

Under these deeds the proprietors of the houses in George Square have certain mutual rights and obligations, and I cannot doubt that the proprietors are the proper parties to frame the rules and regulations for the management of the common interest.

This piece of ground has for many years been used as a garden and shrubbery, and various tables of rules have been made from time to time for its management. Thus we have in the print before us a series of regulations which, though undated, are understood to be the earliest set of rules in existence, and those of 1843 are substantially the same as the earlier but undated series. It also appears from the minutes of the Garden Committee that as early as 1835 an application, similar to that now before us, was made by a Mr Dalgleish, who had opened a school for the education of young ladies in 55 George Square. The regulations which were then in force prevented Mr Dalgleish's demand from being granted, and they were probably the same as we now find in the appendix, and among which are the following provisions—[*His Lordship here read rules II. and IV. above quoted, relating to the non-transfer of keys and the exclusion of scholars non-resident in the Square*]. It would thus appear that rule IV. was in force as early as 1835. It was a regulation which it was quite within the competency of the proprietors to frame for the purpose of exercising and regulating their joint rights, and it was a regulation with which no one outside was entitled in any way to interfere.

If at the time these rules were first proposed any proprietor had objected to them on the ground of undue restriction, perhaps some redress or concession might have been obtained; but that is not the question which we have to deal with here, and it would be impossible to go back now and say that these regulations, which have been acquiesced in and acted upon for so many years, are to be held as unreasonable, or *ultra vires* of the proprietors. Besides, the whole mode of using these gardens is in accordance with the various regulations. Thus, when a proprietor lets his house to a tenant, he ceases himself to have any right of access to the gardens. On the whole matter, I have no hesitation in adopting the view of this question taken by the Lord Ordinary, especially in the latter part of his note, in which he says—"But as the George Square titles in no degree define the use which the feuars are to make of the garden, or prescribe a system of management, I must, as in the case referred to, be guided by the facts of past possession and past administration in determining whether the use claimed by the pursuers is within the measure of their rights. This being so, I can have no difficulty in determining what my decision should be. The minutes of the proprietors, which extend over a period of more than forty years, confine the privilege of the garden to occupiers and their

families, and exclude children attending schools within the Square. These minutes, in my opinion, and the usage following on them, define the pursuers' rights, and disentitle them to the declarator concluded for in the present action."

I am therefore for affirming the Lord Ordinary's interlocutor.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuers—R. V. Campbell—Pearson. Agent—A. Kirk Mackie, S.S.C.

Counsel for Defenders—Trayner—Jameson. Agents—Fyfe, Miller, Fyfe, & Ireland, S.S.C.

Wednesday, December 19.

SECOND DIVISION.

[Sheriff of Lanarkshire.

MUIR *v.* TWEEDIE.

Parent and Child—Bastard—Filiation—Presumption—Admission by Defender of Intercourse with Pursuer.

This was an action of filiation and aliment of a child born in November 1882. The pursuer and defender were fellow servants at a farm from Martinmas 1881 till the summer of 1882, and were the only servants on the farm. The pursuer alleged intercourse with the defender in January, February, and March 1882. The defender admitted intercourse with the pursuer on a single occasion in May 1882, being six months before the birth of the child. There was some evidence of familiarity between the parties in the spring of 1882, and also evidence of familiarity to which the witness who deponed to it could attach no date. The defender led evidence to show that the pursuer and the farmer in whose service the parties were, were on terms of improper intimacy in March 1882. The pursuer did not accuse the defender of the paternity till at least ten days after the birth, though she had an opportunity of seeing him.

The Sheriff-Substitute (BIRNIE) assoilzied the defender. On appeal the Sheriff (CLARK) adhered.

The pursuer appealed, and argued that the admitted intercourse in May raised a presumption against the defender, which, taken with the opportunity at the date of conception, was as strong as the presumption arising from admitted intercourse prior to the date of conception, together with opportunity at that date—*M'Donald* v. *Glass*, 27th October 1883, *ante*, p. 45, and *Milne* v. *Thomson*, 24th October 1883, there cited. There was also strong evidence of familiarity, and the pursuer was entitled to complete the case by her oath.

The defender replied—No doubt the presumption from an admission of intercourse must be regarded as almost equally strong whether the admission applied to a term after or before the date of conception, provided there were opportunity at that date. It was still necessary, however, that the pursuer's should be an "unsuspicious deposition"—Lord Benholme in *Ross* v. *Fraser*, 13th May 1863, 1 Macph 783. In this case the pursuer's deposition was not reliable, and the case was therefore not proved.

The Court refused the appeal and affirmed the judgment of the Sheriff.

Counsel for Pursuer—Strachan. Agent—T. F. Weir, S.S.C.

Counsel for Defender—Sym. Agent—David Milne, S.SC.

Wednesday, December 19.

SECOND DIVISION.

Lord Lee, Ordinary.

ROBERTSON AND OTHERS *v.* PAROCHIAL BOARD OF MIDCALDER.

Public Burden—Public Health (Scotland) Act 1867 (30 and 31 Vict. cap. 101), sec. 8—Powers of Parochial Board—Assessment.

The parochial board of a parish in which there was a considerable village, acting as local authority, arranged to pay part of the wages of a scavenger to clean the village streets, the remainder being paid by the district road trustees. *Held* that such an arrangement was within the powers of the parochial board under the Public Health Act.

The village of Midcalder, situated in the parish of Midcalder, contained at the date of this action a population of 657, the population of the whole parish being 1698. The population was insufficient to make the inhabitants of the village to adopt the General Police Act (the Act 30 and 31 Vict. c. 101). The Public Health (Scotland) Act 1867, sec. 5, constitutes the parochial board of the parish the local authority thereof for executing the Act in such parishes. Under sections 16 to 30 of the Act the parochial board, as the local authority, are clothed with extensive powers in the way of prevention of nuisances, and for proceeding against the authors of the nuisance, to ordain them to remove it, or to pay the cost of its removal by the local authority.

Section 8 provides—"The local authority may, and where it shall be thought necessary by the Board [of Supervision] for the purposes of this Act, the local authority shall, appoint a sanitary inspector or inspectors . . . and make byelaws for regulating the duties of such inspectors."

For some years prior to 1878 the Parochial Board of Midcalder had employed a scavenger to clean the streets. He was paid partly by themselves and partly by the Road Trustees of the district. In 1878, after the employment had been intermitted for a short time, the Board resolved that an arrangement should again be made for the purpose with the surveyor of roads, the sum to be expended by the Board not to exceed 3s. 9d. per week, and it being understood that owners of property were not to be relieved of their responsibility under the Public Health Act.

This was an action by certain ratepayers, who were proprietors and tenants of property in the landward part of the parish, against the Parochial Board for declarator that the defenders were not entitled, as Parochial Board or local authority of