LORD ADAM concurred.

LORD M'LAREN—It appears to me that there is one and only one circumstance which induces hesitation as to altering the interlocutor of the Lord Ordinary, and that is, that the banking company have not clearly explained why they have commenced proceedings against the parties whose names are on the bill by an action against the acceptor after he had explained to them the circumstances in which he came to put his name to the bill. One would like to hear that the banking company had endeavoured first to recover payment from those who are directly liable to them on the bill. But in considering the question of security, which depends entirely on presumption or on the *prima facie* case made by the parties, we expect always the utmost candour from a complainer who asks to have diligence suspended without finding caution, and especially that he should confine himself to the real point of his case, and not make averments difficult of proof, and improbable on the face of them. If the complainer in this case had come here averring merely that the bank was using diligence against him oppressively, and asking that they should not be allowed to proceed, I should have been more inclined to accept the Lord Ordinary's view. But here the complainer in his averments seeks to identify the banking company with the fraud which he says was committed by other parties to the bill, making statements which are apparently not founded on information, and of which there is no corroboration. I think accordingly that we must follow the ordinary rule, and that the complainer can only be allowed to proceed on finding caution.

The Court recalled the interlocutor of the Lord Ordinary, and remitted to him to ordain the complainer to find caution in common form.

Counsel for the Complainer—Vary Campbell. Agent—Keith R. Maitland, W.S.

Counsel for the Respondents — Lees—Orr. Agents—Winchester & Nicolson, W.S.

Tuesday, November 24.

FIRST DIVISION.

CAMPBELL *v.* MAGISTRATES AND TOWN COUNCIL OF EDINBURGH.

Police—Paving Private Street in Edinburgh—Edinburgh Municipal and Police (Amendment) Act 1891 (54 *and* 55 *Vict.*), *sec.* 33—*Premises Abutting on a Street.*

Held that the proprietor of a garden, and of an upper flat and a *pro indiviso* share in the area of a house bounded by a street, was, in the meaning of section 33 of the Edinburgh Municipal and Police (Amendment) Act 1891, an owner of premises abutting on the street though there was no entry from the street either to the house or garden.

Police—Statutory Notice.

Held that notices issued by the magistrates under section 33 of the Edinburgh Municipal and Police (Amendment) Act 1891, calling upon the owner of a house abutting on a private street to pave the same, must specify in what manner the work is to be carried out.

David Campbell appealed, under section 62 of the Edinburgh Municipal and Police (Amendment) Act 1891, against a notice served upon him by the Magistrates of Edinburgh under section 33 of that Act, calling upon him, as owner of certain premises "abutting on" Rossie Place, to construct certain pavements and carriageways in that street.

The appeal was made in the following circumstances: — The appellant David Campbell was heritable proprietor of an upper flat and a *pro indiviso* share in the area of the house No. 23 Lady Menzies Place, Edinburgh, and of a plot of garden ground in front of said house. The subjects were bounded on the west by Lady Menzies Place, and on the north by Rossie Place. The entrance to the appellant's house was by an outside stair from Lady Menzies Place. There was a window in the wall of his house looking into Rossie Place, but no entrance from it either into the garden or house.

On 28th January 1891 the appellant was served by the Magistrates with notices under the Edinburgh Municipal and Police Acts 1879-87, requiring him to form and pave the footpaths, and make up, causeway, or pave the carriageway in Rossie Place to the reasonable satisfaction of the Magistrates and Council. Subjoined to the notices was a note to the effect that Mr Proudfoot, City Road Surveyor, would give information to any owners who might apply to him at his office as to what works were required under the notices. No attention was paid by the appellant to these notices, which were subsequently on 21st October 1891 withdrawn by the respondents.

On the same date the respondents served upon the appellant two fresh notices. The first of these notices referred to the foot-pavements in Rossie Place, and was in the following terms:—"Notice is hereby given to owners of lands and heritages fronting or abutting on the private street of Rossie Place, that the Magistrates and Council of the city of Edinburgh call upon them to free the foot-pavements or footpaths of said street from obstructions, and to properly level, make up, construct, pave, and complete the same to the reasonable satisfaction of the Magistrates and Council within one month from and after the 22nd day of October 1891; and in case this notice is not complied with within the time specified, the Magistrates and Council shall themselves, on the expiry of said period, cause the said foot-pavements or footpaths of the said private street, or part thereof, to be freed from obstruction, and to be

properly levelled, made up, constructed, paved, and completed in such way and manner and with such materials as the Magistrates and Council may think fit, and the costs and expenses which may be incurred by them in connection therewith shall be charged as a debt against such owner or owners in default; all in terms of section 130 of the Edinburgh Municipal and Police Act 1879, and section 33 of the Edinburgh Municipal and Police (Amendment) Act 1891." The second notice had regard to the causewaying of Rossie Place. It called upon the appellant "to free the carriageway of said street from obstructions, and to properly level, make up, construct, causeway, pave, channel, and complete the same to the reasonable satisfaction of the Magistrates," and was otherwise framed in parallel terms to the notice already quoted.

It was against these notices that this appeal was taken.

The appellant maintained that he was not bound to comply with the requisition in the notices, in respect, *inter alia*—"(1) That he is not the owner of lands and heritages fronting or abutting on Rossie Place, and that he is not the owner of houses and heritages adjoining or fronting said street in the sense of the Acts under which said notices are issued. . . . and (3) that the said notices dated 21st October 1891 are not sufficiently specific in their terms." The respondents contradicted both these propositions.

By the 33rd section of the Edinburgh Municipal and Police (Amendment) Act 1891 it is provided—"Where in any private street or court, houses or permanent buildings have been erected on one-half or more of the ground fronting or abutting on the same, or where such ground has been otherwise than temporarily enclosed and laid out to at least the said extent, and where such street or court is not, together with the foot-pavements or footpaths thereof, made-up, constructed, causewayed, paved, and in a complete and efficient state of repair to the reasonable satisfaction of the magistrates and council, the magistrates and council may, if they think fit, by notice call upon the owners of the lands and heritages fronting or abutting on such street or court to free the same, and any foot-pavements or footpaths thereof, from obstructions, and to properly level, make up, construct, causeway, pave, channel, and complete the same to the reasonable satisfaction of the magistrates and council, within a time to be specified in such notice, and in case such notice is not complied with within the time so specified therein, the magistrates and council may themselves, at any time thereafter, cause any such street or court or part thereof, and any foot-pavements or footpaths of the same, to be freed from obstruction, and to be properly levelled, made up, constructed, causewayed, paved, and channelled, and completed in such way and manner and with such materials as the magistrates and council may think fit, and the costs and expenses which may be incurred by them in connection therewith shall be recoverable as a debt from the owner or owners in default."

Argued for the appellant—(1) The appellant was simply the proprietor of a house and garden in Lady Menzies Place, with an entrance from that street. It was true a gable-wall of the house looked on to Rossie Place, but in order to "abut" on a street there must be an access to the street from the house or garden. Here there was none. It was also true that the appellant was a *pro indiviso* owner of the ground on which the house is built, but that was not on the level of the street, and so could not be said to "abut" on it. It was laid down by the Lord President in the case of the *Magistrates of Leith* v. *Gibb*, February 3, 1882, 9 R. 627, that for premises to abut on a street there must be undoubted right of access to the street. (2) There was not in the notices sufficient specification of the work to be done. The right of appeal was given for the first time by sec. 62 of the Act of 1891. Sec. 33 of that Act allowed the householder to do the work himself to the "reasonable satisfaction of the Magistrates," and failing his doing so, the Magistrates might do it as expensively as they thought fit, and the householder would have to pay. It was therefore necessary for the householder to be told definitely in the notice in what mode he must execute the work to obtain the reasonable "satisfaction of the Magistrates." It was true the old notice directed him to call on the City Surveyor to ascertain the way to do the work, but since the right of appeal was only given by the Act of 1891, it was no guidance to him to look at what was said in notices issued before the right of appeal was given, and in any case it would be most unreasonable to expect every householder to go and consult the City Surveyor. On the other hand, if the householder was to do the work without finding out the necessary details, the Magistrates might reject his work and make him do it over again.

Argued for the respondents—(1) The appellant was owner of lands "abutting" on Rossie Place. The case of the *Magistrates of Leith* was a special one, and differentiated from this by the fact that a strip of ground belonging to another person was interposed between the property in question and the street which was to be paved. The word "access," as used by the Lord President in that case, did not mean "entry," but merely that there must be no intervening property between the subjects and the street. Here there was no such intervening property either as to the house or the garden. (2) The notice was sufficiently specific in its terms, for the statute did not require the Magistrates to state how the work was to be done, but merely that it was to be done to their satisfaction. The usual custom was for the householder to apply for instructions to the City Surveyor, and that the appellant was directed to do in the notices of 28th January.

At advising—

LORD PRESIDENT—There are two questions upon which our judgment is asked—First, whether the appellant is proprietor of lands abutting on the street in question? and secondly, whether the notices served upon him by the Magistrates in October 1891 was sufficient, in the sense of giving him sufficient specific notice of what he was required to do?

As to the first of these questions, I have not much doubt that the appellant is proprietor of lands abutting on the street. According to every sense of the word, the garden of which the appellant is proprietor abuts on the street. Also, being *pro indiviso* proprietor of the area of the ground upon which the house is built, he is again, though his interest is a limited one, "proprietor of ground abutting on the street." The case stated for the Magistrates in their answers is quite sufficient on this point. I am therefore against the appellant on the first of the two questions.

With regard to the second, however, the case is very different. The Magistrates appear to me to have acted upon the theory that all that is required of them is to serve a notice which amounts only to a reminder to the ratepayers of the terms of the Act of Parliament. The notice tells him "to free the footpaths of said street from obstruction, and to properly level, make up, construct, pave, and complete the same to the reasonable satisfaction of the Magistrates," but as to the way and manner in which the work is to be done the notice is absolutely silent. We must consider whether, having regard to the fact that there is an alternative procedure provided for by the section, such a notice is an adequate compliance with the requirement of the statute. The scheme of the statute is that the householder should be apprised first of what he is himself required to do under it, and secondly, that failing his doing it, the Magistrates will do the work themselves. I take it, accordingly, that the proprietor may expect to learn specifically what is required of him that he may then consider whether to adopt the first course suggested by the statute, viz., that of doing the work himself, or the second, that of allowing the Magistrates to do the work and charge it to him. There may be circumstances in particular cases which may render it more convenient to individuals to do the work at their own hand. Whether they adopt that course or not may depend on the kind of work to be done, and it is only when the proprietor has due notice of the kind of work which is required of him that he can take advantage of the statutory provision.

It has been said by the respondents that the section may be worked out in this way, that a notice in general terms, such as we have here, should be given, and that a conference should take place between the householder and the City Surveyor as to the specific mode in which the work is to be executed, and that if they fail to adjust their views satisfactorily—the statutory period for appeal running all the time from the date of the notice—then the householder may come to the Court and found on these extra statutory negotiations. I cannot see that a citizen should have imposed upon him the duty of going and consulting the City Surveyor, when the simple plan is for the Magistrates to tell him what is required of him. It is too much to make a citizen go to the City Chambers and see the City Engineer in order to find out whether he will do the work himself or not. It is not, I think, too heavy a burden to lay on the Magistrates to insist that they should state in the notice with sufficient fulness the work that has to be done. There have been cases before us where such notices were issued. I am clearly of opinion that the notice was bad, and that the appeal should be sustained on that ground.

LORD M'LAREN—I am of the same opinion on both points. In the first place, I think that the statute can only be construed to include all the properties into which a tenement is divided. It would be most inconvenient were the proprietors' duty to depend upon a matter of conveniency, whether the proprietor of a flat had also a *pro indiviso* interest in the basement or not. The obligation imposed by the statute applies to all who have a substantial heritable interest in any stratum of a building overlooking a street, and not separated from it by any other intervening property.

Secondly, it is necessary if any appeal can be brought that the notice must specify generally the kind of pavement which the Magistrates desire. There may be individual circumstances which make it very important for the ratepayer to decide which course to pursue. Very often a builder or contractor in house property would prefer to do the work himself, and he must know how the Magistrates wish it to be done. It would be most inconvenient if all the proprietors in a long street were to come and wrangle with the City Surveyor as to the way in which the street should be paved. They would be far more likely to agree to a proposition sent them in the notice by the Magistrates. I am of opinion therefore that the notice is insufficient, because it does not specify the kind of pavement which the Magistrates require.

LORD KINNEAR—I am of the same opinion, and have nothing to add.

LORD ADAM was absent.

The Court sustained the appeal, found that the notices dated 21st October 1891 were not sufficiently specific in their terms, and that the appellant was not bound to carry into effect the work under said notices, and decerned.

Counsel for Appellant—Sol.-Gen. Graham Murray, Q.C.—Craigie. Agent—Robert Stewart, S.S.C.

Counsel for Respondents—Comrie Thomson—Boyd. Agent—W. White Millar, S.S.C.