take my own words home to myself. If it rested with me alone I should find upon the facts as the Lord Ordinary has, and as the Court of Session has not. I find, however, that the two noble and learned Lords who have addressed your Lordships before me have come to a decided conclusion the other way, and I believe the noble and learned Lord who is to follow me, if not quite so decided in opinion, inclines the same way. Under these circumstances I can only take my own lesson home to myself. I should have found a verdict the other way, but I do not dissent from the decision which is arrived at by your Lordships.

Lord Gordon—My Lords, certainly it is with some hesitation that I have felt myself obliged to concur in the opinion of the majority of your Lordships with reference to the disposal of this case. I felt the force of the lecture which was addressed by my noble and learned friend to a juryman. There is, undoubtedly, a certain amount of responsibility which rests upon any one who forms an opinion upon a case of this kind, where there has been such a difference of opinion in the Court below, but I took up the case and addressed myself to the consideration of it with some degree of interest, because I saw that the question involved a good deal of anxiety to the parties who are appearing before us as litigants. I have come to the conclusion that really one must defer to the opinions of my two noble and learned friends who first expressed their opinion upon the facts of the case.

I feel, my Lords, in the present case that a considerable amount of *onus* rests upon the pursuer. The pursuer has brought his action for the purpose of having it "found and declared that he has, along with the defender, a joint-right of common property in the loch called Fionn Loch," "and particularly in that part of the same sometimes called the Dubh Loch, and a joint-right of boating, fowling, fishing, and exercising all other rights in or over the said loch, and particularly in or over the said part thereof." I think that the *onus* lies upon him of establishing his case; and I think that when we come to consider the evidence we find that he has not established it, and he has not shown that he has such exclusive possession as would justify him in asserting the right which he attempts to assert in the conclusions of the summons.

I find that Lord Gifford, who may be held to be in a divided position so far as regards the substance of the opinion which he expressed, deals with the matter with reference to the obstruction which was caused by the artificial erection in the loch. He says in his opinion—"The circumstances are exceedingly singular, and there is such a marked distinction between these two lochs in natural feature that I do not dissent from the judgment which your Lordship proposes; and I think that on this part of the case the artificial barrier is really a very material element, for it has subsisted without objection for more than forty years. The altered state of matters has become the natural state, so to speak, and the two lochs are now completely separated, and I do not dissent from the judgment to which your Lordships have come, and which gives the Dubh Loch exclusively to the proprietor whose lands wholly surround it." Now, there is no doubt that there was a natural barrier, to some extent, before the artificial barrier was constructed. I think the artificial barrier cannot be thrown out of view in the case, and one is glad to get some firm footing in a case of this kind where the elements are so few. I think the artificial barrier did constitute an obstruction to the passage of boats, and that there has not been such an exclusive possession by boats after the artificial barrier was constructed as would interfere with the presumption against the passage of boats both before that barrier was erected and since that barrier was erected.

I feel, therefore, my Lords, that I am very much in the position of the juryman who would very properly be lectured by my noble and learned friend if he was addressing a jury, and that I ought in this case to defer to the opinions of the majority of your Lordships. I would only say, that after the very clear and exhaustive opinion which has been given by my noble and learned friend Lord Selborne, which I cannot attempt to improve upon in any way, I think the best course I can follow is to say that I adopt the conclusion which my noble and learned friend now on the woolsack has proposed that the House should adopt; and further, that I adopt the opinion which Lord Selborne has so clearly expressed.

With reference to the question of law, I think my noble and learned friend opposite, who spoke last (Lord Blackburn), has very fully gone into that, and I do not think I can add anything to the very clear exposition of the law as derived from previous decisions which he has given.

Interlocutor complained of affirmed, and appeal dismissed, with costs.

Counsel for Appellant — Rodwell Q.C. — Mackintosh. Agents—Tippetts & Co., Solicitors.

Counsel for the Respondent — Lord Advocate (Watson) — Benjamin Q.C. Agents—J. & J. Graham, Solicitors.

Monday, July 8.

[Before Lord O'Hagan, Lord Selborne, Lord Blackburn, and Lord Gordon.]

POLICE COMMISSIONERS OF FORT-WILLIAM *v.* KENNEDY.

[*Ante*, Jan. 9, 1877, 4 Rettie 266.]

General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. cap.* 101), *sec.* 162—*Projection of a House beyond the Line of a Street—"House" and "Building."*

An owner of a house in a burgh which stood back some feet from the street line, but had a plot of ground in front separated from the street by a railing fixed on a wall, removed the latter and took down the front of the house, intending to rebuild it in advance. The Police Commissioners thereupon served him with a notice, under the 162d section of the General Police and Improvement (Scotland) Act 1862, to the effect that he must keep the new front wall of his house "in a line with that of the adjoining house." *Held* (affirming the judgment of the Court of Session) that that section of the Act did not

apply, as there was no "house or building" which had been taken down, the railing and wall not being a "house or building" in the sense of the statute.

Opinion [*per* Lord Blackburn] upon the right to appeal against the judgment of the Sheriff in applications by notice and under a petition for interdict founded on the 162d section of the General Police and Improvement [Scotland] Act 1862, to have the front wall of a house kept "in a line with that of the adjoining house."

The respondent in this case was the owner and occupier of a house and shop at the north-west corner of Church Square, in Fort-William adjoining High Street. The front wall of his house stood six feet back from the line of the pillars of the British Linen Company's Bank, which was next it, but his front garden wall with railing was about three feet further forward than those pillars, and abutting on to the Square. He was about to rebuild his house, and bring the front forward so as to be rather in advance of the bank, and for that purpose took down the garden railing and front wall of the house. The Commissioners of the burgh objected to this as contrary to the General Police and Improvement Act, inasmuch as it would be building beyond the line of street. The Commissioners offered to allow him to keep his front wall in a line with the outer face of the columns of the bank, but objected to more. The respondents wished to go further forward. The question turned on the 162d section of the Police Act, which enacts that when "any house or building, any part of which projects beyond the regular line of the street or beyond the front of the house or building on either side thereof," has been taken down in order to be altered, or is to be rebuilt, the Commissioners may require the same to be set back. The Commissioners also fixed the line of street so as to check the respondent. They at last presented a petition to the Sheriff to prohibit the respondent from carrying out his plan, while the respondent appealed against the order fixing the line of street. The Sheriff dismissed the petition and quashed the order fixing the line of street, and on appeal the Second Division agreed with the Sheriff that the section of the Act relied on by the Commissioners did not apply to this case, as the garden railing could not be called a "house or building"—[Jan. 9, 1877, 4 Rettie 266].

The Commissioners then appealed to the House of Lords.

At the conclusion of the case on behalf of the appellants their Lordships delivered judgment as follows:—

Lord O'Hagan—My Lords, this is a very short, a very small, and I think your Lordships will consider, upon the whole, not a very difficult case. The matter has been the subject of much consideration in the Courts below; it has been discussed before the Sheriff and the Sheriff-Principal, and it has gone to the Court of Session, and there the unanimous judgment of the Court has been such as has been indicated to you by the Lord Advocate.

My Lords, it appears to me that there is nothing in the condition of the evidence in the case—nothing in the construction of the Act of Parliament upon the question which here arises—which would entitle your Lordships to disturb that unanimous decision of the Court of Session.

The case comes before this House on two separate appeals—cross appeals—which have been very properly consolidated for the purpose of consideration both by the Court of Session and by your Lordships. That consolidation renders it unnecessary that I should occupy any time in stating the particulars of the two appeals as contradistinguished the one from the other. The questions ultimately raised are very short, and are the same in both appeals, and whether for the purpose of statement or for the purpose of decision it is unnecessary in my judgment to distinguish between them.

My Lords, the contention in the case arises substantially, and I think absolutely, upon the application of the 162d section of the General Police and Improvement (Scotland) Act 1862, which has been so much the subject of consideration, to the circumstances of the present case. It is alleged on the one hand, by Mr Kennedy, that the terms of that section do not apply, and that the Commissioners had absolutely no jurisdiction to do what they have done in this case. On the other hand, the Commissioners assert that the facts of the case bring it within the operation of the statute; that they had ample power; and that their action should be sustained and carried into effect.

Now it appears to me, my Lords, that we would do well in this case to follow the example set by the Court below. There has been a great deal of discussion here with reference to matters of form—with reference particularly to the appellate jurisdiction which has been exercised in the case, whether or no the appeal lies, and whether or no if it lies the proper conditions for giving it effect have been fulfilled by the parties. It does not appear to me necessary, in the view which I take of this matter, that your Lordships should be required to decide upon those points. I think it is enough to say, if you come to the conclusion at which I have arrived, that in this case there was an absolute want of jurisdiction upon the part of the Commissioners; that the whole proceeding so far as they are concerned was null and void; and therefore that whether an appeal did or did not lie in the case the utter nullity of the proceedings renders it unnecessary for us to go through the rather complicated and difficult questions which have been so very ingeniously argued at your Lordships' bar.

Now, that being so, and the issue between the parties being that which I have intimated, the facts are very short indeed, and as far as I have heard the matter discussed I do not think that upon the facts there is any real controversy. Mr Kennedy appears to be a resident in the town of Fort-William. In the town of Fort-William is a square, and one side of that square is made up, as I understand, of three separate holdings, namely, certain bank premises, which appear to be the most important premises upon that side of the square, a cottage, and a house with a little garden, which appears to be the subject of the dispute in this case. I shall say a word directly upon the controversy which appears to have been raised as to whether there was a street at all in this square for the purpose of applying the Act

of Parliament; but taking the frontage of the bank with those pillars which have been so often referred to as being the line of the street, it would appear that Mr Kennedy's house stands about 11 feet behind that particular line. It appears then that before his house, so standing behind that line, there is a garden, and in the front of that garden there is a low wall, which wall extends in advance of the line of the street some three feet. Mr Kennedy recently thought proper to contemplate the improvement of his premises, and with that view he set about removing the wall, whereupon the Commissioners thought that they had acquired jurisdiction under the 162d section of the Police and Improvement Act, and proceeded forthwith to interfere with his operations in the way which I shall shortly indicate. They communicated with him, and told him that they wished to exercise the jurisdiction given to them by the 162d section, and that it would be well for him to arrange with them upon the matter. The section under which the Commissioners thought themselves entitled to proceed is as follows—"When any house or building, any part of which projects beyond the regular line of the street or beyond the front of the house or building on either side thereof, has been taken down in order to be altered, or is to be rebuilt, the Commissioners may require the same to be set backwards to or toward the line of the street, or the line of the adjoining houses or buildings, in such manner as the Commissioners may direct for the improvement of such street: Provided always that the Commissioners shall make full compensation." Under that section, and under the circumstances which I have stated to your Lordships, the Commissioners thought themselves entitled through their representative to address to Mr Kennedy upon the 17th of July 1876 the following letter —"I am instructed by the Police Commissioners to inform you, as acting for the owner of the house occupied by you, that they at their meeting to-day have resolved to permit the owner to project the line of the proposed new building to a line with the outer side of the column or pillar of the adjoining house belonging to the British Linen Company, measuring said line from a point half-way up the shaft of the column."

The question in this case is whether or no that direction was authorised by the Act of Parliament. It has appeared to me, I confess, very difficult to understand what the last line of that order exactly meant—"measuring said line from a point half-way up the shaft of the column." It may have had a meaning, and a good meaning, although one does not quite see why the line should be begun from half-way up the shaft and not from the base of the column. But the real question being, as I have said, whether or no that order was authorised, I do not think it at all necessary to refer to two or three matters which have been raised for consideration in the course of the case upon the pleadings, and more or less in argument here. As I have said, it is not necessary for us to decide the question with regard to the competency of the appeal; nor is it of the slightest consequence, as it appears to me, in the view which I think your Lordships should take of this matter, whether or no the word "street" is to be construed in one way or in the other. It is contended upon the part of Mr Kennedy that this was no street at all; that the side of the square was a sort of private hole-and-corner place for doing business for two or three people, and that the diversity in the frontages of the British Linen Company's premises, the cottage, and this particular piece of ground, behind which was the house of Mr Kennedy, made the thoroughfare so irregular and so incontinuous that it was an absurd thing to call it a street at all, or to say that as a street it came within the operation of the Act of Parliament. I do not think that it is of any consequence, because, whether it was a street or whether it was not, in my view the Commissioners had no business whatever to interfere.

Then the question is, What are we to say about the construction of this Act of Parliament? In the first place, I think we should regard the object of the Act of Parliament. The object of the Act, so far as this 162d section was concerned, was manifestly to prevent the impingement of a substantial house or building upon the high road—in fact, to prevent obstruction by a house or building, so as to guard the public in doing their business from any interference injurious to them.

Now, when we come to consider what is the ordinary meaning of the words "house or building," let us first ask what is the meaning of the word "house." Beyond all doubt, in its common acceptation, and as we use it in the ordinary course of life, we should take a "house" as the dwelling of a person, or occupied for his purposes; it may be a question, as has been suggested, and no doubt properly, in the course of the argument which we have heard to-day, whether the "house" includes that which surrounds it—the courtyard, for example, such as we are familiar with in the old portions of London, but more especially upon the Continent; still a "house" is a house occupied by the person who is the owner or tenant of it for the time being, and not a piece of ground which may be before or behind the house. The object again, as I say, being here manifestly to have a straight frontage along which the various dwellings should go in a straight and uninterrupted line, a house manifestly in its ordinary and common acceptation can mean nothing but the substance of the house occupied by the owner or the tenant as the case might be.

Then we have besides to consider this—I take it that in Scotland, as in England, the ordinary principle of common sense must be adopted, that in construing words you must take the words with which they are connected. You must construe upon the principle of *ejusdem generis*. You may either cut down or you may enlarge, according to the collocation in which the words are used one with another. There are a number of cases which might be referred to (but of course we have not heard the argument upon the other side) in which decisions have been distinctly given that the word "building" is not of necessity identical with "house." The word "building" may mean either a wall or an erection for any ordinary purpose, although it may not be a house at all. In the section I have just quoted to your Lordships we have "house" and "building" put together, and when we consider the object which manifestly the Legislature had in enacting this particular section, it appears to me perfectly plain that the word "building" must be affected in its meaning by the meaning here attributed to the word "house," and that

the generality which might have been fairly attributed to the word "building," if it stood alone, is contracted and made specific by its connection with the word "house."

My Lords, upon this point I would just say a word upon the cases which we have heard referred to, and the language of the English and Scotch statutes, which, as we have been told, is identical. Now, I do not think the statutes are identical in all respects; they appear to me to be identical *minus* the very word on which the whole of the controversy has arisen—that is to say, that in the English statute the word "building" is inserted and not the word "house," whereas in the Scotch statute the word "house" is added to the word "building." Now, if that be so, it appears that there is another consideration in this matter, that in the Act of Parliament itself (I do not know that reference was made in the argument to this view of the question) we find a distinction drawn between the word "wall" and the word "house," and the word "building." By the 163d section the Commissioners get certain powers. They are allowed to "give notice to the owner of any house or building to remove or alter any porch, shed, projecting window, step, cellar, cellar-door, or window, sign, sign-post, sign-iron, showboard. window-shutter, wall, gate, or fence." It is quite plain that the object of the Legislature in that enactment was to enable the Commissioners to remove particular obstructions—obstructions of a minor character under particular circumstances and in connection with particular buildings. And when you take that section along with the 162d section, and observe with what a different object the two sections must have been prepared, and in what a different view—having in the one case a provision against a house jutting out upon the road, and in the other case power to remove a wall which was in this particular instance in the road,—where you have these two things spoken of as distinct from and independent of each other, and to be dealt with in different ways and for different purposes,—it appears to me that that goes some way at all events to aid us in construing the 162d section, and in coming to a conclusion that the "house" or the "building" referred to in that section, which is to be identical or similar to a "house," was not a wall or anything like a wall, the meddling with which alone in this case constituted the foundation of the jurisdiction of the Commissioners.

Then, my Lords, we have been referred to-day to several authorities. I confess, for my own part, I do not see that those authorities bear upon the matter at all. The cases which relate to the Lands Clauses Act appear to me to be quite beside the matter. These sections of the Lands Clauses Act with regard to the substitution of one portion of property for another, or with regard to the sale of a portion, or the sale of the whole, were all enacted *diverso intuitu* altogether from this particular section, which had reference to nothing at all about valuation—to nothing at all but the preserving of the highway from any obstruction which might be put upon it. It appears to me to be only necessary to say that there is nothing in these sections of those Acts of Parliament in the least degree bearing substantially upon that with which we have to deal. With respect to the case of *Lord Auckland* v. *The Westminster Local Board of Works*, May 28, 1872, L.R., 7 Chan. App. 597, it is enough to say that the sections relied upon are not the same; in the next place, that the 74th section of the Metropolis Local Management Act Amendment Act was not in force; in the next place, if you look at the 75th section of that Act, its terms, instead of aiding the Commissioners here, on the contrary, by reference to plots of ground, and the way in which the reference is made, aid most materially the argument on the part of Mr Kennedy.

Now, my Lords, that being so, it appears to me that the case is really denuded of any authority, that we have nothing to help us to a conclusion upon it, but that we must look to the terms of the Act of Parliament and ascertain the object with which the Act of Parliament was passed. Looking at the object and the terms of the Act of Parliament, it seems to me very clear that in this case the word "building" is in substance to be taken as meaning something in the nature of a "house," and that there is no pretence for saying that the mere meddling with the wall was meddling with the house—that it is impossible to argue, as it was attempted to be argued, very ably, but I think very ineffectually, that if Mr Kennedy had never touched that wall at all, but had set about improving his house, say advancing it more or less on the plot of ground between the house and the line of the road, from which it stood 11 feet back, that would have given the Commissioners even a pretence of exercising the jurisdiction which they have thought proper to exercise.

Taking all these circumstances into account, I am very clearly of opinion, and I accordingly propose to your Lordships, that the judgment of the Court below in this case be affirmed, and be affirmed with costs.

Lord Selborne—My Lords, I am of the same opinion. There are three conditions necessary to bring into operation the power of the Commissioners under clause 162 of the Act. First of all, there must be a house or building; secondly, some part of it must project beyond the regular line of the street or the front of the house or building on either side thereof; and thirdly, that house or building must have been taken down in order to be altered or in order to be rebuilt. Unless all these three conditions have been fulfilled the powers do not arise.

Now, first of all, one must see in what way the facts of this case are sought to be brought within those conditions. *Prima facie*, no part of the house in this case projects beyond the regular line of the street, unless the wall is to be deemed a part of the house. The wall does project beyond the line of the street, but the house does not, and the first question will be therefore, Whether, supposing the wall not to be deemed a part of the house, it is a "building" within the meaning of the clause? I confess that I should not have felt quite so clear that that question ought to be answered in the negative merely on the ground of the association of the word "building" with the word "house," which is found upon the face of the clause. But one must look into the other parts of the Act in order to see whether any light can be derived from them as to the meaning of the word "building" as distinct from "house" in this Act. I find no interpretation clause aiding

your Lordships upon that subject, but there are a good many clauses, some of which I have taken note of, in the Act which convince me that the word "building" as it is used in this Act is not applicable to a low wall of this description, which I think is described as a wall in front of a garden about three feet high, with a railing over it.

My Lords, the clauses which I have noted upon that subject I will very shortly refer to. First, there is the 158th section, which says that the Commissioners shall from time to time cause the houses and the buildings in all or any of the streets to be marked with numbers. It must be a building therefore which can be numbered as a house is. The next clause—159—is to the same effect. The owners of houses and other buildings in the said street shall mark their houses with such numbers as the Commissioners shall direct. Then there is the 163d section, which has been mentioned in this case, which says that the Commissioners may give notice to the owner of any house or building to remove a number of things, including a wall, gate, or fence. As my noble and learned friend now on the woolsack has mentioned, this is a wall or fence, and it is plainly distinguished as a thing which may be in the front of a building within the meaning of the Act, but not regarded itself, at least in that clause, as a separate building. Then the 168th section provides that "the owner of every house or building in, adjoining, or near to any street, public or private, shall put up and keep in good condition a shoot or trough of the whole length of such house or building," and so on in terms plainly inapplicable to a wall of this description, showing that buildings *ejusdem generis*, with houses or accessory to houses, are meant. Then there is the 199th section, which says that "if any house or building within the burgh be at any time not drained by a sufficient drain or pipe communicating with some sewer or with the sea, to the satisfaction of the Commissioners, and if there shall be such means of drainage within one hundred yards of any part of such house or building, the Commissioners shall construct or lay from such house or building a covered branch drain or pipe of such materials, of such size, at such level, and with such fall as they think necessary for the drainage of such house or building, its areas, water-closets, and offices, and the expense thereof shall be recoverable from the owner of such house or building, over and above any sum that may be charged for the use of the sewers as above provided for." And then there is the 200th section, which says—"No house or building within the burgh shall be built upon a lower level than will allow of the drainage of the wash or refuse of such house or building into some sewer." It would be easy to add other clauses, but those satisfy me that the Court below has rightly held the word "building" in this Act to be a thing *ejusdem generis* with a house or accessory to a house in a sense not applicable to a low retaining wall of this description.

That having been decided, it strikes me that the whole question raised by the Commissioners, on the record at all events, is decided with it. We have undoubtedly heard an able and ingenious argument from Mr M'Lachlan this morning, which I do not recollect to have heard advanced by the Lord Advocate, to the effect that the wall in question is a part of the house, and the garden too, which is between the wall and the house. I do not propose to pass over that argument without considering whether it would be maintainable, assuming it to come before the House without any prejudice from the manner in which the case has been conducted. But, my Lords, I cannot help observing that on their own pleading the present appellants clearly do not take that ground. They do not put the case as if they regarded this as part of the house or had been proceeding upon any such view. I will not say that that would be conclusively binding upon the footing of estoppel as having admitted that it was distinct from the house, but I cannot help observing that the argument seems to be an afterthought of the appellants, and is certainly not consistent with their manner of pleading, because in the statement of facts for the respondent he says in the third statement that "the bank premises projected forward beyond the respondent's premises," meaning his house evidently. "There is a garden plot 11 feet in breadth in front of the respondent's premises, enclosed with a railing from the square, and he proposed to pull down the front wall of his house and bring it forward to the site of the railing. No part of his house ever projected beyond the regular line of the square (if there is such a line), but the front wall of the house was, on the contrary, many feet back from the said line," and so on. Now, how do the appellants meet that? "Admitted that the bank premises projected beyond the respondent's house" (which of course they would not have admitted if they had regarded the garden and the wall in front as part of the house). "Admitted that there was a small plot of ground in front of the respondent's premises, enclosed with a wall and railing, which projected several feet beyond the respondent's house, drawing a distinction between the garden and the wall in front of it and the house as plainly as anything could be. It is clear to me therefore that this argument, though I do not say it might not have been fit to attend to, if it had been sound in itself, is an argument upon which the Commissioners did not themselves proceed, but I confess I think it unsound in itself. It is perfectly true that if I grant a house, and that house has certain things enjoyed as its appurtenances, gardens, yards, and the like, they will pass with the house. It is equally true that under the Lands Clauses Act, where the object is to protect landowners against the exercise of compulsory powers, a similar rule of construction has been adopted; but before you can transfer that rule of construction to the present Act of Parliament you must consider whether the nature of the Act of Parliament, the objects it has in view, the subjects with which it deals, and the particular language of the clauses you have to construe, admit of such construction, or point to a different one.

I am clear that all these considerations point to a more natural primary and limited construction for the word "house." In point of fact you need not go beyond this particular clause—the 162d—to come to that conclusion, because the clause deals, as I have said before, with a "house" (we will omit the word "building,") some part of which projects beyond the regular line of street, and so on, and which house or building "has been taken down in order to be altered or is to be rebuilt." It is plain that the word

"house" is applied only to the thing which has been taken down or is to be rebuilt, and it would be absurd—it would be extravagant—to say that that applies to a garden. A garden which according to the argument might be a much larger garden than the present—a garden of any size attached to the house—however far back the house lay beyond the front of the garden, would be equally within the meaning of the word "house"—if this is so, I am perfectly clear in my opinion that the word "house" is used in a sense appropriate to its own objects, and does not extend to anything which is not fairly and naturally a part of the house.

I may say that I perfectly agree with Lord Justice Mellish in the case of *Lord Auckland*, 7 Chan. App. 597, which was quoted, that a yard enclosed upon three sides by a house, with a wall upon the other, and occupied in direct connection with the house, is a part of the house. But that appears to me to have no application at all to a garden in front of a house, whether the garden be greater or whether it be less. Therefore I cannot agree with the proposition that this is a case of a part of a house which did project beyond the regular line of the street.

My Lords, it seems to me that one test of that would be this—Supposing that the house had not been touched here—that it had not been taken down wholly or in part, and the wall not touched, and that the garden had been large enough to admit of a separate building being erected upon it, would it be possible to say that the case came within the terms of this clause. I apprehend clearly not.

My Lords, the only thing which pressed upon my mind in this case—and I own that it did press at the beginning in favour of the appellants—was this—that it seems an unreasonable thing to suppose that the objects which the clause was intended to remedy would be attained if a man were at liberty to bring forward a new building where none stood before so as to encroach upon the line of street, and perhaps it would have been much better to have put in such a clause as the 75th clause of the English Act of 1862, which was referred to, which distinctly deals with the case of building upon vacant ground or the garden in front of a house, and prohibits it where it would interfere with the line of street, but it does not appear to me that we can apply that where we do not find such a prohibition in the Act, especially if I am right in my construction of the word "house." Still the inconvenience is not so great as it might seem, because the 161st and 163d clauses of the Scotch Act seem to give powers which if exercised would enable the Commissioners to meet such a case as that. The 161st section says that the Commissioners, if they want to acquire lands or premises for the purpose of widening, enlarging or otherwise improving any streets, may take measures for the purpose, which in this case they have not though fit to do. If they had done that, probably this case would not have arisen, and with regard to two other projections of an inconvenient kind which interfere with or obstruct the highways, under the 163d section, they may remove them, whether they be walls or fences or anything else. Probably these were thought sufficient safeguards against a mischief of this kind. At all events, my Lords, I am of opinion that they are the only safeguards which this Act has provided.

Now, my Lords, with regard to the other portion of the case, I will only say that it is hardly worth dwelling upon, but in the Act, which is rather obscurely worded with regard to general appeals other than those specifically dealt with by clauses 396 and 397, I cannot find enough to convince me that the Courts below have been wrong in what they have decided, and therefore, my Lords, I think your Lordships ought to adhere to their decision.

Lord Blackburn—My Lords, I am also of the same opinion. The section upon which the whole question turns in the first appeal, namely, the 162d section, occurs in an Act for the improvement of burghs and towns in Scotland. That Act has two objects, amongst others one being to improve the streetway, the portion where the public have a right to walk, and the other to improve the line of frontage of the houses which stand on each side of the street. Now, everybody knows that in old burghs particularly the outline of the roadway is apt to be very irregular; there are places where buildings have encroached upon and made it very narrow; there are places again in which, owing to the manner in which the old inhabitants chose to build, the roadway goes into bays running between the houses. Moreover, the roadway is extremely apt, in all the older burghs that I ever saw, to be bounded by houses which come up to the actual roadway, in other cases, not by the houses themselves but by other buildings such as granaries and places of that sort. Again, it is frequently the case that there is ground not built upon, such as gardens and the like, so that the roadway is bounded in some places either by a railing or a wall, or by a fence of some sort.

Now, the Legislature knowing such things to exist, enacted the 162d section of this statute, which has been so frequently laid before your Lordships that I will not detain you by reading it again. Upon this section the first question comes to be, What does "house or building" there mean? I perfectly agree that it may very well be that houses or buildings may be so arranged and so built that a wall such as occurs here may form a portion of them. The instance which occurs to me most naturally is one in which many of the old houses are built in that way—there is the body of the house and two projecting wings. Then joining the two wings there is a wall built so as to enclose a court or garden, the wall having the entrance gates in it. My impression is, that that wall is part of the house, and should be so regarded, but I cannot bring myself to think that when you speak of a house or building that applies to the garden wall which encloses ground around the house, the houses being anywhere within that ground. I think myself that the house means the dwelling-house—the building which is meant for the habitation of man—and such walls, as I said before, as are parts of that house. I do not go with the argument which was adduced to show that because the conveyance of a house may carry with it the garden, therefore this would be necessarily a part of the house within the meaning of the section, because if that were so, a man breaking into that garden during the night and stealing the apples might fairly be

said to be committing a burglary. The real question is, Whether it can be said that this garden wall—for that is what it comes to—can be considered part of the house or building? I think not. The term "house" means a dwelling-house for man, and the term "building" means a building of another character, such as is used for a granary, a warehouse, and so on; such would be the meaning if you did not refer to the 162d section. I quite agree with my noble and learned friend who spoke last that in this Act there are many things which lead to that conclusion, but I do not think it necessary after the observations which he has made to inquire into them.

Now, my Lords, that being so, can it be said that any part of Mr Kennedy's house "projected beyond the line of the street or beyond the front of the house or building on either side thereof?" I think we only require to look at the plan to see that the house proper did not—the garden wall did—but then the garden wall in my view was not a part of the house. Then it is objected, and said, If that be so, we are led into this absurdity, as it is said to be, that if there had been an old house projecting as far as the garden wall, and you were to pull it down and rebuild it, you would be ordered to put it back, but that if it were that the old house itself never projected beyond the line of buildings, and the owner pulls it down he cannot be ordered to set it back; but I think the Legislature have met that case. There is a power given in the case of taking lands which will apply to this instance—if the Commissioners wanted to take Mr Kennedy's yard or garden for the purpose of widening or improving the street, then of course there would be no difficulty arising. Then with reference to the question of any new building being erected within this vacant space, it is impossible to ignore the fact that in the English Act, which received the Royal Assent upon the very same day, being the next chapter to the Scotch Act, there is a clause which enables the proper authority to prohibit the building of new houses upon vacant ground or gardens projecting beyond the line of the street. The Act gave an arbitrary power to prohibit that; in this Act the Legislature have omitted it. If such a clause had been put into the Scotch Act the Commissioners would have had a right to do what they did here, namely, to say, you shall not build beyond the line of the street. Why that was left out I do not know; it may be that it was thought to be a power which might be abused, and that it would be very hard if persons were to be deprived of their property without compensation. The case of *Lord Auckland*, which was decided upon that Act, shows that there were attempts to abuse that power, and therefore it might have been an unwise thing to grant it. Whether that be so or not, the Scotch Act does not give such a power. All I can say is, that it is quite clear to my mind that this house never projected beyond the line of the street or beyond the front of the house or building on either side thereof. Mr Kennedy did not bring himself under the 162d section, and consequently the Commissioners were beyond their power when they endeavoured to keep him from doing what he was doing. On the first ground therefore I think the appeal must be dismissed.

Upon the second question, namely, the competency of the appeal, there is some difficulty in being sure whether one understands all the clauses of the Act. The 169th section undoubtedly gives an appeal in this case, as do several others "in manner after provided." When one comes to see in what manner it is after provided, it is difficult to see that there is any manner provided. The 396th section is clearly confined to those cases relating to works which are to be authorised by the Commissioners. There is a notice to be given and caution to be given by the appellant, and that has the effect of stopping the works—that is complete in itself when one understands it. The 397th section begins by referring to those things of which the cost is provided for by way of Private Improvement Assessment, and then it enacts that the appeal from the Commissioners shall be "in the manner and to the effect hereinlast provided for," and, as I read it, in such cases also there shall be notice given and due caution. But then it proceeds further, and enacts in the final proviso—"Provided always that all such appeals provided for in this"—that is, the 397 section—"and the immediately preceding clause, and all other appeals to the Sheriff allowed by this Act, not otherwise provided for, shall be disposed of summarily, and the decision of the Sheriff shall in all cases be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner of way." Now, that last portion of the proviso clearly applies to an appeal under the 169th section and to several other appeals. I cannot find that there is any other provision at all about it; the appeal is to be "in the manner after provided." The only provision I find is that they shall be disposed of summarily, and that the decision of the Sheriff shall be final and conclusive. I cannot find that there is anything whatever which says that it shall be a condition precedent to bringing an appeal that caution shall be given or any particular statement of the case filed within a certain limited number of days. I should have wished to do as the Court of Session seems to have done, and to have said, according to the decision in the first case—the order is a mere nullity, and what the Sheriff has done has been merely quashing a nullity which could do nobody any harm—and to leave it alone without deciding as to the appeal; but as they have chosen to make an appeal upon this point, the appeal must be considered; and the best judgment I can form upon the matter is, that the Sheriff had jurisdiction, and I think that his decision is right; but, whether right or wrong, it is final and cannot be questioned in any way. I therefore quite agree that both the appeals should be dismissed.

Lord Gordon—My Lords, I am entirely of the same opinion. I think after the disposal of this case by the unanimous opinion of the Court below, and the very careful consideration which your Lordships have bestowed on the review of it upon the present occasion, I should not usefully occupy your Lordships' time with any detailed reference to what is undoubtedly a very complicated Act of Parliament. Several cases have arisen out of the Act of 1862, and, curiously enough, with regard to the proper way of taking an appeal under the 396 and 397th sections, which was considered in the Court below in the case of *Campbell* v. *Commis-*

sioners of Leith, 4 Macph. 853, H. of L., 8 Macph. 31. I see that Lord Benholme, in giving his opinion in that case, which seemed to present a great deal of difficulty to the Court below, said—"This is a statute which is certainly obscure. I find that 'public street' and a 'private street' are defined very much by negatives. You get at what a 'public street' is by seeing that it is not a 'private street,' and then 'private street' is defined by two negatives." That case came afterwards up to the House of Lords, and was disposed of in 1870, and I see that those of your Lordships who gave opinions in that case were a good deal troubled with the multiplicity of provisions as regards appeals and also with the difficulty of finding the proper provisions with regard to the particular appeal which was the subject under disposal in that case. I think the proper course we should pursue with regard to the judgment in the Court below is, that it should rest upon an approval of the action of the Court in exercising their power of granting an interdict against the Commissioners of Police, rather than enter very carefully into the rules with reference to the form of procedure in the way of appeal.

Interlocutor appealed from affirmed, and appeals dismissed with costs.

Counsel for Appellants—Lord Advocate (Watson) — Maclachlan — Raleigh. Agent—R. M. Gloag, solicitor.

Counsel for Respondent—Badenach Nicolson—Purvis. Agent—W. A. Loch, solicitor.

Friday, July 12.

DUNBAR'S TRUSTEES *v.* THE BRITISH FISHERIES SOCIETY.

(Before the Lord Chancellor, Lord Hatherley, Lord Blackburn, and Lord Gordon.)

(*Ante*, p. 227, December 19, 1877, 5 Rettie, 350.)

Superior and Vassal—Feu-Contract—Liability for Road Assessment and Poor-rates—Clause of Relief from Public Burdens payable now or "in all time coming."

A feu-contract contained a clause of relief by the superior in favour of the vassals "to free and relieve" them "of the whole cess or land-tax, feu-duties or other duties, ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming." *Held* (*aff.* judgment of the Court of Session) [*a*] (1) that such clauses cover all burdens except such as have been "imposed by supervenient legislation;" [*b*] that they therefore cover poor-rates; and [*c*] that liability under them is not restricted to the proportion of assessments effeiring to the feu-duty; and [2] that under the clause above quoted the measure of the sum demandable in relief was not limited by the amount of the feu-duty.

Public Burden—Clause of Relief—Road Money.

Held [*aff.* judgment of Court of Session] that assessments imposed under certain Private Acts relating to the Caithness County and Wick Burgh Roads, passed in 1830, 1838, and 1860, were not covered by an obligation in a feu-contract, dated in 1823, to relieve a vassal from public burdens payable "now" or "in all time coming."

The appellants in this case, trustees of the late Sir George Dunbar of Hempriggs, had raised an action against the British Fisheries Society to have it declared that they were not bound under their feu-contracts to relieve the respondents from certain burdens consisting of road assessments and poor-rates imposed on lands feued by them from the appellants. The lands had been conveyed by the appellants' predecessors in 1807 and 1823, and each feu-contract contained a clause whereby the superior undertook to free and relieve the vassals of all cess and land-tax in all time coming, and also of all minister's stipend, schoolmaster's salary, and other public burdens payable out of the lands in all time coming. The feu-duties were two sums amounting to £169. The respondents had since built cottages on the land feued, and part of Pulteneytown was now built on it, so that the poor-rates had risen to about £500 a-year. The appellants and their predecessors had always paid the minister's stipend and schoolmaster's salary, which were the burdens existing at the date of the contracts. Since then poor-rates and burgh and county road assessments had been imposed, and these had accumulated in 1875 to a total sum of £8739. The Society now claimed to be reimbursed these sums, and to have the same burdens paid in all time coming by the superior as they became due. The Lord Ordinary [CURRIEHILL] had held that the appellants were bound to relieve the respondents of these burdens, though they exceeded the whole amount of the feu-duty, and assoilzied the defenders. The Second Division adhered as to the poor-rates, but [*diss.* LORD ORMIDALE] held that the road assessments were not covered by the obligations in the feu-contracts [*ante*, p. 227, Dec. 19, 1877, 5 Rettie, 350].

Both parties appealed to the House of Lords against the decision so far as adverse.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this case your Lordships have to dispose of an appeal and a cross-appeal. The action in the Court of Session was instituted by the trustees of Sir George Dunbar, and it is in the form of a declarator of liberation from certain obligations. Those obligations were contained in two feu-contracts, the one dated in 1803 and the other in 1823, between the predecessor of Sir George Dunbar and a society called the British Fisheries Society. I will read only the second of these two contracts, because of the two it is decidedly stronger in words,—"Sir Benjamin Dunbar binds and obliges himself and his foresaids to free and relieve the said Society of the whole cess or land-tax, feu-duties, or other duties payable to his, the said Benjamin Dunbar's, superiors of the said lands, ministers' stipends, schoolmasters' salaries, and other public burdens, due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming."