it necessary for the respondent to prove marriage, then, in the proof of marriage, the recognition of Glenfalloch after his father's death can be no stronger evidence of marriage than the previous repute out of which it arose. That repute was created, it may be, by a mistaken belief in a marriage in 1781, or it may be by a mistaken inference from the conduct and cohabitation of the parties ; but that cohabitation was originally adulterous, and afterwards illicit, and has not, in my opinion been proved to have changed its character so as to pass into matrimony. Whenever, in regard to any transaction, or any conduct, it has been ascertained that the truth differs from the pretence, then, by the truth, and not the pretence, the transaction or the conduct must be construed. Therefore, I have arrived at the same conclusion as Lord Curriehill, in which I have the misfortune to differ from the majority of your Lordships, that the late Glenfalloch was not legitimate, and that the advocator, Mr Campbell of Boreland, is entitled to succeed in this competition.

Lord DEAS—Perhaps your Lordships will allow me to state that the reason why I did not take any notice of Glenfalloch's averment that the marriage was prior to 1785, was not because I overlooked it, but because I thought it was not material. It does not, according to our practice, tie the party down. In actions of declarator of marriage, we find the case libelled in two or three different ways, and a conclusion about seduction is sometimes added. And as to the proof, it appeared to me that dealing with a matter which occurred eighty years ago, he meant to take as much latitude as possible, not knowing what the proof might be.

The interlocutor of the Lord Ordinary was therefore adhered to by a majority of 10 to 2.

Counsel for Glenfalloch—The Solicitor-General, Mr Clark, Mr Adam, and Mr Berry. Agents—Adam, Kirk, and Robertson, W.S.

Counsel for Boreland—The Lord Advocate, Mr Patton, Mr Fraser, and Mr Gifford. Agent—Henry Buchan, S.S.C.

SECOND DIVISION.

Friday, June 22.

CAMPBELL *v.* THE LEITH POLICE COMMISSIONERS.

General Police Improvement Act—Private Street—Interdict. Circumstances in which held that a street was a "private street" in the sense of the General Police and Improvement Act of 1862, and that the Commissioners acting under the Act, having resolved to pave it, were not obliged to give notice of their intention to do so under the 397th section of the Act.

This was a note of suspension and interdict at the instance of John Archibald Campbell, C.S., against the Leith Police Commissioners, for the purpose of having the respondents prohibited from interfering in any way with the street in North Leith called Regent Street, or with a piece of ground there, the property of the complainer. The proceedings complained of were alleged to have been taken under the 150th section of the General Police and Improvement Act of 1862, The complainer sets forth that on the piece of ground of which he is proprietor houses were erected on both sides of the street, but the remainder of the ground was never occupied, as was once contemplated in extending Regent Street, and that, therefore, the street never became a thoroughfare. In June 1863 the respondents acting under the above-named Act, which they had previously adopted in whole, resolved to have Prince Regent Street, as being a private street, paved and causewayed, and directed their clerk to give statutory notice in terms of the 394th section of the Act, which was done. Section 394 provides that "twenty-eight days at the least before fixing the level of any street which has not been heretofore levelled or paved, and before making any sewer where none was before, or altering the course or level of, or abandoning or stopping any sewer, the commissioners shall give notice of their intention by posting a printed or written notice in a conspicuous place at each of every such street through or in which such work is to be undertaken; which notice shall set forth the name or situation of the street intended to be levelled or paved, and the names of the places through or over which it is intended that the new sewer shall pass, or the existing sewer be altered or stopped up, and also the places of the beginning and end thereof, and shall refer to the plans of such intended work, and shall specify a place where such plans may be seen, and a time and place where all persons interested in such intended work may be heard thereon."

Section 397 provides for a totally different kind of notice by way of handbills, or advertisements in the newspapers; but it is unnecessary to detail it at length, because on 3d November 1865 the Court found that while the respondents had given sufficient notice, in terms of the 394th section, they had not given any valid or effectual notice in terms of the 397th section. Of the same date they allowed the respondents a proof of the averments contained in the 3d and 4th articles of their statement of facts, and also allowed the complainer a conjunct probation. These statements, which were generally denied by the complainer, were to the effect that Prince Regent Street was "a private street" as defined by the General Police Act, and that it did not form part of any harbour, railway, or canal, station, depot, wharf, towing-path or bank ; that it was used by carts, and was accessible to the public; that before and at the date of the adoption of the above Act by the respondents it was not sufficiently levelled, paved, or causewayed and flagged to their satisfaction ; that the respondents, accordingly, under the powers conferred on them under section 101 and 150 of the said Police Act, craved plans to be prepared for paving this street, on the footing that it was a private street, and not sufficiently paved, and, on these plans being submitted to and approved of by them, they gave directions that these improvements should be carried out. Proof was accordingly led by both parties as to these averments.

When the case was previously before the Court the complainer contended that at the date of the resolution of the Police Commissioners of the Burgh to execute these improvements, they had not effectually adopted the General Act of 1862, and that their proceedings were therefore still regulated by the Local Act of 1848, which was admittedly the sole Police Act of the burgh, unless and until the provisions of the General Act were adopted. It was admitted by the complainer that the Police Commissioners had adopted this General Act, but he maintained that the effect of that adoption was suspended until a provisional order was issued by the Secretary of State, and confirmed by Act of Parliament. This plea was, on

the 9th of June 1865, unanimously repelled by the Court, who held that the simple adoption of the Act was the proceeding by which the old Act was superseded, and the new one introduced; that the petition to the Secretary of State for a provisional order was optioned to the magistrates, and might be made at any time after the Act itself had come into operation, the intention of such order and subsequent confirmation plainly being to provide a short remedy for the better execution of this, or any previous Act, in any case where the terms of the provisions were found not to work satisfactorily.

The case came up to-day upon the proof ordered by the Court in November last.

PATTON and G. H. PATTISON were heard for the complainer on the import of the proof.

GORDON and WATSON for the respondents.

At advising—

The LORD JUSTICE-CLERK—The main question we have here to determine is whether or not this street is a private street within the meaning of the Act. To ascertain this, and with a view to an exhaustive analysis, we must attend very carefully to the definition given in the Act both of a public and a private street. By the 3d section of the Act, it is provided that the expression "private street" shall mean "any road, street, or place within the burgh;" and then follows the first limitation—"not being or forming part of any harbour, railway or canal, station, depot, wharf, towing-path, or bank;" the next limitation is, that it must be "used by carts." The third element is of an alternative kind, that it must be "either accessible to the public from a public street, or forming a common access to lands and premises separately occupied." This is one of the most important points of the definition, because we must assume that the two branches of this clause are not the same—are not a mere repetition—but that each has a separate and distinct meaning of its own; and so reading it, I take that what is here defined is a road, street, or place which communicates with a public street, and affords access to the public from that public street; and if this be so, a public thoroughfare which is yet not a public street is within the meaning of this definition. The fourth requisite is, that it shall not have been before the adoption of the Act, well and sufficiently paved and flagged by the owners of premises fronting or abutting on said street; and the fifth, that it shall not have been maintained as a public street. This last condition is important, for a street may be, in the popular sense of the word, a public street, and yet not be so within the meaning of the Act if it has not been maintained as such; and this appears more clearly if we attend to the definition of a public street, as given in the Act. It is said in section 3—"The word 'street' shall mean a public street, and shall extend to, and include any road, bridge, quay, lane, square, court, alley, close, wynd, vennel thoroughfare, and public passage, or other place within the burgh, used either by carts or foot-passengers, not being a private street, and not being or forming part of any harbour, railway, canal, station, depot, wharf, towing-path, or bank." This description amounts to this, that every place within the burgh which is used by foot-passengers or carts, and is not part of any harbour, &c., is a public street, unless it come within the definition of a private street; while the distinctive points of difference between a public and a private street plainly are that the latter has not been sufficiently paved and flagged before the adoption of the Act, and further has not been maintained as a public street. Now, it is quite clear from the proof that this place which we are now dealing with was designed for a street of some kind or other, and that it was not sufficiently paved or flagged when the Act was adopted, and was not maintained as a public road. I think this is proved as clearly as it is possible to prove anything. I have therefore, without the least hesitation, arrived at the opinion that it is a private street within the meaning of the Act of Parliament, and that being so, it is of no consequence whether it be so in any other sense. The only other question which we have to consider is whether there is any irregularity arising from want of statutory notice. Of course, it lies with the suspender to prove that any notice was requisite, and if requisite, has not been given. Accordingly, he says that notice was required under section 397. Now, this section says that, in respect to "the operations which fall by this Act to be provided for by way of private improvement assessment, the Commissioners shall, where not otherwise hereby directed, give notice of their intention;" and then follows the kind of notice required. It must here be observed that this applies only to what is done by way of private improvement assessment. If, then, the proceedings here complained of, which were undertaken under the 150th section, were not of that nature, notice did not require to be given, and the objection falls to the ground. Now, the 151st section clearly shows that the great principle of providing for the expense of private streets is that it is to be apportioned among the owners of the lands or premises fronting the street. Now, what kinds of assessments are provided for by the Act? They are three in number. First, there is the general assessment, that of the whole burgh; this it is not necessary to inquire into; but then there is a district assessment; and while the interpretation clause of the Act gives no explanation of the first, it does of the other; for it says:—"The expression 'district assessment' shall mean any assessment or charge (other than a 'private improvement assessment') which is confined only to a portion or district of any burgh." Now, if the commissioners proceed, as here, to improve a private street, and lay the assessment on each house, that does at first sight look like an assessment answering to this description of a district assessment; but then, no doubt, we must look to the limiting words, and endeavour to ascertain what a "private improvement assessment" is in the meaning of the Act. The interpretation clause does not give us much information It simply says that it "shall mean any assessment or charge on any person for private improvement expenses under this Act;" but, then, in a different part of the Act, we have a very clear definition of what is meant by such an assessment. The 103d section says—"Where, by the provisions of this Act, the owner or occupier, as the case may be, is directed or fails to do any work, matter, or thing in relation to the same, and the work, through the failure or delay of the owner or occupier to execute it, shall be done by the commissioners, or where expenses are incurred by the commissioners for or in respect of any premises, in order to carry out the provisions of this Act, the commissioners shall charge the owner or occupier of the premises with the said expenses or special rates therefor over and above any other assessments or rates to which such owner or occupier may be liable under this Act, and such expenses or special rates shall for the purposes of this Act be called the private improve-

ment assessment." Now, the subject-matter of this clause is that where an owner is ordered to perform any work in reference to his premises, and fails to do it, and the Commissioner is obliged to do it for him, the Commissioner shall be entitled to charge the expense thereof against the individual occupier of the premises, and not a word is here said of any apportionment among other individuals. Such is the private improvement assessment, to which alone the notices under the 397th section apply; and I think, on plain construction of this 103d section, that it is quite impossible to bring any of the operations here complained of under it, and the 397th section is therefore of course inapplicable, and that being so, it is unnecessary to consider whether it was necessary to give notice under the 394th section. I think the Commisssioners acted wisely and well in giving such notices, but I do not feel myself called upon to decide as to their necessity.

Lord BENHOLME concurred generally. He could not congratulate the framers of the Act on their talents for clearness of definition. These appeared to consist principally of negatives. What was a public street was got at by proving that it was not a private street; while a private street was itself defined by two negatives. There were two kinds of notices required by the statute applicable to two different kinds of operators—the one under the 394th, and the other the 397th clause. He thought the terms of the former clause were broad enough to embrace a private street, though doubtless this required some violence of construction. He should be very sorry to have been obliged to come to a different conclusion, because, in that case, no notice whatever would be required for operations such as the present. He could not for a moment imagine that such was the intention of the framers of the Act.

Lords COWAN and NEAVES concurred, and judgment was accordingly given in favour of the respondents.

Agents for Complainer—Campbell & Lamond, W.S.

Agent for Respondents—P. S. Beveridge, S.S.C.

Saturday, June 23.

BRAIDWOODS *v.* BONNINGTON SUGAR REFINING CO. (LIMITED) AND OTHERS.

Reparation—Principal and Agent—Relevancy—Conjunct and Several Liability. Held (1) that a company who employed qualified persons to construct a building for them was not liable to repair damage caused by reason of its insufficient construction; (2) that it made no difference that the proprietors were represented at the building by an inspector, because he was there to look after the interests of the proprietors, and not to discharge for them any duty to others; and (3) that the action might proceed against one defender after being found irrelevant against another, although the conclusion was against both "conjunctly and severally." Issue adjusted.

This was an action at the instance of the widow and children of the late John Braidwood, engineer, who was killed by the fall of a sugar refinery, in or near Bonnington, on 27th February 1865, for damages for the loss thereby sustained by them. The defenders were the Bonnington Sugar Refining Company (Limited) and Blake, Barclay, & Company, engineers, Greenock, and the pursuers alleged that the building fell in consequence of its imperfect construction, which was attributable to the fault of the defenders.

The pursuers proposed the following issue which was reported by Lord Barcaple :—

"It being admitted that the pursuers are respectively the widow and children of the said John Braidwood :

"Whether, on or about the 27th day of February 1865, the said John Braidwood was killed by the fall of a sugar refinery in or near Bonnington, in consequence of the imperfect construction thereof, through the fault of the defenders, to the loss, injury, and damage of the pursuers?"

Damages £1200 sterling.

When the case was moved in the Inner House, it appeared that the record had been made up and closed without a *curator ad litem* having been appointed to the children. A curator was therefore appointed.

CLARK and GUTHRIE SMITH for the defenders, the Bonnington Sugar Refining Company, argued that there was no relevant case stated for the widow against them. They had employed persons who were not said to be incompetent, and if the construction of the building was insufficient, that was a thing for which they as proprietors of it were not in law responsible.

THOMS (with him SOLICITOR-GENERAL) for the other defenders, argued that as both defenders were concluded against *conjunctly* and *severally*, the action could not proceed against one if it was found irrelevant as against the other.

F. W. CLARK for the pursuers was heard in reply.

The LORD JUSTICE-CLERK—The question we have now to consider is entirely betwixt the leading pursuer, the widow, and the two sets of defenders. In a question betwixt her and the Sugar Refining Company I am very clear that there is no relevant case; and I shall explain why I think that the action should be dismissed as at her instance against these defenders. The way in which the averments are made on record is not satisfactory, and we are compelled to take what seems to be their fair meaning. I take the second article of the condescendence to amount to this—that this company is composed of a body of gentlemen associated for the purpose of conducting the business of sugar refining; and that, being registered, it is substantially a corporation or *quasi* corporation. Now, this company employs the other defenders to prepare plans and specifications for the erection of a large building to be used as a sugar refinery. It also authorises them to enter into contracts with tradesmen for the erection of the building, and to engage an engineer for the purpose of superintending the fitting up of the steam machinery. The person so engaged was the deceased John Braidwood. Then the articles of the condescendence which immediately follow have regard to the actings of the defenders, Barclay, Blake, & Co., under the authority committed to them by the other defenders. It is unnecessary to go over them in detail. But the 8th article alleges that "the foundations of said building were insecure, weak, or insufficient to sustain the heavy superstructure which was reared upon them. These foundations were stone piers, each surmounted by a block of stone, on which blocks the said iron columns were rested or sunk. Several, or at all events one, of the said blocks of stone failed or broke shortly