law of Scotland, a sale in open market has no effect in destroying the right of the real owner. Such a peculiar proposition as I have referred to seems to me to be opposed alike to principle and to authority. I have thought it necessary to make these remarks because Lord Young's opinion to the contrary was so powerfully stated.

Lord Rutherfurd Clark—I desire to decide this case on what I think are very simple grounds. There is no question that the horse was stolen, and it is proved that it was bought at Armagh by David Black in good faith. It was stated in argument that if the horse which had been stolen was acquired in open market there, and with certain formalities, that any *vitium reale* attaching to it on being stolen would be thereby cured. Taking this admission, the question before me is whether I am to take the horse as having been bought in open market in Ireland. Now, I think that the defender has discharged the *onus* of establishing that. We have heard the pursuer allege that certain formalities required by statute were not complied with, but we have no allegation on record as to what they were nor that they were not complied with. I do not say that the pursuer might not have amended his case, but he declined to do so at our suggestion, and asked our judgment on the case as it stood. Therefore, on the ground that the sale was in open market in Ireland, and that the pursuer has made no allegations on record as to the want of formalities attending it, I am prepared to give judgment in favour of the defender.

With respect to the other matters touched upon by Lord Young and Lord Craighill, I desire to say that I have formed no opinion, nor do I wish to express one.

The Lords sustained the appeal and dismissed the action.

Counsel for Appellant—J. G. Smith—Shaw. Agents—Curror & Cowper, S.S.C.

Counsel for Respondent—J. P. B. Robertson—Maclellan. Agents—M'Caskie & Brown, S.S.C.

Friday, June 9.

SECOND DIVISION.

(Before Lords Young, Craighill, and Rutherfurd Clark.)

[Lord M'Laren, Ordinary.

EDMONSTONE *v.* POLICE COMMISSIONERS OF KILSYTH.

Police—Public Health—General Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *secs.* 185, 186, 196—*Public Health (Scotland) Act* 1867 (30 *and* 31 *Vict. c.* 101), *secs.* 76, 91, 93, 94, 104.

In 1875 a portion of a parish was formed into a special drainage district in terms of the Public Health Act 1867. In 1877 a populous place lying within the parish was formed into a police burgh in terms of the Police Act 1862. The new burgh included the whole of the special drainage district above mentioned. During this period nothing had been done by the parochial board as local authority in the way of drainage works. The Police Commissioners after their appointment proceeded to execute certain drainage works for the whole burgh without reference to the special district, to defray the cost of which they levied an assessment on the whole ratepayers in terms of the Police Act. *Held* that the assessment had been rightly so imposed.

In the year 1875, under an application in terms of section 76 of the Public Health Act 1867, a portion of the parish of Kilsyth was formed by the Sheriff into a special drainage district. The town of Kilsyth, which lies wholly within the parish, afterwards formed itself into a police burgh under the General Police and Improvement Act 1862. The boundaries of this burgh were fixed by the Sheriff in the year 1877. These boundaries contain the whole of the special drainage district, and an additional suburban district not forming part of the special drainage district. In virtue of the Public Health Act, the Police Commissioners of the burgh then became the local authority, empowered to execute and assess for drainage works.

The complainer Sir William Edmonstone of Duntreath and Kilsyth, Bart., was proprietor of certain mines and minerals lying within the boundaries of the police burgh. From 1875, when the special drainage district was formed, till 1877, when the Police Commissioners were appointed, during which period the parochial board was the local authority under the Public Health Act, no steps had been taken for the formation of any drains or sewers within the special district, nor had any money been borrowed or rates levied for that purpose. After their appointment the Commissioners proceeded to execute certain drainage and sewerage works for the whole burgh, extending not only over the district defined in the proceedings under the Public Health Act, but also over the portion of the burgh lying outwith that district. They then made an assessment for the cost of the works. In calculating the sums to be paid they made one assessment over the whole burgh for the whole works executed, both within and without the special drainage district, and they assessed the complainer upon the full value of the mines and minerals belonging to him. The defenders averred that the operations were undertaken and the assessments levied by them as Police Commissioners under the Police Act, and not as local authority under the Public Health Act, and that in that capacity they had also borrowed money on the security of the rates.

The present case was a suspension of a threatened charge for arrears of assessments alleged to be due by the complainer. The reasons of suspension are stated in Lord Craighill's opinion.

The Lord Ordinary sustained the reasons of suspension, adding the following opinion:—"I am of opinion that the complaint is well founded, because after comparing the clauses of the two statutes I fail to see how the incorporation of Kilsyth into a police burgh in 1877 can have the effect of abrogating the proceedings taken before the Sheriff in 1874, under which a part of that burgh was formed into a special drainage district.

"*Ex facie* of the Public Health Act, the incorporation of a part of the parish into a police burgh would, as regards sanitary administration,

import nothing more than a change in the constitution of the executive authority. There is to be a division of the parish for administrative purposes. The Police Commissioners are to succeed to the functions of the parochial board in the burghal district, unless the Board of Supervision see cause to determine otherwise under section 5. But the duties of the local authority remain unchanged. Nor is there any reason for providing that the formation of a part of the parish into a burgh should affect its division into drainage districts. The contention of the complainer appears to me to be consistent with the terms of the statute and with justice. I think it unreasonable that a proprietor of lands without the special district should be assessed for the cost of drainage within the special district, and I therefore grant suspension of the proceeding, in terms of the prayer of the note, with expenses."

The defenders reclaimed.

At advising—

Lord Craighill read this opinion—There is challenged by the complainer in this action the legality of assessments imposed by the Commissioners of the police burgh of Kilsyth. The grounds of complaint are, first, that property belonging to the complainer beyond the bounds of a special drainage district, formed by the Sheriff in the year 1875, has been assessed for drainage works within that district, in alleged contravention of the Public Health (Scotland) Act 1867, section 93, which enacts that when any special drainage district has been formed under its provisions the expense of the sewerage and drainage works incurred by the local authority within the same, or for the purposes thereof, and for the sums necessary for payment of any money borrowed for sewerage purposes, shall be paid out of a special assessment which the local authority shall raise and levy on and within such special district, in the same manner and with the same remedies and modes of recovery as are therein provided for the district of the local authority. The second reason of suspension is that the rate of assessment is higher than the respondents are entitled to impose upon mineral property either under the Public Health (Scotland) Act of 1867 or under the General Police and Improvement (Scotland) Act of 1862, as the latter is said to be limited or qualified in its assessing clauses by the first mentioned Act of Parliament. The Lord Ordinary has sustained the first of these reasons of suspension, and hence the reclaiming note upon which parties have been heard by the Court.

The circumstances under which this controversy has arisen must first be considered. The Public Health (Scotland) Act 1867 came into operation in the course of that year, and the parochial board of Kilsyth then became local authority of the whole parish, there being in existence at that time no other public body capable of filling that position in any part of the parish. The greater part of the parish was open country, but there was one place of considerable population, namely, the village of Kilsyth, and it was this circumstance probably which led to the application made in 1874 by the requisite number of parishioners for the formation of a special drainage district. Be this as it may, there was such an application, and the result being the formation of the special district the boundaries of which are specified in the complainer's statement. Though this district was formed in 1875, nothing had been done within it in executing or even in preparing for the execution of sewage or drainage works prior to 1877, when the village of Kilsyth as a populous place was erected into a police burgh under the General Police and Improvement (Scotland) Act 1862. The special drainage district formed in 1875 was wholly within the police burgh thus created; but the two were not commensurate, for a portion of the area of the burgh includes lands in the parish of Kilsyth outside the special drainage district. In consequence of the formation of the burgh the Police Commissioners became the local authority within the boundaries of the burgh, and the parish was thus divided into two jurisdictions, the one becoming subject to the authority of the Police Commissioners, and the other remaining subject to that of the parochial board.

In this situation extensive drainage works were undertaken and completed within that part of the burgh which, prior to the erection of the burgh, had been formed into a special drainage district. The money required was borrowed on the security of assessments to be laid on the whole burgh, and those now challenged are the parts of this assessment, imposed on the mineral property of the complainer without as well as within the special drainage district, but within the area of the burgh. Whether these are legal exactions is the question for determination on the present occasion. I am of opinion that the assessment in question cannot be successfully challenged upon either of the grounds upon which it is impugned. With reference to the first, it appears to me that the creation of the police burgh, nothing having followed on the formation of the special drainage district, displaced that division of the parish, the reason for its continued existence having been removed. The moment the Police Commissioners were constituted they became the local authority of the whole area of the burgh, and that area under the provisions of the Act could not be and was not diminished by what had been done when the parish was under the single jurisdiction of the parochial board. Mere inconvenience of course would not be proof that a continuance of the special drainage district was not a result deducible from what has been enacted in the Public Health (Scotland) Act of 1867; but it is a circumstance requiring to be taken into account when the decision is between two interpretations. The contention maintained by the complainer, if allowed, would result in a division of the parish into three portions, one the part of the burgh composed of the special drainage district, another the part of the burgh not included within that district; and the third, the remainder of the parish. Most will be disposed to think, and certainly it is my opinion, that there is no warrant for such a division in either Act of Parliament. The Lord Ordinary undoubtedly is of a different opinion, but his conclusion appears to me not to be called for by anything to be found in either statute, and in its result to be inconsistent with that provision of the first of the two Acts by which the territory of the burgh is separated from the rest of the parish, and placed as an undivided area under the jurisdiction of the Police Commissioners.

The next ground of suspension is, that assum-

ing the whole property within the burgh to be assessable for the works executed since the police burgh was created, the rate of assessment sought to be levied is greater than is authorised as regards its incidence on mineral property. In dealing with this question, there are two points which must be considered—first, Were the works in point of fact undertaken and executed by the commissioners as such, or by them as the local authority of the burgh? Should the latter view be adopted, the assessment would be an overcharge, because the Public Health (Scotland) Act 1867, section 94, provides that the assessment upon minerals shall not be upon the full value, but only upon one-fourth of the value of such property as is entered upon the valuation roll. Upon this issue the true conclusion, as I think, is that the commissioners acted as such, and not as the local authority, in executing the works the cost of which has now to be defrayed. They granted bonds for the money required in the character of Police Commissioners, and this, as it was a contemporaneous Act, appears to me to be a consideration by which this point is determined. The next question is, acting as commissioners, had they power to impose an assessment on the full value of mineral property? Upon this I hesitated for a time. It seemed to me to be unlikely that the commissioners of police, assuming to act as such, could impose a higher assessment than acting as the local authority of the burgh they could exact for the same works, but in the end I have not been able to avoid the conclusion that, after all, this is the true conclusion. The provisions of the General Police Act of 1862 are in this matter neither repealed nor even restricted by the Public Health (Scotland) Act of 1867. On the contrary, the assessing clauses of the Act of 1862 are referred to and recognised in the Act of 1867 as still in force; and the 91st section, in particular, of the later statute is such as seems to be absolutely inconsistent with the notion that the rates which could be levied upon minerals under the General Police and Improvement (Scotland) Act 1862 were reduced below the rates for the imposition of which power was given by the earlier statute. The section referred to enacts that the Public Works Loan Commissioners, as defined by the Public Works Loan Act of 1853, may advance to the commissioners mentioned in the 196th section of the Police and Improvement (Scotland) Act 1862, "for the purposes mentioned in that statute, and upon the security therein mentioned," such sums of money as may be recommended by one of Her Majesty's principal Secretaries of State. This necessarily implies that the rates authorised by the Act of 1862 might still be imposed; and the result consequently must be that the rate of assessment upon mineral property, when the powers given by the Act of 1862 are to be exercised, is the same as that upon other heritages, or, in other words, upon the full sum entered as the value in the valuation roll.

For these reasons, I think that the Lord Ordinary's interlocutor ought to be recalled, the suspension prayed for refused, and the action dismissed with costs.

Lord Rutherfurd Clark read this opinion—The complainer has been assessed for a drainage rate within the police burgh of Kilsyth. It has been imposed under the Act of 1862. He contends that it could only be imposed under the Public Health Act of 1867. It is plain that he has a material interest to support this view, for the incidence of the assessment on minerals is very different under the two Acts. The facts are these:—In 1874 proceedings were taken under the Act of 1867 to form a part of the parish of Kilsyth into a special drainage district. This was finally done by the interlocutor of the Sheriff, dated 29th March 1875. The parochial board, as the local authority, had the power, and perhaps might have been compelled, to construct a system of drainage within the special district. But it is admitted that they did nothing.

In December 1877 the police burgh of Kilsyth was created and the Act of 1862 was adopted as a whole. The special drainage district which had been formed under the Act of 1867 is situated within the boundaries of the burgh.

By the adoption of the Act of 1862 the Commissioners of Police were charged with the drainage of the burgh, and they have extensive powers for that purpose. All sewers and drains are vested in them. They may (sec. 185), subject to the approval of the Sheriff, divide the burgh, if and as occasion may require, into separate drainage districts, and they are empowered (sec. 186) to construct such sewers as may be necessary for the effectual drainage of the burgh. They are also authorised to assess and to borrow on the rates—that is, on the rates leviable under the Act of 1862—in order to defray the necessary expenses.

After the burgh was erected the Commissioners of Police proceeded to drain it. They made no attempt to divide it into districts, but constructed a system of drainage for the whole burgh. They borrowed a sum of money in order to enable them to carry out the works, and they have also laid on an assessment in terms of the Act of 1862 on the whole ratepayers of the burgh. This is the assessment which, in so far as it affects him, the complainer seeks to suspend.

As I understood the argument, it was not disputed that if the special drainage district had not been formed under the Act of 1867 the proceedings of the commissioners would be in order and the rate payable. But it is contended that inasmuch as that district was formed it must be drained under the authority of the Act of 1867, and the cost defrayed by assessments levied in terms of that Act. It was said that the formation of the district gave to the owners and occupants of property within it a *jus quæsitum* to that effect. I cannot adopt that view.

The formation of the special drainage district was no obstacle to the creation of the burgh under the Act of 1862. It might no doubt have given rise to the question whether the whole Act should be adopted or not. But no such question was raised, and the Act was adopted as a whole. I can see no reason why the Police Commissioners should not exercise the powers conferred on them by the Act. The Act is not in any sense abrogated or repealed by the Act of 1867. On the contrary, the 104th section of the latter provides that all powers given by it shall be "in addition to, and not in derogation of, any Act of Parliament not hereby repealed;" and there is no suggestion that the Act of 1862 was repealed by the Act of 1867. It seems to me, therefore, that the Police Commissioners might lawfully proceed to drain the burgh under the authority of the Act of

1862, and that if they proceeded under that Act they must assess under it, and under no other. They may have powers under both Acts, but the assessments must be laid on in conformity with the Act of which they use the powers.

The special drainage district was formed on the assumption that no burgh was to be created, and the local authority within that district, as well as for the rest of the parish, was the parochial board. It was thus a district within the parish, and formed a proper parochial arrangement when no burgh existed. But the creation of the burgh made a material alteration, and what was suitable for the parish might have been unsuitable for the burgh. Whether the drainage district could continue to exist after the creation of the burgh I do not stop to inquire. But if it did, I do not think that the Police Commissioners were bound to adopt it, and to proceed under the Act of 1867, if they thought that such a course would not be for the advantage of the burgh. The matter was one for their judgment, and for theirs alone, subject to such appeals as are given to any ratepayer under the Act of 1862.

Lord Young concurred.

The Lord Justice-Clerk was absent.

The Court recalled the Lord Ordinary's interlocutor, and refused the note of suspension.

Counsel for Pursuer (Respondent)—Robertson—Murray. Agents—Russell & Dunlop, C.S.
Counsel for Defenders (Reclaimers)—Moncreiff—Dickson. Agents—Maconochie & Hare, W.S.

Friday, June 9.

SECOND DIVISION.

[Lord Kinnear Ordinary.

LIQUIDATORS OF THE CALEDONIAN HERITABLE SECURITY COMPANY *v.* CURROR'S TRUSTEE.

Public Company — Director — Misapplication of Funds—Liability for Loss.

In an action for damages against the trustee on the bankrupt estate of a deceased director of a joint-stock company, the objects of which were lending money on heritable and other securities, for loss through misapplication of the company's funds,—*held* that liability for loss incurred through the failure of another company which had an open account with the first-mentioned company, similar to that of banker and customer, on which moneys were lodged on deposit-receipt and remained at call, there being no security for overdrafts, did not attach to the directors where there was not sufficient evidence to show that they were cognisant of the existence and continuance of the irregular account, or that this ignorance arose from a failure in their duty.

The Caledonian Heritable Security Company (Limited) was formed in March 1872, and was incorporated under "The Companies Acts 1862 and 1867," as a company limited by shares, on 27th March 1872, and had its registered office in Edinburgh. The objects for which the company was formed, as set forth in the memorandum of association, were as follows:—"To advance or lend money on security of all kinds of heritable property, or for the purpose of building, draining, enclosing, or otherwise improving the same: To make advances for the execution of works undertaken in virtue of powers conferred by any public or local Act of Parliament, on the securities thereby authorised; and also on the security of annuities and on other assignable properties, and on or for the purchase of reversionary interests heritably secured: To receive money by way of loan, by cash-credit, debenture, deposit, or otherwise, and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

The deceased Adam Curror of The Lee was a subscriber of the memorandum of association, was one of the first directors named in the articles of association, and was elected a director at the first general meeting of the company, when Richard Wilson, C.A., was at the same time appointed manager. Mr Curror continued to be a director till December 1878, when he became disqualified by his sequestration in bankruptcy. The respondent, Thomas Whitson, C.A., was appointed his trustee. Mr Curror died in February 1879. The company carried on business till July 1880, when it was resolved at an extraordinary general meeting held on the 13th of that month, that the company, by reason of its liabilities, should be put into voluntary liquidation. The pursuer, Peter Couper, C.A., was appointed liquidator, and the liquidation was brought under the supervision of the Court of Session in December following.

In or about November 1874, another company, called the Edinburgh and Glasgow Heritable Company (Limited), was established, and was incorporated under the Companies Acts of 1862 and 1867. The objects for which this company was formed were similar to those of the Caledonian Company. Certain of the directors of the Caledonian Company were also directors of the Edinburgh and Glasgow Heritable Company, and with the consent of the directors of the former company, the said Richard Wilson was also appointed manager of the Edinburgh and Glasgow Heritable Company. The Edinburgh and Glasgow Heritable Company carried on business till May 1880, when it also went into voluntary liquidation.

In September 1881 a claim was made by Mr Couper as liquidator (or more accurately, by another party who was then in the position of his assignee, but who afterwards re-assigned to Mr Couper) for a ranking on the sequestrated estate of Mr Curror for the sum of £26,500, being the amount of funds of the Caledonian Company alleged to have been lost through the misapplications of the directorate. The claims against the surviving directors had been previously compromised. The present action was an appeal against the deliverance of the trustee rejecting the claim. The grounds of the claim and the modes in which liability was sought to be fixed on Mr Curror as a director, as disclosed on proof, are detailed in the opinions of the Lord Ordinary and Lord Young.

The respondent pleaded breach of trust on the part of Mr Curror along with the other directors, inferring liability of each *in solidum*.

The Lord Ordinary refused the appeal and