which has been craved. On the whole matter I am quite satisfied that the pursuers have entirely failed to make out a case for interdict, and that they have certainly proved no damage, and therefore I agree with your Lordships in thinking that the interlocutor should be recalled and the defenders assoilzied.

LORD MONCREIFF was absent.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders.

Counsel for the Pursuers and Respondents —Salvesen, K.C.—Hunter. Agents—Hutton & Jack, solicitors.

Counsel for the Defenders and Reclaimers —Clyde, K.C.—Constable. Agent—T. S. Paterson, W.S.

Saturday, January 23.

FIRST DIVISION.

[Dean of Guild Court, Partick.

JOHN C. M'KELLAR, LIMITED *v.* BRYCE.

Police—Buildings — Open Space Attached to Dwelling Houses—Lining Granted subject to Conditions—Second Application in Contravention of Conditions of Previous Lining—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. cap.* 55), *sec.* 170.

The proprietors of a rectangular area of ground situated in a burgh at the corner of two streets applied for a lining for three tenements, two of them to face one street and the third to face the other street. The burgh surveyor objected that a free space equal to at least three-fourths of the area to be occupied by the intended buildings, as required by section 170 of the Burgh Police (Scotland) Act 1892, was not provided. The petitioners thereafter lodged a minute restricting their petition to a lining for two tenements, and also made and initialled the following note on a new plan lodged in process showing only these two tenements —"Back space to be three-fourths the total area of buildings." There being a free space in excess of the area required by the Act for the two tenements, the Dean of Guild, in respect of this minute, granted the restricted application for two tenements conform to the new plan. Subsequently the proprietors presented a second application for a lining for a tenement identical in dimensions and design with the third tenement which had been shown on the plan originally lodged with the first application, and which had been dropped from that application. The burgh surveyor objected, and averred that if the petition was granted the two tenements formerly lined would be left with less than the minimum free space required by the Act. The Dean of Guild Court refused the lining.

Held, in an appeal, that the petitioners were barred by their actings in the first application, and by the conditions under which the lining in that application was granted, from bringing the second application, and appeal *refused*.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 170, enacts— . . . "Every building erected for the purpose of being used as a dwelling-house . . . shall have all the rooms sufficiently lighted and ventilated from an adjoining street or other open space directly attached thereto equal to at least three-fourths of the area to be occupied by the intended building." . . .

A petition was presented to the Dean of Guild Court, Partick, by John C. M'Kellar, Limited, 224 St Vincent Street, Glasgow, for a lining for a tenement of dwelling-houses proposed to be erected on the east side of Clyde Street, Partick, on ground belonging to them.

Objections were lodged by John Bryce, Burgh Surveyor for the burgh of Partick, for the public interest.

The following facts were stated in the petition and answers:—The total area of ground belonging to the petitioners was about 8553 square feet, extending northwards in Clyde Street to Dumbarton Road, and along Dumbarton Road eastwards. On May 4th 1903 the petitioners lodged a petition in the Dean of Guild Court at Partick for the erection of three tenements with offices on this area of ground, two of them having a frontage to Dumbarton Road and one of them having a frontage to Clyde Street. The Burgh Surveyor having lodged, *inter alia*, an objection to this petition that the free space required by section 170 of the Burgh Police (Scotland) Act 1892 (*i.e.*, equal to at least three-fourths of the area to be occupied by the intended buildings) was not provided. The actual area of the three intended tenements was 5756 square feet, three-fourths of which was 4317 feet, whereas the actual back space available was only 2797 square feet, being 1520 square feet less than the necessary minimum of 4317 square feet. On June 2nd 1903 the petitioners lodged a minute in said petition restricting their petition to a lining for the two tenements fronting Dumbarton Road, thereby reducing the area of building to 4046 square feet, and increasing the requisite free space to 3034 square feet. This left unbuilt on 2797 square feet of back ground in addition to the ground on which the third tenement was proposed to be erected, or 4507 square feet in all, an excess of 1473 square feet beyond the area required for the two tenements. The minute lodged by the petitioners restricting their petition to a lining for two tenements bore that they did so "without prejudice to their in future applying for a lining for" said third tenement, "and under reservation of their whole rights and pleas in the

present petition." The petitioners also made the following note on a new ground plan lodged by them in process;—"Back space to be three-fourths the total area of building.—J. C. M'K." On June 4th 1903 the Court, in respect of the minute for petitioners restricting the petition to an application for a lining for the two tenements fronting Dumbarton Road conform to amended ground plan lodged, granted the restricted application craved.

With regard to the said note on the plan the Burgh Surveyor averred—"The petitioners agreed to fix the back space of the said two front tenements at three-fourths of the area thereof by writing a note on the plan to the effect that the back space would be three-fourths of the total area of the buildings."

The petitioners stated that "the note on the plan referred to must be read, and was intended by the petitioners to be read, that the back space would be three-fourths of the total area of the buildings so far as lighted and ventilated by said back space."

In the present petition, which was lodged on June 15th 1903, the petitioners applied for a lining of a tenement in Clyde Street and relative offices exactly the same in dimensions, situation, and design as the tenement and offices shown on the plan lodged with the first application and dropped from the same. It was averred by the Burgh Surveyor that the area of the proposed new tenement to the extent of 237 square feet was taken from the back space requisite in terms of section 170 of the Burgh Police (Scotland) Act 1892 for the two tenements fronting Dumbarton Road lined on June 4th 1903, and that if the present petition was granted the said two tenements would be left with only 2797 square feet of back space instead of 3034 square feet required by the said Act.

On October 16th 1903 the Magistrates, as the Dean of Guild Court, sustained the objections stated by the Burgh Surveyor and refused the lining.

Note.—. . . "The result of the present application being granted would be that a portion . . . of the tenement now sought to be lined would encroach on the free space required and agreed by the petitioners to be left as free space for the first two tenements, and would lessen the back ground available for the two tenements already lined by 237 square feet, thus reducing the space for said two tenements to less than two-fourths of their area.

"In these circumstances the Magistrates are of opinion that the petitioners are not entitled to so reduce the back space necessary for the two tenements to less than the three-fourths required for them, and that there was a judicial compact between the petitioners and the Court under which the necessary three-fourths of the area of said two tenements fell to be provided and cannot be built over to any extent.

"This of itself would be a sufficient ground for refusing the present lining, but in addition to that, the Magistrates are of opinion that the petitioners are bound to provide an open space equal to three-fourths of the entire area of the buildings for which lining has been granted as aforesaid, and for which lining is now asked, and that such space has not been provided. The Magistrates were referred to the case of *Bryce* v. *Lindsay*, 29th November 1901, 4 F. 241, and it was maintained by the petitioners that under the judgment in that case they were entitled to erect each of the three tenements as possessing for open space purposes the whole area at the back, and that it might serve for as many tenements as could be built around it. The Magistrates recognise that they are bound by the judgment referred to, but are of opinion that the ground of decision in that case does not involve such result and does not cover the present case. The Magistrates are satisfied that it is necessary for the proper light and ventilation of the three tenements, surrounded as they are by the other buildings shown on the plan, that the full three-fourths space should be secured, and as the total available back space is required for the two tenements, and has been appropriated for them, there is none left for the present tenement." . . .

The petitioners appealed, and argued — Under section 170 of the Burgh Police (Scotland) Act 1892 each tenement was to be considered as an independent unit, and it was sufficient if three-fourths of its own area was attached to it as an open space—*Bryce* v. *Lindsay*, November 29, 1901, 4 F. 241, 39 S.L.R. 141; *Hoy* v. *Magistrates of Portobello*, July 15, 1896, 23 R. 1039, 33 S.L.R. 763. That was the case here. The proceedings in the previous application had no relevancy in determining the present application, for the space, being open, could provide light and ventilation for more sets of buildings than one. When the statutory space was provided the Dean of Guild was not entitled to refuse a lining on the ground that in the circumstances of the particular case the space would not be sufficient (*per* Lord Trayner in *Brown* v. *Young*, February 21, 1900, 2 F. 647, 37 S.L.R. 466). Even on the view that there was in the proceedings in the previous application something in the nature of a contract, yet in construing that contract it was essential to observe that the minute of restriction lodged by the petitioners was, without prejudice, to their in future applying for a lining for the third tenement, and under a reservation of their whole rights and pleas. It was *ultra vires* of a Dean of Guild Court when granting a lining on a particular application to make conditions or enter into any judicial compact that no more buildings overlooking the same open space were to be erected. A condition or restriction of that kind did not enter the register and could not be made a real burden or binding on singular successors. To hold such a condition or restriction effectual in these circumstances would cause endless confusion in case of the ground being transferred to a singular successor.

Argued for the respondent—The proceedings in the prior application could not be separated from those in the present applica-

tion. In the prior application a lining had been granted for two tenements subject to the express condition or restriction contained in the note on the new process plan lodged and then conform to that amended plan. The Dean of Guild was clearly right in holding that to grant the present application would be a breach of the condition upon which the lining in the former application was granted. In face of their undertaking to leave this area free of buildings the petitioners now sought a lining for buildings precisely the same as those proposed in the original application. They sought to do by means of the device of two applications what they could not do by one application. That it could not be done by one application was clear from the ratio of the decision in *M'Lelland* v. *Moncur*, December 2, 1899, 25 R. 238, 35 S.L.R. 188, for if the lining now sought was granted the free space attached to the two tenements previously lined would be reduced below the minimum three-fourths. The conditions and restrictions subject to which the lining in the previous application was granted being competent and proper, they were binding on the petitioners, and barred the present application. There was here no question of singular successors. The question was solely as to the right of the original petitioners themselves.

LORD PRESIDENT—As this case was originally presented to us it appeared to be attended with some difficulty, but even in the earlier part of the argument I saw no reason to doubt that the views expressed by us in the case of *Bryce*, 4 F. 241, are correct. It now, however, appears that we have a totally different condition of things to deal with in the present case. The Dean of Guild did not grant the application as originally presented, but upon a minute by the petitioners restricting their application he granted a lining in respect of an indorsation upon the process plan of the following words which were duly initialled by the petitioners—"Back space to be three-fourths the total area of the buildings," J. C. M'K. The petitioners now come forward with an application for a lining which would allow them to build upon the ground which is affected by the limitation, and subject to the condition under which the lining in the first application was granted. It is not necessary to determine whether the condition could have been insisted upon *ex lege*, but I am clearly of opinion that the petitioners are barred from now coming forward and asking for a lining inconsistent with it. Upon this short ground I am of opinion that the judgment appealed against should be affirmed.

LORD ADAM—I am of the same opinion. When the case was opened it was suggested that questions of difficulty were raised, but Mr Clyde has restricted his argument to what took place in the Dean of Guild Court in the former petition, and he maintains that looking to the proceedings the Dean of Guild was entitled to refuse the lining craved in the present petition. The petitioner in his first petition craved a lining for three tenements, but by minute restricted his application for a lining for two tenements, and made the following note on the plans—"Back space to be three-fourths the total area of the buildings." The restricted application was then granted "conform to amended ground plan lodged," which showed the area to be left clear of buildings, and part of that area is included in the plan upon which the petitioner now asks authority to build. The Dean of Guild has held that to grant the present petition would involve a breach of the condition upon which the lining in the former petition was granted. I do not think the condition was a matter of contract with the Court, but the petitioner undertook and bound himself to leave this area free of buildings, and on that ground I think we should adhere to the interlocutor of the Dean of Guild.

LORD M'LAREN—There are several decisions of this and the other Division of the Court relating to the Burgh Police Act 1892, section 170. This is not surprising, for the section imposes very onerous restrictions on owners of property in the public interest, and it is natural that owners should not consider the interests of populous districts so much as their own immediate benefit. According to this section the unit is a single dwelling-house, and it is to have three-quarters of its own area appropriated to it as open space. Where houses are built in continuous lines, whether straight or circular, there is no serious difficulty in applying the statute, but the application here relates to the corner of a hollow square—that is to say, to three tenements forming the corner, and having only one square area behind. It is not easy to apply the statute to a case of this kind, for according to a free reading the same space might suffice for the three tenements, but this does not preclude another reading by which the space for light and air is to be equal to three-fourths of the area built upon in the aggregate.

The Magistrate has taken a reasonable view of the construction of the statute in allowing the withdrawal of the one building from the previous application. If it could be shown that there was a sufficiency of ground for the new tenement without encroaching on the open area appropriated to the tenements previously authorised, an important question would be raised, but according to the narrative in the Magistrate's note the plans show an encroachment of 237 feet on the ground which was to be kept open as a condition of the warrant already granted. As I read the statute the open space which is to be left under section 170 becomes charged with a right in the public to restrain building upon it, and the local authority cannot thereafter give a right to put up anything higher than one-storeyed buildings. The Magistrate could not have granted the warrant craved in the present petition without violating section 170 of the Police Act.

I am therefore of opinion that the interlocutor should be affirmed.

LORD KINNEAR—I am of the same opinion. But I agree with Lord Adam that there is no element of judicial compact in this case. If there had been any question of contract arising out of the proceedings in the Dean of Guild Court there might have been some force in Mr Craigie's argument on the reservation by the petitioners of their whole rights and pleas contained in their minute of restriction. But there can be no contract between a Court charged with the duty of deciding questions of legal right and the suitors before it. What I do think of importance is that the Dean of Guild Court may make such conditions as to the building line as are competent, and may insert these conditions in the warrant. In this case the warrant was granted upon clearly expressed conditions, and although the interlocutor proceeds in respect of a restricted demand as shown upon a plan docqueted by the petitioner, the conditions as to air space are not imposed by virtue of any conventional stipulation by him, but in the exercise of the inherent authority of the Dean of Guild Court. The applicant was not bound to build under the authority so granted unless he pleased, but he could not build otherwise, and he could not build under that authority and reject the conditions on which it was granted. It appears to me that the clause in the Act of Parliament would be futile if after the Dean of Guild has granted authority to build on certain conditions imposed for the purpose of enforcing the Act, the person who has obtained such authority were to be allowed to encroach on those conditions. I think the petitioners are not entitled to encroach upon the open space, seeing that it was made a condition of their getting authority to build that the space should remain open, and for this reason I think the interlocutor appealed against should be affirmed.

The Court dismissed the appeal.

Counsel for the Appellants — Salvesen, K.C.—Craigie. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondent—Clyde, K.C. —R. S. Horne. Agents—Simpson & Marwick, W.S.

Saturday, January 23.

SECOND DIVISION.

[Sheriff of Stirling and Dumbarton.

SPEIRS & KNOX *v.* MARSHALL'S TRUSTEES.

Road—Street—Paving by Local Authority —Right of Relief — Bondholder Subsequently Entering into Possession—Owner in Default—Public Health (Scotland) Act 1897 (60 *and* 61 *Vict.* c. 38), *secs.* 39 *and* 150.

The Public Health Act 1897, section 39, authorises the local authority to pave a private street (if the owners of houses fronting the street fail to do so on requisition), and thereafter to recover the expenses from the "owners in default." Section 150 entitles the local authority to recover "any costs and expenses" for which the owners of premises may be liable from "any person who then or at any time thereafter occupies such premises."

A county council, acting as the local authority under the Public Health Act 1897, served a requisition on the proprietor of a tenement fronting a private street calling upon him (along with other owners) to pave said street. The requisition not having been obeyed, the county council executed the work, and by decree in the Sheriff Court recovered the proportionate part of the cost from a firm of house factors who managed the tenement in question, on the ground that they fell within the definition of "owners" in the Act. The house factors having obtained an assignation of the rights of the county council, brought an action concluding for reimbursement of the payments so made against the holder of a bond and disposition in security, who in terms thereof had entered into possession of the tenement. The bondholder had entered into possession after the requisition to pave the street, but before the county council had allocated the expenses on the different proprietors. *Held*, on a construction of the terms of the Public Health Act, that the pursuers were entitled to decree.

The Public Health (Scotland) Act 1897 (60 and 61 Vict. c. 38), section 39, enacts that where any street within a certain category is not levelled, macadamised, and made good to the satisfaction of the county council, "such authority may by notice addressed to the respective owners of the premises fronting, adjoining, or abutting on such street," order them to do such works as are required. The section provides further —"If such order is not complied with the said authority may, if they think fit, execute the works mentioned therein, and may recover in a summary manner the expenses incurred by them in so doing from the owners in default."

Section 150 of the Act enacts as follows— "It shall be lawful for the local authority, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under this Act, either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorised by this Act."

In March 1899 the County Council of Dumbarton issued notices under section 39 of the Act to the proprietors of properties in Temple Gardens, Temple, including numbers 1 and 3 thereof, calling upon them to level and macadamise the streets abutting on their properties.

These notices having been disregarded by all the proprietors concerned, the County