upon the Court to ordain them to do. I think that that is a very good argument, provided the allegation bears out the position which is contended for. But has the appellant asked them to do that? It appears to me that the conclusions of the summons are much wider than the rights which are given under that 13th section, or under any of the subsequent sections. I think that it will not do for the pursuer to say that there is among the things which he calls upon the trustees to do, one element which would fall within that clause of the Act, and that he requires them to perform operations which will protect him from all damage, not merely operations which will protect him in the particular matter which is referred to in the clause of the Act —namely, the raising of the water of the river so as to injure the particular banks. The demands here are far wider than the rights here given; they rest on all injury done to his lands in any way (not merely by raising the water) by any of the operations of the trustees, whether referable to matters referred to in this section or with reference to any of the operations which have been performed under the Act of 1858, which repeals the former Acts, except so far as relates to matters which have taken place under them. Now, it would be a very inconvenient course to endeavour to eliminate out of all that demand some particle which might be applicable to the case, and to apply it to that particular matter which is provided for by the statute. That would be a most inconvenient mode of proceeding if it were at all possible. If the pursuer had confined himself to the particular matter of his right he might have had a relevant claim, and he would not have incurred the dismissal of this action as irrelevant, inasmuch as it is too comprehensive and goes beyond what it ought to contain, mixing up various things which ought not to be mixed up together. He would not in any way be precluded from having his remedy by confining his claim to what is the subject matter of his right.

I think, therefore, that the Court below has done right in dismissing this action upon both conclusions, upon all the matters referred to in the first conclusion, and upon a certain portion of the matters referred to in the second conclusion. I therefore concur in the judgment which has been proposed.

Agents for Appellants—Dundas & Wilson, C.S., and Grahames & Wardlaw.

Agents for Respondents—James Webster, S.S.C., and Loch & Maclaurin.

Monday, March 20.

DAVID JAMES SMEATON *v.* THE MAGISTRATES AND TOWN COUNCIL OF ST ANDREWS.

(*Ante*, vol. vi. p. 197).

Agreement—Police Commissioners—Locus pœnitentiæ. The Commissioners of Police of a burgh adopted at a meeting "a memorandum or heads of agreement" "as the basis of an amicable settlement" with a proprietor who had claims of compensation against them, and they instructed their clerk to prepare a deed of agreement in conformity therewith. This decision was communicated by the clerk to the proprietor. *Held* (reversing a decision of the Second Division of the Court of Session) that this resolution was binding upon the Commissioners, and was not rescindable at their next meeting.

This was an appeal from a decision of the Second Division as to the regularity of certain sewerage operations affecting the appellant's property. The appellant raised an action against the Magistrates of St Andrews, as Commissioners of Police of that burgh, seeking to have it declared that they were bound to carry out a certain scheme of drainage which they had agreed upon with him on 12th February 1866, by which scheme the course of a certain proposed drain through his lands was settled. The pursuer and appellant set forth in his condescendence that he was the proprietor of the lands of Abbey Park, consisting of about sixteen acres of land, in the burgh of St Andrews, and he kept a large educational establishment, in which about seventy young gentlemen were educated, and which had cost him about £12,000. The drainage of his premises went into a small burn called Kinness Burn, which was within 200 yards of his house. The Commissioners having resolved to drain the burgh, gave notices, and took steps under the Police Act of 25 and 26 Vict. The first scheme did not touch the appellant's lands; but it was abandoned, and a new scheme proposed which did carry a drain through his lands. He objected to this second scheme as injurious to his property, and contended that the Commissioners had no power to alter their first scheme. He applied for interdict, and also appealed to the Sheriff, without success, and then made a claim for compensation. At this stage the Commissioners proposed a compromise, and ultimately they agreed to carry a drain in a certain direction along the Kinness burn, instead of the one previously proposed. This compromise was, as the pursuer alleged, assented to on both sides, and adopted by a resolution of the board, communicated to him; and part of the agreement was that a formal deed should be executed, embodying the heads of such agreement. At the request of the Commissioners, the pursuer, after the agreement, withdrew his former notice of trial, and discontinued all further preparations in that direction. Both parties also instructed their engineers to meet and consult. The Commissioners, however, afterwards changed their mind, and resolved to depart from the agreement, and carry out, instead thereof, the scheme formerly contemplated. Thereupon the pursuer raised the present action. The defenders in their answers contended that the contemplated deviation was *ultra vires;* and that the alleged agreement was never completed, and never became binding, and was *ultra vires* that the former scheme, being approved by the Sheriff, was final and conclusive. Lord Ordinary Jerviswoode held that the interlocutor of the Sheriff being final and conclusive as regards the previous scheme, the action must be dismissed. On reclaiming note, the Second Division recalled the Lord Ordinary's interlocutor, and held that the question as to the validity of the alleged agreement ought first to be decided by the Lord Ordinary. Thereupon the Lord Ordinary held that the agreement was entered into and binding, and accordingly found for the pursuers on that ground. On a second reclaiming note, the Second Division recalled the Lord Ordinary's interlocutor, and held that the alleged agreement was never concluded, and dismissed the action; thereupon the pursuer now appealed.

SIR R. PALMER, Q.C., and Mr H. J. MONCREIFF,

for the appellant, contended that this was a binding and concluded agreement between the parties, and was acted upon by the appellant, and ought now to be carried out, and the judgment should be reversed.

Mr JESSEL, Q.C. (with him Mr PEARSON, Q.C., and Mr J. C. SMITH), for the respondents, contended that the secretary of the Commissioners had no authority whatever to communicate the resolution of his board to the appellant, and that all that took place was without authority of the board, and not binding on them.

At advising—

LORD CHANCELLOR—My Lords, This is a case which unfortunately has occasioned very considerable litigation between the present appellant Mr Smeaton and the Commissioners of Police of the Burgh of St Andrews. The sole object of the litigation may be stated in a very few words. The Commissioners are empowered by the General Act for that purpose to execute sewers in particular, and such other works as are mentioned in the Act within the district which is confided to them; and in the course of the execution of those works, and laying them out according to their judgment, they proceeded to design a line of sewer which Mr Smeaton, the appellant, says would have been a very serious injury to him and to his property, because it passed under some grounds which were used by him as cricket-grounds and play-grounds, with reference to an establishment of young men who were under education in his house, and under his superintendence. He was desirous, therefore, that instead of the line of sewer taking that course a different line of sewer should have been provided, one which should have passed outside his grounds towards a river or brook which ran at the bottom of his grounds, and which he, in his judgment, thought might be executed with equal advantage to that which would accrue from the adoption of the line proposed by the Commissioners. And he resisted in every way in which it was competent for him to do the original line as designed.

The Commissioners took a different view from Mr Smeaton upon the subject, and determined to carry into effect the sewer as originally designed, and accordingly gave the notice in the usual form as required by the Act. And the Act requiring that under those circumstances persons should be heard who objected to any course which the Commissioners might adopt, they heard Mr Smeaton, I think by counsel, and notwithstanding that hearing persisted in adopting the line in question. Mr Smeaton had the resource open to him under the Act of appealing to the Sheriff-Substitute with reference to the line in question, and was enabled to object to the line being adopted before the Sheriff, but the Sheriff decided in favour of the Commissioners, and accordingly that line was chosen and selected as the line to be executed.

Thereupon, nothing would remain but to compensate Mr Smeaton for the damage he had sustained by the execution of the work as proposed. He laid the damages very high, probably at a somewhat extravagant rate, asking two or three thousand pounds if the line should be pursued through the course which the Commissioners had adapted. At the same time, he says in the present case, and possibly with some degree of reason, that it would have been detrimental to him with reference to the pupils he was engaged in teaching, and to those who might succeed him, and that there might probably be an alarm amongst those who placed their children under his charge if a sewer was carried through his play-ground; and he anticipated therefore very great damage if that course were pursued.

This being the state of things, and the Sheriff having come to that determination, towards the end of the year 1865 a negotiation took place, which went on for a very long period between the Commissioners and Mr Smeaton. Many meetings of the Commissioners were held for the purpose of considering the question; Mr Smeaton asking the large amount of damages I have mentioned, and the Commissioners, possibly apprehending that, though there might not be entire ground for paying such excessive damage as that, still there might be ground for paying a considerable amount of damage, and being therefore willing to see whether, all things being taken into consideration, it might not after all be more expedient to make the sewer in the direction desired by Mr Smeaton. Accordingly communications took place through the medium of Mr Grace, who was the secretary or the proper officer for the purpose of the Commissioners; and Mr Grace communicated on his part to Mr Paterson, the engineer and surveyor of the Commissioners, with reference to his views on the subject. Mr Smeaton called in his agent and surveyor. It is enough to say that numerous letters passed between the parties—numerous meetings were held by the Commissioners. I pass over all that, because it ultimately resulted, on the 12th of February 1866, in an arrangement which Mr Smeaton insists upon now as a good and valid arrangement between him and the Commissioners, and one which he is entitled to have carried into effect by that body. The only reason why I enter at all into these communications is this, that undoubtedly whatever was done after the 12th of February, be it valid or invalid, was not done without great consideration on the part of the Commissioners, and without many interchanges of proposals, varying from time to time, and some concessions on the part of Mr Smeaton with regard to proposals on his part, which seem to have been laid before the Commissioners; and after a great deal of discussion as to what limit of expense ought to be specified as that which should be borne by the Commissioners, and what contribution Mr Smeaton was willing to make (if he was willing to make contribution) instead of requiring compensation for the making of the new line, it resulted in an agreement by which compensation would be waived altogether by Mr Smeaton, and some payment would be made by him in order to secure the making of the line in the way that he preferred.

At last, after all these communications, the following proposed heads of agreement were sent by Mr Smeaton's agent, Mr Alexander Nicholson, who had supervised the preparing of the heads of agreement on the part of Mr Smeaton, to the Board of Commissioners. It is not necessary to read them all through, but the heading is this—dated 12th February 1866—"In order to effect an extrajudicial settlement of all claims whatever on the part of Mr Smeaton against the Commissioners in connection with the portion of said southern main sewer which is to pass through his lands of Abbey Park, it is proposed as follows." Then all the proposals are given at length, and there is only one that I need mention. It will be found between letters C and D, on p. 136, "Provided the report of Benjamin Blyth, Esq., civil engineer, Edinburgh,

or any other engineer of standing to be mutually agreed on, is obtained by Mr Smeaton within fourteen days from this date." Then there is a proviso introduced in the agreement itself by a marginal note in these words—"Note. If this reference should be objected to, Mr Smeaton is prepared to leave it to his engineer, Mr Stewart, and Mr Paterson rather than have a difference,"—Mr Paterson being the engineer and surveyor of the Commissioners. Then the whole agreement is set out at considerable length. I need not read it any further, it simply specifies that the work shall be executed in the line that Mr Smeaton desires, and that he is to give up all compensation, and to make a contribution towards the completion of the work. There are three proposals contained in the agreement — the third was, "That a formal deed of agreement embodying the stipulations and provisions above written and other necessary formal clauses shall be prepared by the Commissioners' agent, and revised by the agent of Mr Smeaton, and shall be executed by the Commissioners and Mr Smeaton (in duplicate) within fourteen days from this date, the expense of said deed to be defrayed by the parties mutually." Then it is added —"To end the disputes in an amicable spirit, Mr Smeaton is agreeable to the terms contained in the foregoing heads of agreement." That is signed "Alexander Nicholson," who was Mr Smeaton's agent for the purpose.

On this very 12th of February, two or three meetings took place in the morning and in the evening, because the time was drawing near within which the Commissioners were bound to do something. Mr Smeaton having been before the Sheriff, and having proceeded to make his claim for £3000, it was necessary that the Commissioners should do something, aud in fact notice had been given for the summoning of a jury to settle the question of the compensation to be paid to Mr Smeaton. But at the first meeting of the Commissioners upon the morning of the 12th of February, it is stated in the minute which appears in page 138, that "the Provost stated that counsel had advised the Magistrates that it would be proper to make a tender to Mr Smeaton of a sum in name of damages, in consequence of the construction of the south main sewer through his property in view of the impending jury trial, and that the Magistrates therefore wished authority from the Commissioners to make said tender." That authority was given, and then on the same 12th of February Mr Grace, the clerk of the Commissioners, sent a letter making a tender of £420 sterling, with reference to the intended jury trial, and Mr Grace accompanied that by another letter directed to Mr Smeaton, saying, "although, in order to avoid any question under the statute, the Commissioners have given the notice herewith sent, and will present the petition to the Sheriff referred to therein, they reserve their plea that the application is premature, or otherwise that the enquiry cannot proceed till the alleged damage has been done by the execution of the works."

All that is done in the morning of the 12th of February, but in the evening, at seven o'clock, having then the proposal of Mr Smeaton before them, the Commissioners met again, and they proceeded to consider Mr Smeaton's proposal, which is brought before them by Bailie Bairnsfather, who submits the matter for their consideration. There is, first, a proposal that they should meet with closed doors, that is negatived, then they discuss the matter, and finally this takes place,—"Mr William Smith thereafter moved that the said memorandum or heads of agreement now read be adopted by the Commissioners as the basis of an amicable settlement of the questions presently depending between them and Mr Smeaton, on the understanding that there should be a reference to Mr Blyth C.E., or any other engineer, as proposed by the memorandum, but that the possibility of lessening the height of the embankment through Abbey Park shall be entirely dependant on Mr Smeaton's engineer, Mr Stewart, being able to satisfy the commissioner's engineer, Mr Paterson, that such height can be diminished consistently with maintaining the gradient specified in the memorandum" and so forth, and that in fact is the only variation which is made in the proposal. It is not a very grave variation, as far as that is concerned, because what Mr Smeaton had said in his proposal was this, I propose that it be according to the report of Mr Blyth, but I am content to leave it to Mr Stewart and Mr Paterson, my engineer and your engineer; but the variation made in the motion I have just read is this, that at the particular point in question which required the interference of engineers, the matter is to be decided by Mr Paterson, who will only alter the arrangement proposed in the event of Mr Stewart, that is the engineer of Mr Smeaton, being able to satisfy him by laying his arguments before him, of the propriety of that being done.

Then Mr Bruce moves an amendment, "that the Commissioners adhere to the resolution come to by the meeting of Commissioners on 1st current, to abide by the statutory route." That, amongst other things, had been one of their former resolutions, during the interval of continued negotiation to which I have referred. Then "the sederunt being called and votes marked, 14 voted for the motion of Mr William Smith, and 13 for the amendment of Mr Bruce, whereupon the former was declared carried, aud the meeting accordingly resolved in terms of the motion of Mr William Smith," which was a motion adopting the agreement. Then "Mr Bruce and Mr Rae dissented from the resolution. The meeting then directed the clerk to prepare a deed of agreement between the Commissioners and Mr Smeaton, based on and in conformity with the said memorandum or heads of agreement. Mr Paterson" (who was the engineer) "who was present, was also instructed to proceed to get the specifications adjusted in terms of said heads of agreement, and to obtain estimates for the construction of the deviation sewer, and submit such estimates to the Commissioners." It appears also, at the same time that they sent a notice to the contractor to hold his hand, the contractor, a Mr Robb, being then about to proceed with the plan which had been settled by the Sheriff, instead of the plan now arranged.

Then the next thing we find is, that Mr Grace communicates immediately with Messrs Drummond & Nicholson, Mr Smeaton's agents,—I will only pause one moment upon that. It is said that there was no authority given to him at this meeting to make this communication which I am about to read, but it appears to me impossible to hold that the meeting must not be taken to have authorised him so to do, because we find that not only was the communication made, and the agreement with the variation in question adopted, but Mr Smeaton's assent to that variation is distinctly required and is given, and further than that, we shall find in the letter which I shall shortly read fully, of the 16th

of February 1866, a distinct statement with reference to this arrangement, and a distinct requisition on the part of Mr Grace, that in consequence of this arrangement Mr Smeaton shall withdraw his claim for £3000 damages; and Mr Smeaton accordingly acting upon it and withdrawing his claim, I think after all that it is impossible to rely upon the circumstance, which has been much commented upon, that the resolutions did not contain a specific direction to Mr Grace to write to Mr Smeaton, which had been, it is true, the course pursued upon other occasions when Mr Grace had been so required to act. For, on the other hand, I find that the Commissioners give distinct notice to Mr Grace to prepare a deed based upon this agreement, and to put himself in communication with Mr Smeaton's agents, because we find that the meeting directed the clerk to prepare a deed of agreement between the Commissioners and Mr Smeaton in conformity with the said heads of agreement. That could not be done unless the clerk was authorised, and fully felt himself to be authorised, to make the communication, that the heads of agreement should be settled in a more formal shape. It was only the formal shape that was required to be given to them, as the basis of the agreement was settled between the parties.

Now the letter sent to Messrs Drummond and Nicholson is this—"The memorandum or heads of agreement which your Mr Nicholson subscribed to-day on behalf of Mr Smeaton, with the view of terminating in an amicable spirit all questions between him and the Commissioners, was submitted to the Commissioners this evening, as was understood between us. By a majority of 14 to 13 the Commissioners adopted the memorandum as the basis of an amicable settlement, on the understanding that there should be no reference to Mr Blyth, or any other engineer"—then it states the variation from Mr Smeaton's proposal, and it proceeds—"Be good enough to let me know immediately on receipt that you accept of this resolution on the part of Mr Smeaton,"—a matter necessary on account of that variation—"I may mention that the motion which was adopted was made by Mr William Smith. and seconded by" so and so.

The answer of Messrs Drummond and Nicholson is—"Dear Sir,—We are favoured with your letter of the 12th instant, a copy of which we have sent Mr Smeaton, requesting him to drop you a note expressing his acquiescence in the modification as regards the levels." They acted evidently with considerable caution, because they knew how much Mr Smeaton had set his mind upon this particular business. And Mr Nicholson writes accordingly on the 13th, telling him of all that had passed between him and Mr Grace, and asking him to express his assent. Mr Smeaton writes to Mr Grace thus—"Dear Sir,—I have just received copy of your letter of yesterday's date to Messrs Drummond and Nicholson, my agents. In reference to the resolution by the Commissions, as stated in said letter regarding levels, height of embankment, exclusion of Mr Blyth, C.E., &c., &c., I agree to the same in the terms in which Mr Nicholson has expressed his concurrence on my behalf."

Then comes a letter (p. 144), dated the 16th of February 1866, from Mr Grace to Messrs Drummond and Nicholson—"Dear Sirs,—I received your letter of the 13th current, and the same evening Mr Smeaton sent me a note signifying his acquiescence in the resolution arrived at by the Police Commissioners on Monday evening. I shall therefore prepare a draft of the deed of agreement between the parties, and send it to you for revisal as soon as possible, but as Mr Paterson got away the plan and specification with him to Edinburgh, I shall not be able to proceed with the draft till I get them back, and receive from him the amended specification." Then he proceeds to explain why there may be a little delay, but he says it will be signed next week he thinks. Then he says—"In consequence of the arrangement that has been made between the Commissioners and Mr Smeaton, I think it would be satisfactory that you wrote me withdrawing the notice given by him to have the compensation fixed by a jury, and I beg you will write me accordingly"—and Mr Smeaton does it.

Now, I must say, standing there, that I think the agreement between the Commissioners and Mr Smeaton is full and complete, provided of course (which is one of the points in controversy), that the Commissioners have power to enter into such an arrangement. It seems to me that nothing could be more clear and satisfactory than the state of the case as it rests there. There is a proposal made on behalf of Mr Smeaton by his proper agent, made after long investigation and communication between the parties, and many proposals and counter proposals, and great consideration of the whole subject, and that proposal, it is said, is varied in one not very important particular, but still sufficiently important to require acquiescence in the alteration. And that proposal so varied is communicated by Mr Grace to Mr Smeaton. Mr Smeaton's agents are asked, first, if he would acquiesce in the variation. The agents do not like to rest upon their own authority, but send it to Mr Smeaton personally, to know whether he acquiesces—he transmits to the clerk of the Commissioners his acquiescence, and thereupon the clerk of the Commissioners writes again to Mr Smeaton's agents, and says everything is settled, and we think that you ought now to withdraw your claim to damages, which is going forward for reference to a jury—and that is done.

Now there are several objections taken to this agreement; the first I have already dealt with, namely, that Mr Grace is supposed not to have had authority to intimate to Mr Smeaton its acceptance by the Commissioners, and I say no more upon that subject. Then it is said that it was not competent to this Board to enter into any agreement whatsoever of the character in question, first, on this ground, that the Sheriff's decision for the original line of sewer was final under the Act of Parliament—and the Sheriff's decision being final, it was not competent for the Commissioners to go back from the line which had been determined upon by the Sheriff, and to substitute another line even by consent. And that indeed was the view which was in the first instance taken by the Lord Ordinary in the course of this litigation; but the Court of Session held that the Lord Ordinary was in error upon that conclusion, and I think justly so held. The decision of the Sheriff is to be final in this sense, that when a party complains of a course of dealing with his property with reference to the line of sewerage which may be adopted, he has it open to him to go before the Sheriff and to make out such a case as he may be advised as to the propriety of the adoption of the line. The Commissioners, if they persist in that line, state their case before the Sheriff, and the Sheriff comes to his

own determination as between the lines proposed by the parties before him upon that occasion. But the Act of Parliament never meant to state that the Sheriff was to do more than, when these matters were brought before him, to say that as between the two parties to this agreement—namely, the Commissioners, on the one hand, and the party whose property was to be taken, on the other—the Commissioners were entitled to do that which was the right and proper thing to be done. That determination being made, there was nothing to prevent the Commissioners, in lieu of entering into expensive contests, and subjecting themselves to heavy damages in consequence of the line they had taken, upon a full review of all the circumstances of the case, from coming to an arrangement with those who opposed them, and taking a different course for the purpose of saving money to those whose funds they have to deal with—namely, the rateable inhabitants of the town—in the execution of works of this description. In truth, this objection is very nearly allied to a subsequent objection as to whether it was competent to the parties to enter into any agreement at all. I think it is founded upon a misconception of the compound problem which has to be solved by the Commissioners. It is not the mere dry problem whether or not a line in a particular direction, in an engineering point of view, will be more convenient than another, because it may be convenient to take the sewerage through some very valuable property; indeed, it might be convenient to take it through the middle of a manufactory, which would be able to make out a serious grievance, and be able to obtain exceedingly heavy damages in consequence of it. Their judgment is to be exercised in the best manner in the interests of the town. The question they have to determine is what would be the best, all things considered, taking expense into consideration, amongst other things, taking the expense of the work and the amount of compensation that they may have to pay for injury to parties who may be affected by the proposed line, and any other expense, into their full consideration, and taking into consideration the engeering question as to the merits of the proposed line, and to say, what on the whole is it best for us to do for the interests which are entrusted to our charge? I apprehend, therefore, that they had a perfect right, notwithstanding that the Sheriff had come to that decision, to enter into the negotiation they did enter into.

Then, my Lords, it is said that there is a formidable obstacle, and one which has been sustained by the judgment of the Court of Session, which obstacle is stated to be this—You, the Commissioners, are acting as a public body, and you are bound to come to your decision upon what is best to be executed for the benefit of the inhabitants, and having done that, it is said you choose your line, and you choose it acting in a *quasi* judicial capacity, because not only has the person who objects to the line coming through his property a right to be heard, but all persons having to contribute to the work—all the rate-payers—have a voice in the matter, and have a right to be heard before you with respect to the line in case they object to the line proposed. You having therefore a *quasi* judicial position cannot bind yourselves by any agreement. You must take upon yourselves to act judicially, and you cannot bind yourselves by a special agreement with any particular parties to execute the work in any particular way. Then it is further said that a body constituted as this body is ought not to be taken by surprise, and that an agreement carried by a majority of one, as it was upon this occasion, is a thing to be looked at with great suspicion; and that the Commissioners are not at liberty to enter into contracts of this description, snatched from them by a hasty decision, without giving the subject full and mature consideration, and exercising upon it a *quasi* judicial deliberation.

This, however, was not exactly the form which the judgment of the Court above took. The Court above considered that the agreement was somewhat hastily snapped at, and they held that in effect it was not intended to come to a permanent agreement, but that only the basis of or heads of an agreement had been suggested by the parties which had never ripened into a complete agreement.

Now, with regard to the power to enter into the agreement, I am content to rest upon the decision of the judges, and the reasons there given. I need not read them, but Lord Cowan states them very fully; they are pretty much what I have ventured to give. Their reasons were that the Commissioners were competent to act to the best of their judgment, and that it was expedient that they should act to the best of their judgment in laying down the line of sewage, and that upon that ground they did not conceive that there was any obstacle from the Sheriff having come to a certain conclusion of a defined character to prevent their entering into the consideration of all that was best for the interests of the property entrusted to their charge. Lord Neaves also, I think, assented to that proposition of the first interlocutor of the Lord Ordinary.

Then the case went back to the Lord Ordinary, and there arose this last objection that I have to deal with, and which is at the foundation of the present appeal. The Lord Ordinary having had the case remitted to him with a declaration of his having been in error as regards the finality of the decision of the Sheriff, he, on reconsideration, came to the conclusion that the agreement was effective. He having been instructed by the higher Court to determine that question, held that it had been proved (taking the view which I ventured to take) to be a binding and conclusive agreement between the parties.

Then it came, in the last instance, before the judges of the Court of Session; and they were of opinion that, looking to all the circumstances, it must not be taken to be a final and concluded agreement, and amongst other things, they relied a good deal upon the form in which the matter was presented as being the basis of an agreement and not an agreement itself, and upon the circumstance of the referring to a future deed to be executed, for which instructions were given, and they relied also upon what they considered to be the impropriety of allowing a body of this kind to be hastily surprised into an agreement, and they considered that this agreement, come to by a majority of one voice, indicated that to have been the character of the agreement thus entered into.

I will read the opinion of Lord Cowan upon this part of the case. He says,—"Taking the terms of the memorandum and of the resolution together therefore, I cannot hold the parties to have definitively and absolutely bound themselves and the community of St Andrews to these heads of agreement. The parties were still *in nudis finibus contractus*, and until the formal deed was written

out and duly subscribed by the parties respectively—by the pursuer on the one hand, and by the preses and clerk of the meeting on the other—it seems to me that they are to be regarded as still entitled to resile—especially should good ground for doing so meanwhile arise to induce the one or the other so to act." Now the point with reference to the preses and the clerk I confess appears to me to be not sustainable. It rests upon the clause of the Act which says that contracts with regard to works should be signed by the *preses* and the clerk. I very much doubt whether that relates to a contract made with a person whose property is affected or damaged by the execution of works with regard to any arrangement which may be come to with him. But the question here is not whether this in itself is to be the final and ultimate deed which is to be executed; the question here is, Whether there is such a resolution come to, and such acquiescence on the part of the body who came to the vote, that the agreement should be adhered to, and a formal deed executed so as to make this an instrument to be completed, undoubtedly by a formal deed, but an instrument binding the parties to the execution of such a deed? All that we have to do upon the present occasion is to say whether there has been an engagement entered into by the Commissioners with Mr Smeaton that they will execute a deed of the description hereby specified, and which they have undertaken to execute. I think it is hardly necessary to say more upon that. The whole agreement is entered on the minutes expressly, and is signed by the preses and the clerk—not indeed in the shape of signing the agreement *eo nomine*, but simply as a recital of all that had been done. But what I take to be the true intent and meaning of the clause in the Act of Parliament is simply this, that when the works are positively to be taken in hand and are to be executed, or, if you will, when the final deed is being executed between the third parties as to the line in which the works are to be taken, the subscription shall be made. But the question being simply, How far the parties deliberately bound themselves by the course they took at that meeting of directing the deed to be executed and directing an intimation to be made to the other party to act thereon by withdrawing his claim for compensation in this matter, I confess it appears to me that the conclusion to which the Lord Ordinary came was correct, namely, that the pursuer was entitled to a declaration according to the first conclusion of his summons—which is a conclusion that the deed in question ought to be executed according to the resolution come to upon that evening of the 12th February, and that therefore the interlocutor of the Court of Session, in which their Lordships came to a contrary conclusion, ought to be reversed. The objection which has been rested upon the ground of this being merely the basis of an agreement seems to rest upon a very narrow foundation indeed, because all that is required is to reduce the agreement into formal terms. Not a single new term is to be introduced; but the basis of agreement which is submitted to him who has to accept it becomes the agreement itself when it is accepted by him who has to accept it, and it contains every term which is afterwards to be introduced into the formal deed which shall be executed and which shall receive effect.

Then there is the last objection, which was entertained in the Court below, and as to which it is necessary that a word should be said. As regards this agreement, it is said,—We, the Commissioners, cannot, now that the line of sewerage is changed, proceed with this as the sewer in respect of which we have given notice; we gave notice as regards the other sewer which went through the grounds of Mr Smeaton, and not with respect to a sewer which takes this or that course. I think that objection is a sound one, and that, as regards the course to be taken by the Commissioners hereafter in giving effect or attempting to give effect to this arrangement, I think notices will have to be given, and that when the deed has been executed upon the part of the Commissioners with Mr Smeaton, all parties who are entitled to object to that new line of sewer may come and object to it. What may be the result of those objections it is not for us to say. They may or may not have the effect of stopping the line of sewer from being carried in the direction in which Mr Smeaton desires that it should be carried.

Farther than that, there is a clause in the Act that the clerk shall certify the line as the proper line to be taken, and Mr Paterson has said in some of his letters that he will never so certify this line. I must call attention to this. It is not necessary that he should certify to its being proper in an engineering point of view, but that it is proper in every point of view when everything is taken into consideration. He may find, for instance, that damages to Mr Smeaton amounting to the sum of £3000 would have to be paid, and I think that Mr Paterson would be very well advised if he certified that a sewer which made such a slight deviation as is here made, and which could be made for £400 or £600, would be the more proper one than one which would cost £3000 or £4000, although perhaps in a less eligible direction—all that would have be considered.

Again, I must observe that with reference to Mr Smeaton's position it is only due to him to say this,—there was one of his letters which was read to us for the purpose of showing Mr Paterson's objections to the line—I think it is after this arrangement had been entered into—that he says he does not think that the other side expected very much to prevail with the Sheriff, but that they had very large expectations with regard to the damages which might be given. No doubt Mr Smeaton, with reference to the damages which he claimed, thought that he had a hold upon the Commissioners in inducing them to come into that agreement.

My Lords, it seems to me, therefore, that our course is plain, namely, that we have simply to follow the interlocutor of the Lord Ordinary, which declares that, according to the first conclusion of the summons, the Commissioners are bound to execute the deed which they have agreed to execute, and which was in truth agreed to be executed, and was all but executed when the parties attempted to resile from the agreement. I am of opinion that they had no power to resile. I think that after the execution of the deed the matter must be remitted to the Court below, who will see that all proper steps are taken with regard to it. I think there was nothing at all judicial upon the part of the Commissioners with reference to the determination of the line which they proposed as a matter originating in their own minds, and as to which they were to hear all the objections that might be made against it. But now they will take it as a matter which did not originate in their own

minds, but which originated in another mind, and to which objections may be made by others. It seems to me that they will stand in exactly the same position as they would have stood in if by a majority of "13 to 12;" they had originally resolved to carry the line in this particular direction. They have resolved to carry it in this particular direction after considering all the circumstances, and calculating all the chances, including the chance of having to pay heavy damages in the usual way, by the verdict of a jury.

Nothing that I have now said is intended to express an opinion that when the deed is executed according to the agreement between the parties, Mr Smeaton would be entitled as a matter of course to have the line of sewage proceeded with in the direction he desires; or that Mr Smeaton is entitled to the benefit of any of those negative conclusions which he has inserted in his summons, namely, those conclusions in which he desires the Court to declare that the Commissioners are not entitled to make their sewer in any other direction than that which is here specified.

What I apprehend the Commissioners have agreed to do is this—They have agreed to enter into a formal agreement with him, that they will make this sewer in this direction, always under the powers of their Act, and if they cannot make it under the powers of their Act, of course that raises a totally different question from any that we have had to consider. I think, my Lords, that we are warranted in coming to the conclusion that this agreement should be executed, and the powers of the Commissioners put in force pursuant to the provisions of the Act of Parliament, and under the direction of the Judges of the Court below.

Lord Chelmsford—My Lords, the only question to be decided in this appeal is that which arises on the first conclusion of the summons of declarator, viz.—"that the defenders, the Commissioners of Police of the burgh of St Andrews, are bound to execute in duplicate a formal deed of agreement embodying the stipulations and provisions contained in a memorandum or heads of agreement, signed by Alexander Nicholson, on behalf of the pursuer, on or about the 12th day of February 1866, and approved of, and accepted, and adopted by the defenders, at a meeting held by them in St Andrews on the said 12th day of February 1866."

The determination of this question depends upon whether the agreement mentioned in the summons was a concluded and binding agreement between the parties. The Lord Ordinary, by his first interlocutor, found that "an agreement was entered into, and was concluded, between the pursuer and defenders, in the manner and to the effect stated in the 18th and following articles of the condescendence on his behalf." But the defenders having by their third plea in law pleaded that—"The Sheriff having already sanctioned a certain line of main sewer through the pursuer's lands, and the decision being, by the Police Act, declared to be final and conclusive, it is not now competent for the defenders to adopt a totally different line of sewer through the said lands;" the Lord Ordinary found that, assuming the said agreement to have been concluded as alleged, the execution of the same as such is not capable of being specifically enforced by the pursuer, or being executed by the defenders, in so far and in respect that the terms thereof are inconsistent and incompatible with the terms of the decision of the Sheriff above mentioned," which is declared by the Act "to be final and conclusive, and not subject to review by suspension, reduction, or advocations, or in any manner or way." He therefore sustained the third plea in law of the defenders, and assoilzied them from the conclusions of the summons.

This interlocutor was reversed by the Inner-House, and they remitted to the Lord Ordinary to proceed with the cause. On the 27th of October 1868 the Lord Ordinary pronounced another interlocutor, by which he found that an agreement was adjusted and completed between the parties, and that, as matter of law, it was not beyond the power of the defenders to enter into the agreement. This interlocutor being carried by reclaiming note to the Inner-House, the Second Division of the Court of Session recalled it, and found that no concluded agreement had passed between the parties, and therefore assoilzied the defenders from the conclusions of the summons.

The appeal before your Lordships is from this interlocutor; and the question to be determined is, Whether the respondents are bound to execute a formal deed of agreement for the construction of a sewer in a particular direction through the appellant's lands of Abbey Park.

The learned counsel for the respondents contended that the Commissioners of Police had no power to contract in any other way than that provided for by the 65th section of the 25 and 26 Vict. cap. 101—"That, by the 394th and 395th section of the Act, the Commissioners must give public notice of their intention to make a sewer; and they are to hear and to determine upon any objections to the intended work." And how, it was asked, can they bind themselves by any private agreement?

The question as to the competency of the Commissioners to enter into agreements with individuals whose property is to be affected by the proposed works, was before the Court of the Second Division, upon appeal to them from the first interlocutor of the Lord Ordinary. And the Court held that there was no statutory incapacity to prevent the Commissioners from entering into a binding agreement with individuals with reference to operations under the statute. With regard to the objection that the statute has prescribed a particular course of proceeding to the Commissioners which cannot be departed from, it does not follow that after an agreement has been entered into for the construction of a sewer the preliminary notices are not to be given, and that the same mode of dealing with objections is not to be followed as in all other cases where the works are proposed to be executed solely upon the judgment of the Commissioners.

It being therefore competent to the Commissioners to enter into an agreement with the appellant to carry the proposed sewer in a particular direction through his lands, was there a binding executry agreement between the parties which entitled the appellant to call upon the Commissioners to execute a formal deed in conformity with that agreement?

It was not denied that if the memorandum of agreement had been entered into between private persons it might have been specifically enforced against the party refusing to perform it. But it was held by the Court of the Second Division that the memorandum was a proposal merely to pave the way for a final settlement; and, to use the language of Lord Cowan, "the parties were still

in medio finibus contractus, and until the formal deed was written out and duly subscribed by the parties respectively,—by the pursuer on the one hand, and by the preses and clerk of the meeting on the other,—they were to be regarded as still entitled to resile."

With respect to the communication to the appellant by the clerk, of the resolutions of the Commissioners, and the consequent proceedings of the appellant, amounting to proof of *rei interventus*, which would prevent the Commissioners from resiling, Lord Neaves observed that "resolution without communication is nothing,"—and he held that "Mr Grace, the clerk of the Commissioners, was the author of the alleged *rei interventus*, but he had no authority from the Commissioners so to bind them. His business as clerk was to record the resolutions of the Commissioners and to interfere no further without express instructions; and that he had no authority even to communicate to Mr Smeaton the resolution of the Commissioners; for the minute embodying that resolution was not approved of until the next meeting, when steps were immediately taken to rescind it."

It appears to me that the question is not, whether the memorandum was originally a mere proposal for an agreement (for upon that point there can be no doubt), but whether this proposal was accepted by the Commissioners, and the terms of it agreed to by them at the meeting held for the purpose of determining whether a deed of agreement should be executed embodying the stipulations and provisions contained in it.

At the morning sitting of the Commissioners on the 12th February 1866, the "memorandum of the proposed heads of agreement" was laid before the meeting. After specifying the terms to be agreed to on both sides, it concludes in these words—"A formal deed of agreement embodying the stipulations and provisions above written and other necessary formal clauses, shall be prepared by the Commissioners' agent and revised by the agent of Mr Smeaton (in duplicate) within fourteen days from this date, the expense of said deed to be defrayed by the parties mutually." And this was signed by Mr Nicholson on behalf of the pursuer.

The meeting was suspended till 7 o'clock in the evening. At the evening sitting, the memorandum being read, Mr William Smith moved in the terms which have been read by my noble and learned friend on the Woolsack, and the motion made by him was carried by a majority of one. "The meeting then directed the clerk to prepare a deed of agreement between the Commissioners and Mr Smeaton, based on and in conformity with the said memorandum or heads of agreement. Mr Paterson, civil engineer (who was present) was also instructed to proceed to get the specifications adjusted in terms of said heads of agreement, and to obtain estimates for the construction of the deviation sewer and submit such estimates to the Commissioners"

As it is decided that the Commissioners had power to enter into an agreement with the appellant, I have some difficulty in understanding how it could be considered, after their acceptance of his proposal and their directions to their clerk to carry it out by having a proper deed of agreement prepared, that the memorandum should continue to have the character of an unaccepted proposal. I think there is nothing to interfere with the binding effect of the agreement in the slight variation in the original terms proposed, with respect to the reference to Mr Blyth or some other engineer, and as to the levels and embankments. These alterations were accepted by the appellant in a letter of the 13th February 1866.

It seems to have been considered by the Court below that the resolution adopting the memorandum was not binding on the Commissioners until it was communicated to the appellant, and that there was no regular communication made to him, as the clerk had no authority from the Commissioners to communicate the resolution. But I apprehend that the resolution of the meeting, and the direction to carry out the agreement, bound the Commissioners without any formal communication of their proceedings to the appellant. The Commissioners must have been informed by their clerk, from time to time, of the progress which was making towards the preparation of the deed, and they never appear at any time to have suggested that there was no final agreement, or that their clerk had no authority to communicate with the appellant on that footing. In particular, the letter of Mr Grace to Messrs Drummond & Nicholson, of the 16th February 1866, could not have been written without the authority of the Commissioners. He there says, "In consequence of the arrangement that has been made between the Commissioners and Mr Smeaton, I think it would be satisfactory that you wrote me withdrawing the notice given by him, to have the compensation fixed by a jury, and I beg you will write me accordingly." I think it was on the following day that Mr Smeaton wrote a letter, withdrawing the notice which had been given to the Sheriff.

That the Commissioners considered the agreement (if legal) to be a concluded one, appears also from the report of the committee to which my noble and learned friend has alluded, in which they speak of this agreement and of the reluctance to withdraw from it, but say that, in consequence of legal difficulties they feel themselves bound to do so. Lord Cowan thought the parties entitled to resile "especially (as he said) should good ground for doing so meanwhile arise, to induce the one or the other in good faith so to act," "and (he adds) so it happened with the Commissioners, for having consulted their counsel, they were advised that their resolution was illegal and *ultra vires*." But this turned out to be an erroneous opinion of counsel, as the Court of Session decided that the agreement was not *ultra vires*. Another ground suggested for rescinding the agreement was, that the surveyor to the Commissioners would refuse to certify for a sewer in the direction specified in the agreement. But the certificate of the surveyor is required under the 395th section of the Act only where an objection has been made to the intended work, and after the person making the objection has been heard, and *non constat* that there will be any objection.

As according to the opinion of your Lordships there is a formal concluded agreement between the parties, the appellant does not require the aid of proof of *rei interventus*. If it were necessary I should be prepared to hold that, supposing there were no previous authority by the Commissioners to their clerk to communicate the resolution binding them to the agreement, there is ample evidence to show that they never objected to the communication as unauthorised and as a breach of the clerk's duty.

There seems to me to be nothing in the objection

that the conclusion of the summons asks for a declarator that the Commissioners are bound to execute a deed of agreement embodying the stipulations and provisions contained in the memorandum or heads of agreement signed by Alexander Nicholson, whereas that memorandum was not accepted simply by the Commissioners, but with a variation. It is to be observed that the appellant's first plea in law is founded upon a valid and binding agreement having been constituted by the memorandum of agreement, and the defenders' acceptance and adoption thereof at their meeting of the 12th February 1866, and the pursuer's acceptance by his letter of the following day. But upon the conclusion of the summons itself I think that if the Commissioners objected to a declarator of their being bound to execute a deed in terms of the summons on account of their acceptance of the memorandum or heads of agreement with a variation, the appellant might at the hearing consent to have the deed with the variation introduced by the Commissioners.

Although your Lordships are of opinion that the Commissioners are bound to carry out their agreement by a formal deed, yet if you were satisfied that the deed would be of no avail to the appellant, you might probably be disposed, for his sake, not to reverse the interlocutor appealed from. But this will not necessarily follow from the execution of the deed. The Commissioners must indeed give the notices required by the statute of their intention to construct the sewer in the agreed direction, and thus afford an opportunity for objections to the work. And it was intimated that the surveyor of the Commissioners would refuse to certify under the statute that the work, in his judgment, ought to be executed. But as the certificate of the surveyor is not required, except where no objection is raised to an intended sewer, and as far as appears no owner of lands is interested in making an objection, your Lordships will not suppose that the Commissioners will raise up an objection in order to make the certificate of the surveyor (which they know will be withheld) necessary, and so enable them to defeat their own deed.

I agree with my noble and learned friend, that the appeal must be disposed of in the manner he has stated.

Lord Colonsay—My Lords, this case has required some minute examination of the proceedings, which are printed along with the case, which are very voluminous and are somewhat obscure by reason of their being so voluminous. The ground of the judgment of the Court below appears to me to have been in substance this, that there was no concluded agreement. The learned Judges decline to go into any other question, and they alter the interlocutor of the Lord Ordinary, and assoilzie the defenders from the whole conclusions of the summons. It appears to me, on an examination of these documents and the course of procedure in this case, that in the position in which Mr Grace stood in reference to the whole of these matters, it must be held that Mr Grace was acting with the authority of the Commissioners, and that there was, through Mr Grace communicating with Mr Nicholson, a concluded agreement, to the effect that a formal deed of agreement was to be made out, and further that Mr Grace prepared a draft of agreement.

But there has been, and still is, an awkwardness in the position into which this case has been thus brought by the respondents, but it is not one from which it is impossible to have the matter extricated; certain things have been already fixed by the law in this case. In the first place, it was fixed in a former proceeding, here referred to, that the decision of the Commissioners in reference to the propriety of following out their powers by making a particular sewer, was a proper matter to be dealt with by an appeal to the Sheriff, and not by the Court of Session. There was a case referred to in reference to this matter where the Court refused a note of suspension and interdict which was presented, on the ground that there had not been such an excess of jurisdiction as would entitle them to interfere in that stage of the proceedings. But that was a special condition of things. The matter was then practically depending before the Sheriff in another issue.

But another thing has been fixed in this case which is of some importance, and that is by the judgment of this Court repelling the third plea in law for the respondents. The Lord Ordinary dismissed the action, and assoilzied the respondents on the ground that the proceedings before the Sheriff had already fixed the line of the sewer, and that it was not competent to the parties to come to the Court in the form in which they did. His first interlocutor is to that effect, "that assuming the said agreement to have been concluded as alleged, the execution of the same was not capable of being specifically enforced by the pursuer or of being executed by the defenders in so far and in respect that the terms thereof are inconsistent and incompatible with the terms of the decision above mentioned, and which decision is under the terms of the 397th section of the statute (25 and 26 Vict. c. 101) declared to be final and conclusive;" and therefore he sustains the third plea in law for the defenders, and assoilzies them from the conclusions of the summons. The third plea in law was this—"The Sheriff having already sanctioned a certain line of main sewer through the pursuer's lands, and the decision being by the Police Act declared to be final and conclusive, it is not now competent for the defenders to adopt a totally different line of sewer through the said lands." That obstacle, then, to the proceedings of the Court of Session has been removed by the judgment of the Court, which alters the interlocutor of the Lord Ordinary, and repels that plea. There were two interlocutors, one of the 20th of March, recalling the interlocutor of the Lord Ordinary, and another of the 30th of March, repelling the third plea in law for the defenders.

Then there was another plea which the Court dealt with—"That, on the assumption that the document does contain a completed contract, it was *ultra vires* of the defenders to enter into such a contract, and contrary to their duty to the public." I do not know exactly upon what ground that plea of *ultra vires* was intended to be placed. I do not think much was made of it here. I see that in the case of the respondent the plea of *ultra vires* is put in this way—"because it was *ultra vires* of the respondents to enter into a contract with the appellant of the kind alleged by him without due notice to the ratepayers, and without affording them an opportunity of stating objections to this contract, and the stipulations contained in it;" and "because the respondents had no power to fix on this deviation line of sewer without the public notice required by the statute." I do not think

there is much weight to be given to these objections; because, as I understand the matter, the Court below, in disposing of the third plea, stated their opinion that it was competent for the Commissioners to enter into agreements, and to alter their views as to the line that any particular sewer should take, if they found sufficient reason for doing so—and probably sufficient reason would be found in the difference of expense of the two lines. Therefore, the powers of the Commissioners to alter the direction of the line of sewer is a matter to which the Court has already given their assent. But as to the notion that it was *ultra vires* of the Commissioners to enter into an agreement, and that they had no power to fix upon a deviation line without public notice, the answer is, That before any public notices are given, the statute requires that the Commissioners shall have fixed upon the line. Therefore there is no inconsistency, and there is no incapacity on the part of the Commissioners, to enter into an agreement as to the line which they propose to take.

Being of opinion that the Commissioners fixed themselves by the arrangement with Mr Smeaton, that this should be the line which was to be executed, I think they cannot avoid putting their hands to the deed, which is to be the formal fulfilment of that undertaking on their part. But then, what is to be the effect of that? I think it cannot have the effect that the appellant claims in his summons. I think that is out of the question. He maintains in the conclusions of his summons that they are to do everything that can be done for the execution of this line of sewer; which the respondents say would imply, that if they cannot get it sanctioned otherwise, they must go to Parliament, and get the sanction of Parliament to taking this line. Those are extravagant views, which I do not think the appellant is entitled to insist upon, for I think it may turn out that the Commissioners are not bound to do so. Then the appellant concludes that they shall not make the sewer in any other line than that which he has chosen. These conclusions, I think, are quite out of the question. I think the course to be taken ought to be this, and that the Commissioners will be doing their duty by following this course, namely, to give the statutory notices for the line which they have agreed to adopt, so as to give parties an opportunity of objecting; and I am by no means prepared to say, that if upon those objections the Commissioners are satisfied by the parties objecting, that the line is either impracticable or wholly inexpedient, they would not then be entitled to pronounce judgment against it upon that ground. They are in no different position in this case from what they would have been in if they had originally prescribed this line, and given notices for it. All that they do is subject to the qualifications and conditions of the Act of Parliament. They must give the required notices—they must allow parties to object—the surveyor, who is the statutory officer, is to be called on to give his certificate, and whatever judgment may be pronounced by the Commissioners on hearing the whole matter, it will be competent to the parties interested to make it the subject of an appeal to the Sheriff. I doubt very much whether the Court of Session could deal with some of the matters indicated in the opinions of the Judges, which seem to be raised by the summons, namely, as to the merits of this particular line of sewer. I doubt whether that is a matter for the consideration of the Court of Session. I think the true question we have to deal with, and which the Lord Ordinary dealt with, is whether or not there is an executory agreement. It would not be enough to abide by the interlocutor of the Lord Ordinary, because that finds only in terms of a declarator—there are no operative words in it—nothing out of which operative words can be extracted—and therefore I think the best course is that which has been suggested by my noble and learned friend on the Woolsack, that we should reverse the judgment of the Court of Session, and send the case back to the Court below, expressing the opinion we entertain as to the proper course to be followed. I am not without hopes that when the parties come to look at their true position, they will find it more expedient for both of them to go to their work more smoothly than they seem disposed to do at present.

LORD CHANCELLOR—The question I have to put to your Lordships is, that the interlocutor of the Court of Session of the 10th of December 1868, complained of, be reversed; and that the House declares that the interlocutor of the Lord Ordinary of the 27th of October 1868 ought to have been adhered to; and remit the case to the Court of Session, in order that they may deal with the same according to this declaration; and that there be no costs of the appeal.

Agents for Appellants—Maclachlan & Rodger, W.S.

Agents for Respondents—Maitland & Lyon, W.S.

Monday, March 27.

MACLEAN & HOPE *v.* FLEMING, *et e contra.*

(*Ante*, vol. v. p. 579.)

Ship — Charter-Party — Short Shipment — Dead Freight. Circumstances in which *held* (affirming judgment of Second Division of the Court of Session) that pursuers suing under a charter-party had failed to prove that a smaller quantity of bones had been delivered to them than had been actually shipped, and owner of ship held entitled to dead freight under the charter-party, in respect a complete cargo had not been shipped.

These are conjoined actions, in which the pursuers of the one, Maclean & Hope, sue the defender Fleming, owner of the ship "Persian," for the value of a quantity of bones, and in the other Fleming sues for balance of freight on bones actually carried, and for freight on 210 tons of bones which would have been further yielded by the vessel if filled with a complete cargo in terms of the charter-party. The circumstances under which the case arose are stated at length in the opinion of the Lord Chancellor.

The LORD ADVOCATE appeared for the appellants, Maclean & Hope, and Mr JESSEL Q.C. and SIR GEORGE HONEYMAN Q.C., for the respondent.

At advising—

LORD CHANCELLOR—My Lords, in this case there were two actions, an action and a cross action, in relation to a controversy between the parties, Messrs M'Lean & Hope, the appellants, and Mr Fleming, who is a shipowner. It appears that Messrs M'Lean & Hope, by means of their agents, under a certain arrangement, and a certain charter party, to which I shall more particularly refer, caused a cargo of bones to be brought from the Levant, from Con-