is also provided that the grounds of appeal or complaint and the replies thereto shall be set forth in such terms as shall be submitted by the parties within ten days.

Now, these being the duties imposed on the assessor by the statute, and the remedies for correcting his valuation when wrong, the first objection that is taken to this Case is that it is entirely out of form. My opinion is that the Case is certainly most inadequate as it stands to enable any Court of law to decide the point intended to be raised. But as the Judges have power under the Statute of 1879 to remit the Case to the Commissioners with instructions to have it more fully stated, I should be unwilling to throw out the Case upon that ground. But the objections that appear to me to be conclusive against the competency of the appellant's proceedings are those which were stated under the first and second heads of Mr Dundas' argument. In the first place, the form of the complaint to the commissioners shows that what the appellant attempted to do was entirely unauthorised by the statute. What he complained of was not the valuation roll as made up by the assessor, but that certain returns made by Lord Abinger were "inaccurate and fictitious," and had been "made for the purpose of laying the basis of unfounded and unreal claims to the county franchise." The complainer seemed to assume that the statute authorised any proprietor upon the roll to step in between the assessor and the discharge of his duty, and to require him to disregard the returns made to him under the statute. Now, I think that is a total misapprehension of the position. The statute authorises assessors to call for returns from proprietors, but it puts upon the assessor alone the duty of dealing with these returns, and it provides a penalty of £50 for any false return. It was a mistake on the part of the appellant to frame his complaint upon the theory that he was entitled to interfere with the assessor in the discharge of his statutory duties. His remedy was after the assessor had made up his roll to complain of it in the form required by the statute with respect to the rent or value of subjects entered at other than the just and true amount thereof.

But in addition to this objection I am of opinion that the case is not competently before us, because it is not one in which the appellant had any right of appeal from the determination of the Commissioners to the Valuation Judges. It is clear that the 9th clause of the Act of 1854, which relates to "persons entitled to appeal," authorises only appeals with reference to the entry or entries applicable to such persons themselves. The 13th clause of that statute deals with "complaints" as distinguished from "appeals." The Statute of 1857 (sec. 2) and the Act 1879 (sec. 7) apply only to the case of "persons entitled to appeal." I can find nothing in the statutes to justify me in applying the provisions of these clauses to complaints under clause 13 of the Act 1854. The statutes appear to me to have been framed upon the principle of leaving to the assessor, subject to a complaint to the commissioners or magistrates, the duty of attending to the public interest with respect to the just and true amount of rent or value, excepting always that, as provided in section 9, the proprietors or tenants or occupiers of the several subjects have the right of appeal conferred upon them with reference thereto. There is no authority in the statute for allowing every proprietor on the roll to demand a Case for the opinion of the Valuation Judges upon the amount of rent or yearly value entered as applicable to all the other subjects in the roll. I give no opinion as to the effect of the valuation roll in the Registration Court. That is a question for the Registration Court to decide. But I have always understood that the objection that a certain qualification was nominal and fictitious was one which was competent and well known in the Registration Courts, and it has not been shown to us that such an objection will be excluded if otherwise legitimate and well founded, on account of the valuation roll having been made up by the assessor and Commissioners in the manner adopted here.

With regard to the case of *M'Gregor* v. *Sir Robert Menzies* (No. 105), I have only to observe that it appears that no objection was taken to the competency of appealing the case from the Commissioners to the Judges. That point was not raised. The only point raised was as to the title of the complainers to make a complaint under the 13th section of the statute, and even that point does not appear to have been urged before the Valuation Judges.

The Court pronounced the following judgment:—

"The Judges, in respect no Case has been competently brought before them in terms of the statutes, dismiss this Case as incompetent."

Counsel for Appellant—Omond. Agents—Murray, Beith, & Murray, W.S.

Counsel for Respondent—J. P. B. Robertson—Dundas. Agents—Dundas & Wilson, C.S.

COURT OF SESSION.

Friday, January 26.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Kinnear, Ordinary.

OSWALD *v.* THE AYR HARBOUR TRUSTEES.

Harbour—Statutory Trustees—Ultra vires—*Servitude—Power of Harbour Trustees to Enter into a Contract in Restraint of their Statutory Powers intended to Bind themselves and their Successors in Office—Lands Clauses Consolidation (Scotland) Act* 1845 (8 *Vict. c.* 19), *secs.* 17, 48, *and* 61.

Harbour trustees, incorporated by Act of Parliament, served on the proprietor of a piece of ground having a frontage to the harbour a notice in terms of the Lands Clauses Acts intimating their intention to take from him, for the use of the harbour, that portion of the piece of ground which lay next to the harbour, and the erection of buildings on which would therefore shut off the remainder of the ground from its frontage to the harbour. In the course of the proceedings in an arbitration to

fix the compensation payable to the proprietor under the Lands Clauses Acts, the trustees put in a minute by which they agreed that the conveyance of the ground to be granted to them by the proprietor should be qualified by a declaration that they should not erect sheds or warehouses thereon, and that they would maintain a road immediately adjoining the proprietor's remaining ground. *Held*, by a majority of seven Judges (*rev.* judgment of Lord Kinnear), (1) that the trustees were not restrained by their statutes defining their rights and powers from erecting sheds or warehouses on the ground taken from the proprietor; and (2) that they being persons administering under a statutory trust for the public interest a subject which was *inter res publicas*, and having by their statutory notice acquired a full right of property in the ground taken, could not effectually bind themselves and their successors in office to observe any limitations in the use of the ground; and that therefore the proprietor was entitled to compensation for the taking of the ground, on the footing that it was acquired absolutely for the purposes of the harbour, and that the frontage was or might at any time be cut off. Lords Shand, Craighill, and Rutherfurd Clark *dissented, being of opinion* that the trustees in the exercise of their statutory duties could bind themselves, as a matter of detail in the reasonable administration of their trust, not to build on the ground in question.

The Ayr Harbour Trustees were incorporated under the Ayr Harbour Act 1855, confirmed by the Ayr Harbour Amendment Act 1873. In 1879 there was passed the Ayr Harbour Amendment Act 1879, wherewith were declared to be incorporated the Lands Clauses Consolidation Act 1845, the Lands Clauses Consolidation Amendment Act 1847, and the Harbours, Docks, and Piers Clauses Act 1860, excepting sections 25 and 26 of the last-mentioned Act. This Act (the Ayr Harbour Amendment Act 1879) provides by section 4 that the Harbour Trustees "may make and maintain in the lines and according to the levels shown on the deposited plans and sections, the works hereinafter specified, and all proper approaches and other works and conveniences in connection therewith respectively, and may enter upon, take, and use such of the lands delineated on the said plans and described in the deposited books of reference (except as hereinafter provided) as may be required for and in connection with these works, and for the purposes of the harbour. The works hereinbefore referred to and authorised by this Act are . . . (2) a road of access and wharf along and adjoining the north quay of the harbour and the quay on the eastern side of the entrance to" a wet dock previously mentioned in the Act. Section 10 of the same Act provided—"10. The trustees may from time to time erect sheds, warehouses, offices, workshops, hydraulic and other machinery, and cranes, and lay down wharves, lines of rails, and sidings, and construct other works, and conveniences, upon and around the docks, quays, and other portions of the harbour, and make junctions between the said lines of rails and sidings and the Ayr Dock lines authorised by the Railway Act of 1878, and any other lines of railway which may hereafter be formed to the harbour, and may from time to time maintain, remove, and alter the said several works and conveniences: Provided always that nothing in this section shall authorise the trustees to take any lands otherwise than by agreement," &c.

The trustees scheduled, for the purpose of making the road of access and wharf above mentioned, a piece of ground belonging to Mr Oswald of Auchencruive, extending to 246 decimal parts of an acre, and forming part of a yard of 1 acre and 14 falls Scots lying on the north side of and adjacent to the river and harbour of Ayr. The part of the yard thus scheduled formed the whole frontage of the yard to the harbour. Between the yard and the river ran a road or quay, which in a previous process, at the instance of the trustees against Mr Oswald, had been decided by Lord Young (Ordinary), whose judgment was acquiesced in, to form part of the harbour of Ayr, and to be under the control of the trustees, but the *solum* of which was held by the Lord Ordinary not to form part either of their property or of that of Mr Oswald.

The trustees served upon Mr Oswald the statutory notice under their Act of 1879 and the Lands Clauses Acts that they intended to take the piece of ground above mentioned, and required him to treat with them therefor. Failing to agree as to the amount of compensation to be be paid for the ground so taken, the parties submitted to arbitration, under the provisions of the Lands Clauses Act 1845, all claims competent to Mr Oswald against the trustees in respect of land or property taken for the purposes of their works, and in respect of the damage, if any, done to Mr Oswald's remaining lands. Mr Oswald in his claim did not distinguish between the amount claimed as the value of the land and the amount claimed for damage by severance and otherwise, but demanded a lump sum "in respect of the land taken, and for the damage to be done to the remaining lands by severance or otherwise." In his pleadings before the arbiters he stated the nature of the damage to his remaining property—for which damage compensation was sought—to be that "the result of the trustees acquiring the ground would be entirely to cut off the yard from the harbour and wharf, and to render the yard and wharf entirely useless for the purposes for which they were acquired, and almost entirely useless for any other purpose. The yard, from its proximity to the harbour and its surroundings and situation, is of very great value, but its value will be entirely destroyed by the Harbour Trustees interposing between the yard and the frontage to the harbour and river."

Proof was led by the parties before the arbiters and the oversman. On the second day of this proof the following minute was put in by the trustees—"The minuters hereby agree, with the view of saving expense in this reference, that the conveyance to be granted by Mr Oswald in their favour of the piece of ground forming the subject of reference shall be qualified by a declaration that they shall not erect sheds or warehouses thereon, and that on the portion of said ground immediately adjoining the remainder of Mr Oswald's yard a road of not less than 30 feet wide shall be formed and maintained by them." The competency and validity of this minute were objected to by Mr Oswald on the grounds hereinafter explained.

The oversman (on whom the determination of the question in the submission had devolved), on the narrative that it was contended before him by Mr Oswald that the trustees were under their Acts "entitled to build and make erections on the said land or property taken from him," and that this contention was denied by the trustees, and that the minute above quoted had been lodged and objected to as incompetent, as also above narrated, pronounced a decree-arbitral containing alternative findings. In the first place, in the event of its being admitted or judicially determined that the trustees, either under their Acts or in consequence of the agreement tendered by the minute being admitted or found to be invalid, were entitled to build or make erections on the ground taken, and thus to shut out Mr Oswald's remaining ground from a frontage to the street or harbour, he found that the sum payable to Mr Oswald as the value of the ground taken and as the amount of compensation in respect thereof, and of the damage to the remaining property by the taking of such land or the construction of such works, was £4900. Alternatively, in the event of its being admitted as judicially determined that the trustees were not entitled under their Acts to hold or make erections on the ground taken, and thus shut out the remaining ground from a frontage to the new street, or that the agreement tendered by the minute was valid, he fixed the sum payable as the value of the land taken and the damage to the remaining property by the taking of such land for the construction of the works at £2786, 12s. 2d. He also found Mr Oswald entitled to expenses in the arbitration as taxed by the Auditor of the Court of Session.

Mr Oswald then raised this action against the trustees for declarator—First, that by the statutory notice served upon him by the defenders the latter had purchased and taken from him the 246 decimal parts of an acre above referred to, "absolutely and without restriction or limitation as to the use to be made by the said trustees of the said land or property, and are liable and bound to pay to" the pursuer the full value of the ground itself, and also compensation for the damage done to his remaining ground by the taking of the ground or the construction of the works; secondly, that the defenders were entitled to build on the ground so taken by virtue of the Acts above referred to; thirdly, that the minute lodged by the defenders in the process of submission was incompetent and invalid, and of no effect in the reference; fourthly, that the sum of £4900 (being the amount fixed by the oversman in the first alternative finding) was the amount due and payable to him by the defenders in respect of the value of the ground taken, and of damage to the remainder of his property. Then followed a petitory conclusion for the sum of £4900.

Alternatively the pursuer concluded for payment of £2786, 12s. 2d., the amount found due by the oversman in his second alternative finding. He also concluded for the expenses of the arbitration as the same should be taxed.

The pursuer's ground of action was set forth in the following pleas-in-law:—"(1) In respect of the Acts of Parliament, the statutory notice, and the proceedings in the reference, all as condescended on, the pursuer is entitled to decree in terms of the first alternative conclusions of the summons. (2) The minute lodged on behalf of the defenders in the course of the proof in the reference is incompetent and invalid, in respect (1st) that it is unauthorised by and illegal under the provisions of the Lands Clauses Consolidation (Scotland) Act 1845 with regard to the compulsory taking of land; (2d) That the ground taken had been already purchased and taken from the pursuer absolutely and without qualification by force of the said statutory notice served upon him; (3d) That the arbiters and oversman were bound by the terms of the reference to award compensation for the said ground so taken, and also for the damage done or to be done to the pursuer's remaining land by the taking of the said ground, or by the construction of the works of the Ayr Harbour Trustees thereon; and an award upon any other footing is *ultra fines compromissi;* (4th) That the said minute is not legally binding upon the Ayr Harbour Trustees; (5th) that the said minute was an illegal and ineffectual attempt to change, in the course of the proof and without notice, the question referred to the arbiters. (3) The second alternative finding in the oversman's award is incompetent, in respect it is *ultra fines compromissi*, and was pronounced without the pursuer having had any opportunity of leading evidence in regard thereto. (5) In any event, the pursuer is entitled to decree in terms of the second alternative petitory conclusions of the summons" (*i.e.*, that for £2786, 12s. 2d.)

The defenders pleaded—"(2) The pursuer is only entitled to receive the sum awarded under the second alternative finding of the said decree-arbitral, in respect (1st) that the defenders are not entitled under their Acts to build or make erections on the ground taken from the pursuer, and thus shut out his remaining ground from a frontage to the new road or street along the harbour; and (2d), that their minute of 17th November 1880 is valid and binding upon the defenders. (3) The defenders having been all along willing to implement the second alternative finding of the award, and to pay the expenses of the reference as the same might be taxed, the present action was unnecessary, and ought to be dismissed with expenses."

The Lord Ordinary found "that the amount due and payable to the pursuer by the defenders under and in terms of the decree-arbitral libelled is £2786, 12s. 2d., being the sum found due under the second alternative finding of the said decree-arbitral," appointed the cause to be put to the roll for further procedure, and on the motion of the pursuer granted leave to reclaim.

"*Opinion.*—The question to be determined in this case is, whether the pursuer is entitled to receive compensation for land taken by the defenders, in terms of one or other of two alternative findings in a decree-arbitral pronounced by the oversman in a reference under the Lands Clauses Acts and the Ayr Harbour Amendment Act 1879?

[*His Lordship then narrated the proceedings in the arbitration as above detailed, and proceeded*]—"The findings of the oversman appear to raise two questions for determination in the present action—first, whether under their statutes the defenders are empowered to erect buildings on the ground taken so as to deprive the remaining

ground of its frontage to the street and harbour? and secondly, if they are not prevented from building by their statutes, whether they can competently accept a conveyance under the conditions stated in the minute, and whether such conditions will be valid and effectual to the pursuer and his successors?

"As to the first of these questions, I cannot find that the Act of Parliament prohibits the erection of buildings on the ground in question. It is true that the specific purpose for which the defenders are empowered to acquire it is the construction of a road of access and wharf. But both by the Harbours, Docks, and Piers Act, and by the 10th section of the special Act, they have powers to erect sheds, warehouses, and other conveniences on the docks, quays, and other portions of the harbour; and there is nothing in the special Act to exempt lands taken for the purpose authorised by section 4 from the scope of this general power. It is said to be impossible that the works should be constructed and maintained as contemplated by the statute if sheds, warehouses, or any similar obstruction authorised by section 10 were interposed between the pursuer's ground and the new road and wharf. The impossibility is not self-evident. But the question for me to consider is not whether the works will in fact be so constructed as to injure the pursuer, but whether under their statute the defenders are empowered so to construct them if they can. And I am of opinion that if they are not restricted in their use of the land taken, by contract or by the conditions of their title, there is nothing in the Act of Parliament to restrain them from erecting upon it sheds or warehouses in such a way as to interfere with the pursuer's frontage.

"But, on the other hand, it appears to me that their uses of the land may be effectually limited by the terms of their title, and if they accept a conveyance under the conditions proposed in their minute, they and their successors in office will be restrained from violating those conditions to the prejudice of the pursuer. Three objections have been taken to the validity of the minute.

"In the first place, it is said that it is not within the power of the Harbour Trustees to discharge the right given to them by the statute to use the ground they are authorised to acquire for all or any of the statutory purposes. They cannot, therefore, it is argued, accept a conveyance under conditions or qualifications which will restrain them or their successors from exercising their powers of building under section 10 upon any part of the subject conveyed; and in support of the argument it is pointed out that these powers are not to be exercised once for all by the trustees now in office, but are continuing powers, to be exercised from time to time as the requirements of the harbour make it necessary or convenient to extend the harbour buildings. It is said that an undertaking to abstain from erecting such buildings as may be requisite is *ultra vires* of the trustees, and the condition by which it is proposed to qualify the conveyance will therefore be absolutely void. But although the condition will be void, it is maintained, as I understand the argument, that the conveyance will be effectual, and the pursuer's land will therefore be liable to injury from which he cannot be protected by any stipulation in the title, and for which he will receive no compensation. I cannot assent to this argument. The trustees, it is true, have a general power to build sheds, &c., upon the harbour. But they are not compelled to acquire the right of building upon every foot of land which they find it necessary to take for other purposes. The fallacy of the pursuer's argument on this part of the case, which was very cogently enforced, appears to me to be in the assumption (which I think erroneous) that the defenders propose to lay a restriction of the nature of a servitude upon land which they now hold free from any restriction whatever except such as may be implied from the purposes of their statutes. But that is not the nature of the transaction. They are simply abstaining from purchasing, at a very considerable cost, rights which they do not at present possess, and which they do not think it necessary for the due execution of their trust to acquire. It is said they are attempting to fetter their successors; but the trustees, who are actually executing the statutory powers of taking land, must necessarily consider and determine the purposes for which the land is required, and if it is required for a specific purpose within their general powers, there seems no reason why they should be compelled to acquire larger rights than they consider requisite for the due execution of that purpose. The amount of compensation, when they take a part only of a proprietor's land, must be estimated with reference to the uses which they are to make of the land taken. It must frequently happen in such cases that the uses contemplated are not co-extensive with the general powers of the promoters, and if this is not apparent otherwise, I see no reason why it should not be made apparent by express declaration in the title. I must of course assume that it is unnecessary for the convenient use of the harbour that the piece of ground in question should be built upon so as to destroy the pursuer's frontage. The Harbour Trustees say that not only is it unnecessary so to build, but that it could not be done without defeating the statutory purposes for which alone they acquired the land. I see no reason, on the one hand, why the pursuer should be compensated for an injury to which he is not subjected, or, on the other, why his lands should not be permanently secured by express restriction in the title, or by some other effectual method, against an injury for which he has received no compensation.

"2. The second objection is, that assuming a power to accept a conveyance under the qualification in question, the offer to do so came too late, and that it cannot receive effect without the consent of the pursuer. The argument is rested on two different grounds. In the first place, it is said that the defenders' minute is an attempt to introduce a new term into a concluded contract, and secondly, that it is an attempt to vary the issue submitted to the arbiter. The first point is founded on the well-settled principle that when a company or a corporation are entitled to take land compulsorily under statutory powers, notice of their intention to take operates as a contract from which they cannot recede. The pursuer referred to *Laing* v. *The Caledonian Railway Company*, 9 D 70, and *Tawney* v. *The Lynn and Ely Railway Company*, 4 Railway

Cases, 615. There are other cases to the same effect; and there can be no question that serving the notice completes a contract, the subject-matter of which cannot be altered without consent. But it is not proposed to alter the subject-matter of the contract. There is no authority—at least none was cited—for saying that the notice fixes anything with regard to the uses which may be made of the land after it has been acquired, except that they must be within the purposes for which compulsory powers have been given. The special use within the powers to which the land is to be applied is not one of the particulars stated or required by the Lands Clauses Act to be stated in the notice. It appears to me therefore that if such use may be competently defined, that is one of the matters which still remain for adjustment. It is an element in the settlement of the compensation that the definition is desired, and the notice fixes nothing as to the compensation except that failing agreement it must be settled in the manner provided by the statute.

"The objection that the minute varied the issue before the arbiter is in my opinion equally untenable. One of the issues very distinctly raised by the terms of the pursuer's claim was, whether he was entitled to compensation for damage to his yard in consequence of 'the Harbour Trustees interposing between the yard and the frontage to the harbour and river.' The pursuer averred that by reason of such interposition 'the value of his yard would be destroyed.' The defenders in their answers averred that on the contrary the sole effect of their proceedings, as regards frontage, would be to give the remainder of the yard 'a frontage to the full extent of its width to an improved because widened road forming a part of the harbour.' The parties were thus in controversy as to the effect of the operations. The defenders were quite entitled to satisfy the arbiters, if they could, that the pursuer's apprehensions were groundless; and by tendering for that purpose an undertaking to construct the works in a particular way they no more vary the issue than by putting in plans or putting their engineer into the box to prove how the works were in fact to be constructed.

"3. The pursuer however complains that he was taken by surprise and was not prepared to lead, and did not in fact lead, any evidence as to the damage which he would suffer, on the footing that the undertaking in the minute is effectual. If the pursuer was taken by surprise, his remedy was to move for an adjournment, and as he did not think fit to do so, his objection (assuming that it could be made effectual in this process) appears to me to come too late. But if it were still open I think it unfounded. He had due notice of the defenders' contention as to the effect of their proposed works as regards his frontage to the harbour, and the undertaking in the minute involves no departure from that contention."

The pursuer reclaimed.

After hearing counsel the Second Division appointed the cause to be heard by one counsel on each side before the Second Division and three Judges of the First Division.

The pursuer argued—The serving of the statutory notice made a completed contract between pursuer and defenders—as between seller and purchaser—after which no variation could be made on the substance of the contract; all that remained was the adjustment of details.—*Laing* v. *Caledonian Railway Company*, Nov. 14, 1846, 9 D. 70. The defenders were proposing to alter the subject-matter of the contract, for in proposing to create a servitude *de non ædificandō* they were proposing to take less than they had already contracted to take, and this without the consent of the pursuer. The defenders could not now engraft on the contract a restriction of their powers which would diminish the amount of damages claimable by the pursuer, according to the rule of estimation fixed by sec. 61 of the Lands Clauses Act. The pursuer was not bound to take the restriction in part payment of his claim of damages.—Lands Clauses Act 1845, secs. 17, 48, and 61; *Morgan* v. *Metropolitan Railway Company*, L.R., 4 C.P. 97; *Lockerby* v. *Glasgow Improvement Trustees*, 10 Macph. 971. The next point was, Were they bound by these statutes from creating a servitude on the ground taken by them which should bind their successors in office, and if they had such power, had they by the minute effectually bound both themselves and their successors? Statutory trustees or commissioners, administering their trust solely for public purposes like these, and who are in no sense proprietors, cannot so affect the property under their charge as to bind their successors in office in a way that might in the future tend to the prejudice of the public interests with which they are charged. To create a servitude as here proposed would require a specific statutory power, and there was no word of such power in any of their statutes. That being the case, the validity or invalidity of the minute is of no consequence. Therefore unless the pursuer was to have full protection against any future erection on this ground—which the defenders could not give him—he was entitled not only to value for the ground taken, but also for damage to his remaining ground, according to the estimation of the statutory tribunal appointed for that purpose by the Act which gave the defenders their power to compel the pursuer to sell—that is, to the larger sum awarded by the arbiter.—Harbours, Docks, and Piers Clauses Act 1847, sec. 23; *Proprietors of the Staffordshire and Worcestershire Canal Navigation* v. *Proprietors of Birmingham Canal Navigation*, L.R., 1 E. and I. App. 254, Lord Chelmsford, p. 267; Brice on *Ultra Vires*, 128; *The Queen* v. *South Wales Railway Company*, 14 Q.B., Ad. and Ell. 902.

The defenders argued—The defenders did not dispute the pursuer's contention as to the completion of a contract by serving of the notice, or that the pursuer's claim was to be measured as directed by the Lands Clauses Act. The question was as to the amount of damage which will be caused to the remainder of the ground. Erections which would cut off the pursuer's frontage would of course require a high estimate of damages, but if that source of damage were got rid of, the amount in name of damage must be proportionately diminished. Assuming that the defenders had power to build all over the ground taken, they, as trustees for public purposes, were not bound to use all their statutory powers in regard to it, and the pursuer was not entitled to measure his damage on the footing that they would necessarily use the maximum of their powers and cause him the maximum of possible damage. If the likelihood of their doing so was a matter of inquiry they were entitled to say "We shall tell you what

use we intend to put or not to put the ground we have taken." In short, the competency of the minute on the part of the defenders, assuming it within their powers, was clear. The next question, then, was as to their power. These trustees were an incorporation with perpetuity and a common seal. Were they not entitled to bind themselves to the exercise of some of their powers only? So long as they were acting within their powers they are acting lawfully. The statutes did not order them to use all their powers; the public benefit required that a discretion be left to them on this head; and what they did in this way by valid contract with a third party must necessarily bind their successors, for if not they could never enter into any contract having permanent effects on the laying out of the harbour. They took an unlimited right under the statute, and what they did by the minute was to define the exercise of their powers in regard to it.—Brice, pp. 58-9; *Magistrates of Edinburgh* v. *Warrender*, June 5, 1863, 1 Macph. 887.

At advising—

Lord President — The defenders, who are statutory trustees or commissioners for managing and improving the harbour of Ayr, obtained power under their latest Act of 1879 to acquire certain additional lands for an extension of the harbour works.

In the exercise of this power they served a notice on the pursuer to take from him by compulsory purchase a piece of ground forming part of a yard belonging to him lying adjacent to the harbour, and having a frontage thereto.

It is alleged by the pursuer, and not denied, that the effect of the defenders acquiring this piece of ground and covering it with buildings would be to shut off the remaining part of the yard belonging to the pursuer from its frontage to the harbour, and thus to diminish its value.

The parties not having agreed on the amount of compensation to be paid to the pursuer, the question was submitted to arbitration in the usual way under the provisions of the Lands Clauses Act.

In the course of the proceedings in the arbitration it was maintained by the defenders that by the clauses of the Act of 1879 they were restricted in the uses of the land they had acquired from the pursuer, and were not entitled to erect thereon houses, sheds, or warehouses.

Not relying on this ground exclusively, the defenders further in the course of the proof put in a minute by which they agreed "that the conveyance to be granted by Mr Oswald in their favour of the piece of ground forming the subject of reference shall be qualified by a declaration that they shall not erect sheds or warehouses thereon, and that on a portion of said ground immediately adjoining Mr Oswald's yard a road of not less than 30 feet wide shall be formed and maintained by them."

The pursuer, on the other hand, maintained that the defenders had full power under the statute to use the ground in question for all harbour purposes, including the erection of sheds and warehouses, and that the defenders had no power to bind the statutory trust to the effect proposed in the above-quoted minute.

The oversman not considering himself qualified to determine the questions thus raised, pronounced a decree-arbitral containing alternative findings, one proceeding on the assumption that the defenders are not by the statute prevented from building sheds and warehouses on the ground acquired from the pursuer, and that they cannot competently bind themselves by the proposed qualification in the conveyance to abstain from so building in all time coming; and the other proceeding on the opposite assumption that the defenders are prevented from so building by the statute, or may validly and effectually bind themselves and the Harbour Trust in the manner proposed.

In the former alternative he awards £4900 as the amount of compensation payable to the pursuer, but in the latter alternative the smaller sum of £2786, 12s. 2d.

The result is that the pursuer is entitled to recover the larger sum unless it can be shown either (1) that the defenders are prevented by the terms of the statutes defining their rights and powers from erecting sheds and warehouses on the ground taken from the pursuer; or (2) that they have effectually bound themselves and their successors in office by the minute referred to in the decree-arbitral never to apply the ground to such a purpose.

As to the first of these alternatives, it was virtually abandoned by the defenders in the course of the argument, and is so plainly untenable as to require no further notice.

The only question therefore remaining for consideration is, whether the defenders as statutory trustees or commissioners can bind the trust which they administer by an obligation to refrain in all time coming from using for certain harbour purposes ground which they have by compulsory purchase acquired for harbour purposes under authority of the statute.

The answer to this question depends in my opinion on a consideration of the precise character and powers of the defenders as defined by the various Acts of Parliament relating to the harbour of Ayr. It appears to me that the defenders are nothing but parliamentary commissioners for managing and improving this harbour, which but for the provisions of these Acts or some previous grant would, like other *res publicæ*, remain vested in the Crown for the benefit of the nation.

The defenders are not in any proper sense grantees of the harbour. The burgh of Ayr had a grant of free port from Robert III., which was renewed by subsequent royal charters. But the harbour of the burgh of Ayr which formed the subject of these grants was confined to the south bank of the river, whereas the harbour administered by the defenders extends to both sides of the river, and comprehends what was the harbour of Newton-on-Ayr on the north bank, which never was made the subject of any Crown grant (see *Ayr Harbour Trustees* v. *Weir*, 4 R. 79). The Act of 1772, which created the Harbour Trust, did not transfer to the trustees any right of property in the harbour; and it is very clear from the provisions of that and all the subsequent statutes that this harbour is not an estate in which anyone can have a beneficial interest except the public at large. The grantee of a harbour enjoys a beneficial interest in the subject of the grant under certain burdens in favour of the public. He is bound to apply the harbour revenues in the

first place to the maintenance and repair of the harbour and to providing suitable and necessary machinery for the accommodation of vessels frequenting it. But he is not bound to extend or improve the subject, and the balance of revenue after providing for repairs belongs to himself as proprietor for his own beneficial use.—*Officers of State* v. *Christie*, 16 D. 454. The extent to which a grant of harbour may be profitable to the grantee may be well illustrated by the history of the harbour of Leith, which belonged under royal charter to the Corporation of the City of Edinburgh, and the revenues derived from which constituted no inconsiderable part of the income of that corporation. The position of the defenders stands in marked contrast to all such cases.

It is necessary also to distinguish this statutory trust from all statutory corporations constituted for the purpose of carrying on a trade. A railway company, for example, is not like, the defenders, the mere creature of statute. It is a trading company formed by voluntary association with a view to the profit of the persons associated. From the nature of the business contemplated the company requires to go to Parliament for powers, without which they could not make the railway, and they receive these powers if Parliament be satisfied that the proposed work is likely to be of public utility, and subject to certain conditions stipulated on behalf of the public and of the landowners with whom they are to transact. So long as they comply with these conditions they are entitled to manage their own affairs in the way they think best calculated to produce the greatest profit to themselves, which is the sole end and aim of the partnership.

Such an incorporated company are in no sense trustees for the public. On the contrary, they contract with the public through Parliament, and so long as they keep the terms of the contract, they may use or refrain from using their statutory powers, according to their views of what will most conduce to their own interest and advantage. The only fiduciary position in such a case is that of the directors, and they are trustees or agents for the shareholders only, by whom they are appointed, and by whom they are liable to be controlled. In exercising their powers of taking land such a company may do what its directors or shareholders for the time think best, and may make such arrangements for accommodation works and the like as will prove least expensive, or be likely to diminish claims of damage, though it may be doubtful whether in the end it would not have proved better economy to pay more and secure more land, or a more unrestricted use of the land they have acquired. It is entirely a question of prudence and discretion with a view to profit.

The position of the defenders is the reverse of all this. They are entrusted with the management and improvement of a subject which is *inter res publicas*, and cannot be made the source of profit or patrimonial interest to anyone. Their powers are strictly defined, and their revenues specially appropriated. In the exercise of their powers they are merely the commissioners or agents of the Crown and of Parliament, and the statutes constitute their mandate, the terms of which they must implicitly follow. When, therefore, they have exercised any of the powers committed to them, they are not entitled to engraft on the simple exercise of the power something which limits or restricts the full operation and effect of what they have done, so as to convert it into the exercise of a power which the Legislature has not thought fit to confer upon them.

By the incorporation of the Lands Clauses Act with the special Act of 1879, the defenders are armed with the power of compulsory purchase of all or any part of the lands within the limits of deviation shown on the parliamentary plan. But they are not empowered to acquire, at least by compulsory purchase, any interest in such lands short of or different from a full right of ownership. Neither have they any power after acquiring land for harbour purposes to create servitudes over it in favour of adjoining landowners or others, or to make or save money by giving to private parties such an interest in the land as will prevent its being applied in time coming to any of the harbour purposes for which at any time, however distant, it may come to be required.

When the defenders served on the pursuers the notice of 31st December 1879, there was thereby concluded between the parties a complete personal contract of sale, and the reciprocal obligations thereby created were, on the part of the pursuer, to deliver a conveyance to the defenders of the land embraced in the notice, and on the part of the defenders to pay the price as it should be fixed in terms of the statute. From that moment the defenders were in the position of absolute owners of the land without restriction or reservation or encumbrance of any kind, but in trust to use the subjects they had acquired, with all its incidents and advantages, for harbour purposes when and how they thought most expedient, but for no other purpose whatever. It appears to me that of the rights thus acquired under the statute they have no power by the statute to divest themselves, in whole or in part, and that a proposal to save the sum of £2613, 7s. 10d. by selling to the pursuer and forcing him to accept at that price a right of servitude over the land which will restrict them in the use of it in all time coming is a plain excess of power on the part of parliamentary commissioners like the defenders.

Lord Justice-Clerk— I concur in all respects in your Lordship's opinion.

Lord Mure—I also entirely concur in your Lordship's opinion.

Lord Shand—I am unable to concur in the opinion of your Lordship in which the Lord Justice-Clerk and Lord Mure have expressed their concurrence, or in the other opinions now delivered, for I think the judgment of the Lord Ordinary is sound, and that it ought to be affirmed. While constrained to differ from your Lordships, I confess it is satisfactory to me that I have come to a different conclusion; because it cannot I think be questioned that if judgment is now to be pronounced against the defenders for the sum of £4900, the defenders will thereby be required to pay away £2100 of that amount out of the trust funds under their administration without obtaining any return for it, while on the other hand the pursuer will be enriched by that

amount in respect of a possible injury to his lands which the defenders have no interest to inflict, which they are quite willing to avoid, and which in all probability never will be caused.

The arbiter in the decree-arbitral which the pursuer seeks to enforce has in effect found that if the minute given in by the defenders, whereby they undertake to restrict the uses to be made of the ground acquired from the pursuer, be effectual, and within their powers, the sum of £2786, 12s. 2d. will be full compensation to the pursuer for the land taken and injury done to his remaining lands. If, on the other hand, the minute be ineffectual, because it was *ultra vires* of the trustees to bind themselves and their successors in regard to the use to be made of the ground taken, then the arbiter finds that the pursuer is entitled to the larger sum of £4900 as compensation for the land taken and injury done to his remaining land. The difference, being £2100, is thus, in the estimation of the arbiter, the compensation due to the pursuer if the defenders are compelled on legal grounds, contrary to their desire in the administration of their public trust, to hold the ground taken from the pursuer unrestricted in any way as regards the uses to be made of it. I am humbly of opinion with the Lord Ordinary that the defenders in the administration of their trust can effectually bind themselves and their successors to use the ground taken from the pursuer under the restriction contained in their minute, viz., that "they shall not erect sheds or warehouses thereon, and that on the portion of said ground immediately adjoining the remainder of Mr Oswald's land a road of not less than 30 feet wide shall be formed and maintained by them."

I do not doubt that in taking land compulsorily from the pursuer for the purposes of their undertaking the Ayr Harbour Trustees were bound to do so absolutely, assuming always that the pursuer was unwilling to treat on any other terms. The pursuer could not be compelled to dispose of a limited or qualified right to the land only, and accept a corresponding price under the true value. The only effectual notice which the defenders or others acting under the powers of a similar Act of Parliament could give to a party not willing to sell by agreement was a notice to take absolutely, and the result of such a notice would be that a contract of sale was entered into with the owner of the land under which the owner would become entitled to the full value of the ground taken as on an absolute sale. Accordingly the pursuer in the present case became entitled under the notice served on him to payment of the full price for the ground, extending to about a quarter of an acre, taken from him, and on an absolute and unqualified sale.

This being conceded, the question between the parties arises. That question is, whether when the pursuer maintains that the remainder of his ground not taken will be injuriously affected by the uses to which the ground purchased may be applied in the defenders' hands, the defenders are not entitled to diminish the alleged injury, and so to save the trust the payment of a large sum on that account, by undertaking that the use of the ground taken shall be restricted to certain of the trust purposes authorised by their statutes.

In solving this question I would first observe that if the pursuer instead of being desirous to enlarge his claims of damage at the expense of the trust, had been willing to sell the land which has been taken from him compulsorily, on the arrangement that it should be used only for the purposes of a road to the extent of 30 feet *ex adverso* of his remaining lands, and under a restriction against sheds and warehouses on the remaining small strip of from 15 to 24 feet outside, or on the harbour side of the road, it appears to me there would have been nothing illegal or *ultra vires* on the part of the defenders in making the purchase under that agreement. In that case the defenders would have had this legitimate object in view, that they would save the funds under their administration the payment of a considerable sum by undertaking to refrain from certain uses of the ground which I assume in their judgment would either be of no value to them, or at least would not be of a value at all commensurate with the sum they might be required to pay as compensation for the injury to the pursuer's remaining lands, while, on the other hand, the pursuer would secure, as in the case supposed he might desire to do, that the land retained by him should not be subject to injury from particular uses of the ground agreed to be sold—an object which he might greatly prefer to any payment of damages or compensation in money.

It would, I think, be difficult to show that a purchase on such terms, desirable in the interest of both parties, could not be effectually made, but that the purchasers must retain a power of injuring the seller's remaining lands which they do not desire to have, while the seller must take payment in money for the risk of an injury for which money in his view would not compensate him. The argument of the pursuer must go the length of maintaining that such an agreement, although in the interest of both parties, could not receive effect, because it would be *ultra vires* of the statutory trustees.

It is true that there are clauses both in the defenders' private Act of 1879 and in the General Harbours Act of 1847 which provide that the trustees shall have power to construct certain specified works and erections on ground acquired by them, including amongst others sheds or warehouses. These provisions of the statutes are intended to define generally the uses to which the trustees of the undertaking may in the administration of their trust put the lands acquired by them, and to exclude objections by the sellers or other neighbouring proprietors to the exercise of the powers thereby given. But I see nothing in these provisions which compels the trustees to take and to hold every foot of land which they acquire for all of these purposes. If in the fulfilment of their trust they desire to acquire ground in a particular situation for a special purpose, for which they think it specially suitable, being satisfied that it ought to be devoted to that purpose only, and they can acquire that ground with the consent of the proprietor, on terms which will effect a large saving to the trust, by agreeing to restrict its use to the purposes for which alone they want it, I see nothing in the Acts of Parliament which will preclude them from doing so. That the trustees have the power to acquire ground for all the purposes mentioned in the statute does not, it appears to me, prevent

them from acquiring it at a lower price for certain only of these purposes, if the owner be willing to sell the ground for limited uses. The larger power of taking ground for all the purposes of the Act from an owner willing or unwilling to part with it does not in my opinion preclude the trustees from taking and holding the ground for certain of the trust purposes from an owner consenting to sell on these conditions.

I cannot better illustrate what I mean than by reference to an agreement printed in the appendix to the present reclaiming note, entered into between the defenders and Messrs James Paton & Sons, wood merchants, Ayr. This agreement relates to a stripe or piece of ground which obviously exceeds thirty feet in breadth, and which appears from the service plan in process to adjoin the pursuer's property, and to have a much longer frontage to the proposed new road and the harbour than the pursuer's property has. This agreement seems to have been entered into while the defenders' bill was still in Parliament, but for the purpose of illustration I shall assume it to have been entered into or to have been adopted by the trustees after the Act of 1879 had passed. That agreement provides for the payment, for the stripe of land taken, of a price as on a compulsory sale, and for the damage to be done to the remaining lands "by severance or otherwise," all to be fixed by arbitration. It contained further these provisions:—"*Third*, The first parties shall be bound to construct and maintain a road not less than 30 feet in clear width in front of the second parties' property. *Fourth*, In the event of the trustees at any time requiring to erect sheds for the purposes of the harbour, in front of the second parties' property, such sheds shall be constructed and maintained in such a manner as shall, keeping in view the nature of the business being carried on in the second parties' property, afford reasonable facilities of access in a direct line from the gates or other entrances in the second parties' property to the quay." The object of these provisions was on the one hand to save the Harbour Trustees from paying damages or compensation for injury to the large part of Paton & Sons' woodyard left as their property and in their possession, on the footing that the trustees might use their powers so as completely to block up the frontage to the road and harbour, which they had no intention or desire to do; and on the other hand to secure Messrs Paton & Sons against this being done. Can it be truly said that this agreement was *ultra vires* of the Harbour Trustees, and so ineffectual? The Harbour Act provides that the trustees shall take the ground required for a road of access along and adjoining the north quay; and having taken ground to fulfil this purpose, in the line and situation in which obviously that road must be, the trustees apply the ground to that purpose, and bind themselves so to maintain it. Then, in the event of their erecting sheds for the purposes of the harbour on the part of the strip of ground outside (or on the harbour side) of the road in front of Messrs Paton & Sons' ground, they bind themselves, keeping in view the nature of the business being carried on in Paton & Sons' property, "to afford reasonable facilities of access in a direct line from the gates or other entrances in their property to the quay." According to the pursuer's argument, the defenders could not effectually make such an agreement; but I confess I am unable to see that the defenders were in any way acting beyond their powers. What they did was certainly advantageous to the trust, as it diminished the claims of Messrs Paton & Sons for compensation for injury to their lands not taken. It was certainly reasonable. It was in my opinion a fair and legitimate act of administration within their powers as trustees. The opposite view would lead to this, that the trustees could not agree to give facilities of access to the public road and harbour from a property having a long line of frontage, even to the extent of allowing two or three gates or entrances from such a woodyard as that of Paton & Sons direct to the road or harbour, for it is said that they, and their successors in all time coming, must have the power of using every foot of ground acquired for all the purposes of their statutes, including the power of building a wall, or sheds, or warehouses, or other harbour works, so as entirely to shut out the whole front of the property from direct access to the harbour. This seems to me, with deference, to be an extreme and unjustifiable contention. If sustained, it would carry the doctrine of *ultra vires*, as regards the powers of administrators of public trusts and public companies, to an extent which is unreasonable, and which would be mischievous in its results. It would compel the administrators of such trusts in many cases to pay for injuries to lands which a restriction of no importance to the trust, or an accommodation given in no way injurious to the trust, would avoid. Such matters must, I think, be left to the trustees as points of administration within their power and discretion, and as to which they may effectually bind their successors. The trustees acquire their statutory powers in order to enable them properly to carry into effect the undertaking and works which their statute has sanctioned. But such acts as I have considered are done for the very purpose of carrying the undertaking into effect in the most prudent way, and at the least expense to the trust, according to the judgment of the trustees in their administration. There are many acts of a much more important kind falling within the discretion of the administrators for the time which effectually bind their successors. The trustees in office for the first three years judge and determine finally what land shall be taken within the authorised limits, and so fix for all time, so far as the statute is concerned, what shall be the limits of the undertaking; and in the execution of their works, by the making of docks, the erection of permanent warehouses, stores, and sheds, and the like, they really determine the fixed lines on which the harbour plans and works shall be carried out, and so determine the uses to which a great part of the ground belonging to the trust shall be applied. The agreement to allow permanent entrances from ground fronting the harbour at certain points, or to refrain from putting certain particular erections on specified parts of the trust property of small extent, and a few yards only in breadth, entered into *in bona fide* and in the interest of the trust, is a matter of much less importance than those I have just alluded to; and should such acts be not held to be within the trustees' powers of administration, it seems to me that public trusts must be carried on under very serious disadvantages which have not hitherto

been found to exist. It is clear that a private party in the defenders' circumstances would act as the defenders have done. I understand that your Lordships are not prepared to hold that a public company, carried on for the purpose of making profit, though deriving its powers from statutory authority, as in the case of a railway company, would be precluded from taking the same course. It would, I think, be extraordinary and unfortunate if there be any principle of law which would deprive trusts for public purposes of the same power of making prudent and economical arrangements in dealing with their property.

"A corporation of a public nature may not so deal with its property as to incapacitate itself from performing its public duties" (Brice on the Doctrine of *Ultra Vires*, p. 128). This is, I think, the correct statement of the general law on which I understand the opinions of your Lordships who have preceded me to be rested. It must be conceded that if the act of the trustees in here dealing with the trust property by agreeing to restrict the use of a small part of the land acquired for the purposes of the statute, could be properly characterised as having the effect of incapacitating the corporation from performing any part of its public duties, the act would be *ultra vires*. The *dicta* in the case of *The Staffordshire and Worcestershire Canal Navigation Proprietors* v. *The Proprietors of the Birmingham Canal Navigation*, cited in the discussion, were applicable to a case of that kind—a case in which, according to the view of the Judges, the corporation, by the grant alleged, but which was not admitted to have been made, would have been plainly incapacitating itself from performing its public duties. This is clear from the opinions of the learned Judges. The plaintiffs and appellants in that case alleged that they had acquired a prescriptive right to the use of an important and valuable body of water which the proprietors of the Birmingham Canal Navigation had by their system of works allowed to flow in a particular course for a series of years. The Court were of opinion that the plea of prescription could not be maintained, for this among other reasons, that the alleged grant which was the foundation of it would have been *ultra vires* of the trustees under their statute. But this was entirely because the supply of water, the use of which was claimed, might be so essential to the trust that the want of it might incapacitate the trustees from the due performance of their public duties. Thus Lord Chelmsford there said—"By a grant of the continual use of the quantity of water flowing from the canal into the canal of the appellants, the respondents would have fettered themselves in the exercise of the powers vested in them by the Act for extending, preserving, and improving their canal, for which the application of all the water beyond what was necessary for keeping up the communication between the two canals might have been essential." And Lord Westbury said —"Had any grant been made at any time by the respondents' company of the right now alleged by the appellants to have been acquired against them by use, such grant would have been *ultra vires* and void, as amounting to a contract by the respondents not to perform their duty by improving their navigation, and conducting their undertaking with economy and prudence." So, if the defenders in the present case had proposed to make any grant of the property of the trust, or to place a part of the trust-estate under such restrictions or conditions that it could in any fair and reasonable sense be said that they were thereby disabling themselves or their successors from the performance of any part of their public duties, or if it could be said, in the language of Lord Westbury, that the defenders' undertaking amounted "to a contract not to perform their duty by improving the navigation, and conducting their undertaking with economy and prudence," there would be great force in the pursuer's argument—force so great indeed as to entitle the pursuer to succeed. But this is not so. The principle founded on cannot in reason be carried the length of excluding or preventing acts of economical, prudent, and reasonable administration in matters of detail, and not essential. The ground in question here is quite a small stripe in the length of the harbour, being only 213 feet in length by 45 to 54 feet in breadth. To the extent of 30 feet in breadth it is required and taken for an open public road, specially required and authorised and described in the statute. The remaining breadth, being 15 to 24 feet, is really the only subject of restriction, and the only harbour works which the trustees undertake not to erect on it are sheds or warehouses, for which indeed such a breadth of ground would seem to be very ill-suited. Such appliances as cranes, weighing-machines, or other machinery for loading, unloading, measuring, and weighing goods—for which alone such a narrow strip of ground on the quay seems to be suitable —the trustees may erect on it as they please; and the restriction, which cannot injuriously affect the trust, will effect a saving of £2100 of the trust funds. The restriction is in substance little, if anything, more than securing to the pursuer the benefit of a direct access from his property to the harbour and quay, in order to remove a heavy claim of compensation for the risk of his being deprived of this access. The act of the trustees appears to me to be fairly characterised as one of ordinary and reasonable administration for the benefit of the trust. It is an act which can neither incapacitate nor in any way hinder the present trustees or their successors in the performance of their public duties.

A great deal has been made of the argument that the restriction is the constitution or grant of a predial servitude, and that a predial servitude is an alienation of property. I confess that the use of these formidable terms does not in any degree affect my judgment. The same thing may be said of the giving a right of access to the road and harbour from one or two gates on the line of the pursuer's frontage. For the determination of certain legal questions it may be common and useful to speak of the constitution of a predial servitude as an alienation of heritage. But, after all, the substance of the thing really is, that the owner of property agrees to restrict his uses of it in favour of the neighbouring owner, and nothing else; and in the present case the minute given in by the defenders, followed by the payment of compensation on the footing of that minute being effectual, would give as complete a right to the pursuer as any regular bond or grant of servitude would do.

If the defenders, for the reasons I have stated,

could by arrangement with the pursuer—that is, with his consent—effectually bind themselves and their successors to the limited use of the ground purchased, and so are capable of holding ground for certain limited statutory uses, it appears to follow without doubt that in the case which has occurred they can do so without the pursuer's consent. The pursuer has an undoubted right to full payment of the price of the land taken from him, and which must be taken absolutely; and he will get this. But he has no vested right to payment of compensation or damages for injury to his remaining ground, on the footing that the defenders shall not be entitled to diminish or remove the cause of the alleged injury. He cannot insist on being injured that he may get money. When he complains of injury the defenders are entitled to say that they will remove the alleged cause of it, and if the grounds of his claim are gone, of course the claim falls. The defenders accordingly having bought and paid for the land taken, meet the claim on the head of injury to the remaining lands, from the unrestricted use of the ground purchased, by undertaking that the use shall not be unrestricted but limited in terms of their minute. They can, I think, do so effectually. Their obligation is not *ultra vires* for the reasons I have stated, and so I am of opinion that the pursuer is not entitled to decree for the larger sum claimed.

In conclusion I have to observe that both parties have concurred in asking that the decree-arbitral should be enforced according to one or other of the pecuniary results there brought out. Observations were made in the course of the argument to the effect that the arbiter should have avoided all difficulties by simply giving decree for one sum on his view of the probabilities of the uses to which the ground in question would be put. That would have been quite right if the defenders' minute had not been lodged. But after that minute was given in I feel bound to say I do not see what other and better course the arbiter could have taken than to give alternative views of the sum due, according as the legal question which the pursuer raised should be determined. That he acted wisely in not attempting to settle that question for himself is made very clear by the divided state of opinion of the Court.

For the reasons I have stated, I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

Lord Young—The question in the case, stated briefly and in substance, is, Whether the Ayr Harbour Trustees may reduce the price otherwise justly payable by them for land compulsorily taken from Mr Oswald by constituting over it a servitude against building? I am of opinion that they cannot. The land was taken absolutely by the usual notice, and clearly and admittedly could not have been otherwise taken. A notice to take subject to a servitude *de non ædificando* would confessedly have been bad, unless indeed it might have been regarded as a notice to take absolutely. It follows necessarily, I think, that the Harbour Trustees cannot in the course of the arbitration to fix the price thus qualify their taking so that the price shall be fixed on the footing that they take subject to a servitude. It was urged on us by the Harbour Trustees, first, that the question did not regard the price of the land taken, but compensation for injury to that from which it was severed; and second, that the substance of the proposal by the Harbour Trustees was not to constitute a servitude, but to bind themselves to abstain from an apprehended use injurious to Mr Oswald's adjoining land, so that they should not be required to pay him compensation on the footing that such use was open to them. I think it is a question of the price of land taken, and that none the less that in fixing that price account is to be taken of severance, *i.e.*, of the injury by the severance to the property retained by the seller, having regard to the possible and more or less probable uses to which the land taken may be put by the buyer. I do not regard this topic as of great importance, but think it right nevertheless to state my view of the subject. The price of any commodity you choose to instance is not a simple but a very complex thing, being always made up and composed of many elements, such as, in the case of common merchandise, material, labour, profit, carriage, and so on. In the case of land compulsorily taken, the compulsion is an element of price none the less that experienced arbiters generally or invariably estimated it separately—usually by adding a percentage. So also severance, which always involves the consideration of possible and more or less probable use, is just an element of price—as it would certainly be in fact in a sale to one who greatly desired to acquire a piece of his next neighbour's land, and was willing to pay for the accommodation. It has really no bearing on the question that a valuation jury (although not a valuing arbiter) is required by the statute to estimate this element of price separately. It is matter of common experience that the purchaser of one of a pair or part of a set pays a higher price for breaking the pair or set—what he pays being nevertheless just the price of what he buys.

With reference to the proposal of the Harbour Trustees to bind themselves not to build on the land taken, so that the possibility of their doing so may not be taken account of as an element of price—or, if you prefer the expression, compensation—I have to observe that they take by statute and compulsorily, so that the question is not what is reasonable between parties freely contracting, but what the Legislature has empowered the one party to compel the other to submit to. Mr Oswald, reasonably or not, declines to sell on the footing of the obligation proffered, and the question is, Can the Harbour Trustees compel him by taking his property compulsorily on that footing? Now, I have shown, I think, that they cannot take compulsorily on that footing. The Legislature might—and for aught I care to inquire, very reasonably might—have so authorised them, only it has not, if it be conceded, as it is, that a notice to take subject to a servitude *de non ædificando* would be bad as a notice to take compulsorily. Nor is it material to inquire whether the term "servitude" is strictly applicable to the obligation which they offer, for if a notice to take subject to a servitude against building would be bad, it is too clear to admit of dispute that a notice to take with an obligation not to build would be bad. But, in truth, a servitude *de non ædificando* is just an obligation not to build run-

ning with the land, as I presume the proffered obligation is meant to do, and to call it an obligation rather than a servitude cannot vary the argument or the rights of parties. Just as frivolous, in my opinion, is the argument that the Harbour Trustees do not insist in giving the obligation or constituting the servitude, but are to be dealt with on the footing that they have, in respect they are willing if Mr Oswald pleases.

What I have said applies equally to the proffer of an obligation to use the land only as a road or way, in order that the price or compensation may be fixed just as if only a right-of-way had been taken by the notice. The statute does not authorise a right-of-way over the land to be taken by compulsion, or any taking whatever, on such terms that the price or compensation shall be fixed on the footing that the land is to be used as a road only.

Having this opinion as to the law applicable to a case of compulsory taking, I am not disposed, on the invitation of the valuation arbiter, to determine whether or not by a voluntary transaction the Harbour Trustees may subject any portion of their land to a servitude, or by voluntary agreement limit their right to use it as authorised by their statute, and as may be required by their public duty. I rather think they are not; but it is sufficient for the decision of the case that they cannot compel Mr Oswald to part with his land on the footing of such servitude or obligation.

Lord Craighill—I think the interlocutor reclaimed against is right, and as I agree in the reasons which the Lord Ordinary has given for his judgment it is not necessary that I should say much on the present occasion. Recapitulation of the facts is altogether unnecessary.

The questions for decision are specified by the Lord Ordinary in the note to his interlocutor. But I think it better to take these as they are suggested by the several conclusions of the summons. By the first the pursuer seeks to have it declared that the defenders purchased and took the lands in question, "and that absolutely and without restriction or limitation as to the use to be made by the said trustees of the said land or property, and are liable and bound to pay to the pursuer the full value of or compensation for the land or property so purchased or taken." This is the foundation of the action; but important though the conclusion is, it is not contested by the defenders. The service of the statutory notice they admit operated as a purchase, and as there was no limitation of the right which was to be acquired, that necessarily was the full and absolute ownership of the ground, and the price to be paid must be that of full and absolute ownership. The controversy between the parties only begins when the question of compensation for the "damage done or to be done to the remaining property" of the pursuer comes to be determined. The pursuer, however, as I think, has all along been insensible to this consideration, and accordingly has maintained that the minute lodged in the reference was not produced with the view of "saving expense in the reference, but with the incompetent and illegal purpose of altering the subject of the reference to the said arbiters and oversman." The implication here obviously is, that whereas the purchase was absolute, and the price or compensation to be rendered must be fixed on that assumption, the purpose which the minute was to serve was to change the contract into one by which a smaller right than full ownership was acquired, and was to be paid for or compensated. This view, however, is a plain misapprehension. The subject of purchase, and the price to be paid for that subject, are what they would have been if the defenders' minute had never been tendered. The defenders have suggested, and the oversman has decided nothing to the contrary. The minute could become operative only when compensation for damage done to the remaining property arose for determination, and that is a matter the decision of which depended on the circumstances as these existed at the time when the award was to be pronounced. The question presented to the arbiters and oversman for decision was not changed. What it originally was it remained to the end, though the decision upon it in this case, as in every other case, was liable to be affected by the proof adduced on the subject of anticipated damage to the remaining property of the pursuer.

The second conclusion of the summons is to have it declared that the defenders are entitled to build or make erections "on the ground taken from the pursuer, and thus shut out his remaining ground from a frontage to the harbour, and street or road or access to the harbour." The soundness of proposition here presented depends upon the Acts of Parliament by which the powers of the defenders are regulated, and on that which has, if anything has, been accomplished by the minute presented to the arbiters and oversman. If the minute is a binding obligation this conclusion cannot be supported; and accordingly the third conclusion of the summons is that this minute shall "be found incompetent and invalid and of no effect in the said reference." This last is now, as in truth it ought always to have been, the cardinal question; the answer to it being decisive of the present litigation. That the defenders are entitled to say whether the ground or a part of the ground in question shall at present be formed into a road or wharf, and shall not be made the site of sheds or warehouses, is not disputed. Under the terms of the last Ayr Harbour Act the making of a wharf or the making of a road upon part of this ground was a thing expressly authorised. So far, therefore, there was and there could be no contravention—nothing which involved an exercise of power beyond those conferred by the statute. But what is urged is, that the defenders, in the course they have pursued, have limited without statutory authority the action of the Ayr Harbour Trust in time to come, and that in so doing they have exceeded their powers. Now, it appears to me that it would be very unfortunate were it necessary upon this consideration to disannul that which has been done by the defenders. They acted for the best. What they did plainly was done and will be for the benefit of the trust, because thereby a saving of money which otherwise must be paid will be accomplished. And nothing short of a plain statutory inability to elect the particular statutory use to which the ground in question was to be applied, and to exclude its application to other purposes in the future, would in my opinion be warrant for holding that they have exceeded

their powers. At every stage of their proceedings in the affairs of the trust there is a discretion in the trustees to apply trust property to any one or more of the statutory uses which may be considered best, and the future not less than the present is within their sphere of action. This appears to me necessary if there is to be a plenary power of administration. Such powers of administration, I think, the defenders possessed, and they did no more than exercise these powers when for the benefit of the trust they dealt with the ground in question in the way evidenced by the minute. Had they gone out of their Acts in making an election of the uses to which their property was to be applied, there would have been an obvious case of invalidity, but the use to which the ground is to be put was within their Acts; and the decision upon that subject, as a third party was concerned, and as the trust would suffer if their resolution were to be overturned, was a decision once for all.

There is, I may add, in my opinion, no distinction in this respect between a trading corporation and a corporation for purposes intended to increase and facilitate trade in such a place as Ayr, constituted by Act of Parliament. The powers of both are statutory; and if, as I think must be conceded, the former could for the benefit of the company elect once for all the particular statutory use to which ground they had acquired is to be put, so may the latter; the thing done in each case being neither more nor less than an exercise of discretion—an act of statutory administration. The fact that a trading corporation exists, indeed is constituted, to make profit, and so to save money where money could be saved, is immaterial as a distinction; because what self-interest dictates in their case is suggested by considerations of public duty in the case of such a corporation as the Ayr Harbour Trust.

These are my views, stated in a general way, in support of the interlocutor pronounced by the Lord Ordinary; and for these reasons, and the reasons stated by Lord Shand, I am very clearly and strongly of opinion that the interlocutor ought to be affirmed.

Lord Rutherfurd Clark—I am of opinion that the interlocutor of the Lord Ordinary should be affirmed.

I do not doubt that the defenders by their notice purchased the whole interest of the pursuer in the ground which they took, and that in the exercise of their compulsory powers they could not do otherwise. From this purchase there arose to the pursuer a claim, 1st, for the price of the land taken, and 2d, for the damage done to his remaining land. The price represents the value of the land. The damages must be determined by reference to the use to which the land taken may be put. If the pursuer were excluded from access to the harbour the damages would be great. But if he retains the same access which he possessed, or had right to possess, he will, as I understand the arbiter, sustain no damage, and is therefore entitled to no compensation.

To obviate the pursuer's claim for damages the defenders have undertaken so to use the land as to preserve the right of access which he had to the street and harbour, and for his further security they had offered to make that undertaking a real burden on it. If this undertaking be legal, the pursuer is entitled only to the smaller sum which is awarded by the arbiter. If it is not binding on the Harbour Trust he is entitled to the larger.

1. The pursuer says that the undertaking is an innovation on the contract of sale constituted by the notice. I do not think so. The sale remains unaffected, and the pursuer has the same right to the price, which is all that is truly done under the contract of sale. The damages are not created by the sale, but by the use of the ground which is sold.

2. He contends that the proposal of the defenders amounts to a compulsory purchase of part, not of his whole interest in the land, inasmuch as a servitude over it is to be constituted in his favour. I do not think that this view is sound. His whole interest has been taken, and he must be paid on that footing. But he cannot claim damages when none will be sustained. It is the obligation not to put the land to certain uses which excludes the claim of damages. The proposal to make the obligation a real burden on the land taken is merely intended to create an additional security in favour of the pursuer. He may, as he chooses, allow or object to this limitation being inserted in the defenders' title. But he cannot by objecting to its insertion make out a right to damages.

3. But it is said that the undertaking is *ultra vires* of the defenders. The argument is that by the notice they took the land for all the purposes to which they were entitled to put it, and that it is not lawful for them to renounce any of these uses. This to my mind presents the serious difficulty in the case.

It may be noticed that the defenders do not propose to exercise powers which they do not possess. Their purpose is to abstain from the exercise of certain powers which they do possess; and it must, I think, be assumed that by thus abstaining they are acting for the advantage of the trust. As the trustees of the harbour, it is their duty to follow the course which is most for the benefit of the trust, and I must therefore take it that in their opinion it is more advantageous that they should surrender certain powers which are formally vested in them, but to which they probably attach little or no importance, rather than incur an immediate obligation to pay £2000.

If the defenders had acquired by agreement such interests in the land taken as would enable them to make a road and an addition to the quay without interfering with the pursuer's right of access, I do not see any ground on which the agreement could have been impeached. They were not bound to acquire further rights than were necessary for the purposes they had in view. Hence I think that the pursuer and defenders might by agreement have placed themselves in the relation in which the latter desire to stand. But in doing so the defenders were abstaining from exercising powers that were competent to them, or, in other words, they were acquiring the land for certain purposes to the exclusion of others. It seems to me to be a very singular result that they can do with the consent of the pursuer what they cannot do without it. It is impossible, in my opinion, to hold that their powers can in any sense depend on the will of the pursuer.

No doubt the defenders could not acquire any such limited right in the land without the pur-

suer's consent, because he can force them to purchase his whole interest. But while the pursuer's entire interest must be paid for, I do not see how he can, by refusing to enter into an agreement, force the defenders to retain rights to his benefit and to their manifest loss.

If a railway company took land for the purposes of their railway, they might, I think, surrender a use of it for which they had no need, and the retention of which would cause a serious liability. The company would surely be entitled to decide whether it was more for their advantage to surrender the use or incur the debt consequent on its retention. Indeed, this was not, as I understood, disputed in argument. The theory was that a company which existed for profit might be trusted with the determination of what was best for its own interests.

But I fail to see any solid distinction between a railway company and a harbour trust. It is true that the one subsists with the view to the profit of its shareholders, and that the other is charged with the interests of the public. But it seems to me that they must have the same powers to protect the interest of the beneficiaries, so that the public shall not suffer a loss from which private shareholders could escape. Whether it is better to retain the power of putting the land in question to all possible statutory uses, or by surrendering some of them to save the trust from a heavy payment, is, I think, a point of trust administration which the defenders are competent to decide. The question would not be varied although it could be shown that the uses which the defenders proposed to renounce could never be of any value to the trust. For the pursuer would reply that the land had been taken for all the possible statutory uses, and that his claim for damages must be dealt with on the footing that it might be put to all or any one of them. I cannot accede to an argument which would lead to a result so inequitable and so burdensome to the trust. I prefer to hold that it is within the discretion of the defenders to decide which of the two courses may be the more beneficial to the trust, and I see no ground for thinking that in this case they have exceeded their discretion.

The Court recalled the interlocutor of the Lord Ordinary, ordained the defenders to make payment to the pursuer of the sum of £4900 with interest at 5 per cent. from 2d February 1880, and found the pursuer entitled to expenses in the whole cause.

Counsel for Pursuer (Reclaimer) — Solicitor-General (Asher, Q.C.)—Mackay. Agents—Dundas & Wilson, C.S.

Counsel for Defenders (Respondents) — Lord Advocate (Balfour, Q.C.)—Mackintosh—Guthrie. Agent—T. J. Gordon, W.S.

Friday, January 26.

SECOND DIVISION.

(Before Seven Judges.)

[Lord Adam, Ordinary.

BARONY PAROCHIAL BOARD *v.* CADDER PAROCHIAL BOARD AND OTHERS.

Property—Nuisance—River Pollution—Sewage—Public Health Act 1867 (30 *and* 31 *Vict. c.* 101), *sec.* 22.

A parochial board acting as local authority under the Public Health Act 1867, having petitioned the Sheriff under that Act to have a person on whose ground a nuisance existed ordained to remove it, themselves, under interlocutor of the Sheriff, executed certain works for the purpose of removing the nuisance, but failed to recover the cost from that person as author of the nuisance, on the ground that that person had not been given an opportunity of himself carrying out the necessary works. The works consisted of the conversion of an open ditch into a drain with cesspools. The board did not establish any special drainage district nor take over the drain from the proprietor of the ground. Thereafter an action was raised against the board by an inferior heritor on the stream into which the drain (by means of a smaller burn into which it opened) discharged its contents, concluding, *inter alia*, for interdict against their discharging or permitting to flow into the stream any sewage or drainage whereby it might become unfitted for the primary purposes. *Held*, by a majority of seven Judges (*rev.* judgment of Lord Adam), that the defenders having done nothing beyond remedying, as ordered by interlocutor of the Sheriff, the nuisance existing within their own parish, and not being the owners of the drain, nor causing the pollution complained of, nor because of their operations responsible for it, the action was wrongly directed against them, and that the proper defenders would have been the proprietors of the houses, the sewage from which was sent into the drain. The Lord Justice-Clerk and Lord Craighill *dissented, being of opinion* that the defenders were vested in and responsible for the drainage works which they as local authority had had executed.

Section 22 of the Public Health (Scotland) Act 1867 provides—"In case of non-compliance with or infringement of any decree aforesaid," for the removal, remedy, or discontinuance of any nuisance, "the Sheriff, magistrate, or justice may, on application by the local authority, grant warrant to such person or persons as he may deem right to enter the premises to which such decree relates, and remove or remedy the nuisance thereby condemned or interdicted, and do whatever may be necessary in execution of such decree; or if in the original application it appears to his satisfaction that the author of the nuisance is not known or cannot be found, then such decree may at once ordain the local authority to execute the works thereby directed; and all expenses incurred by the local authority in executing the