Trustees were of opinion that the revenue derived from it would be sufficient to pay the interest due on the money expended on its construction. But that, as the result shows, and was pointed out in the case of *Hutton* v. *Annan*, was a matter of pure speculation, and if any trustee were to lend money on such security it could not for a moment be justified. That, however, was not the only security which lenders had for repayment of their loan and interest, because they had the security of the rates, duties, and other revenues of the Trust, but that only, as I have pointed out, so far as these rates, duties, and other revenues might not be required to pay the loans and interest thereon having priority.

That leads accordingly to a consideration of the accounts of the Harbour Trust accessible to the lenders when this loan was finally concluded—that is about 16th October 1880. Now, as the Lord Ordinary has pointed out, the question is not exactly the same as in the case of *Hutton* v. *Annan*. In that case the date of the loan was 1885, and it may very well be that the accounts in 1880 disclosed a state of affairs which would have justified the loan at that date, although the accounts in 1885 may not have justified a loan at that date.

To meet the interest alone on the sum of £427,000 which the Harbour Trustees had obtained power to borrow, would, it will be observed, require a sum of between £16,000 and £17,000 a-year at 4 per cent., which was the rate payable on the loan in question. Now, it appears, taking the defender's figures to be correct, that the ordinary revenue of the Trust for the four years preceding the date of the loan had been for 1876 £69,211; 1877 £73,740; 1878 £72,154; and 1879 £66,865. The revenue from harbour dues and rates during the same years respectively had been £61,698, £65,169, £65,792, and £58,312, while the surplus revenue during the same years had been £11,258, £13,092, £6542, and £13,309.

These figures show that in none of these years was there surplus revenue sufficient to meet the interest of the debt on the sum authorised to be borrowed—that the revenue of the Harbour Trust was of a fluctuating character with a tendency to decrease, and could not be relied on to produce a larger surplus revenue in future years—that accordingly the only source which lenders could look to for payment of their loans and interest was that the new wet dock would yield a free revenue sufficient to meet the interest of the debt, but that, as was pointed out in *Hutton* v. *Annan*, was a matter of pure speculation. When we add to this that the bond in question was not a first security, but was postponed to a prior debt of £873,000 secured on the revenues of the Harbour Trust, I think the conclusion we must arrive at is the same as was arrived at in *Hutton* v. *Annan*, that this loan was not a reasonably safe investment for trust funds.

I have not taken into consideration the accounts of the Harbour Trust for the year 1880, because at the date the transaction was entered into they had not been published. At the same time they were accessible to a lender, and ought perhaps to have been seen. These accounts show a more unfavourable state of the revenue than these for the previous years.

It ought also to be noticed that the bond in this case, differing therein from the bonds in *Hutton* v. *Annan*, assigned to the lenders not only the rates, duties, and other revenues of the Trust, but also the works and property of the Trust — the money having been borrowed under the unexhausted borrowing powers of the Harbour Act of 1872, and not under the Act of 1880. But this makes no practical difference, because, as was pointed out in the case of *Cowan's Trustees*, no means were available, either under the Acts or at common law, by which the real property of the Harbour Trustees could be attached and applied in payment of the creditors. Moreover, if any such means existed the benefit would accrue, not to the defenders, but to the prior and preferable creditors of the Trust.

I am of opinion accordingly that the investment in question was not a proper investment for Mr Alexander's trustees to have made, and that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN, LORD KINNEAR, and the LORD PRESIDENT concurred.

The Court adhered.

Counsel for the Pursuers—Guthrie, Q.C —A. Davidson. Agent—James A. B. Horn, S.S.C.

Counsel for the Defender—Johnston, Q.C. —W. Thomson. Agents—Steele & Johnstone, W.S.

Friday, March 3.

FIRST DIVISION.

[Lord Kincairney, Ordinary.

SCOTT AND OTHERS *v.* MAGISTRATES OF GLASGOW.

Statute—Bye-Laws—Bye-Laws "for Regulating the Use of" a Market-Place—Ultra Vires—Markets and Fairs Clauses Act 1847 (10 *and* 11 *Vict. cap.* 14), *sec.* 42—*Diseases of Animals Act* 1894 (57 *and* 58 *Vict. cap.* 57), *sec.* 32 (3).

A local authority issued a bye-law to the effect that the sale rings at a public market belonging to it "shall not be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying."

Held (*aff.* judgment of Lord Kincairney—*diss.* Lord Kinnear) that the bye-law was "for regulating the use of the market-place" within the meaning of sec. 42 of the Markets and Fairs Clauses Act 1847, and therefore not *ultra vires*.

Statute—Bye-Laws—Approval by Government Department—Preliminary Hearing—Markets and Fairs Clauses Act 1847 (10 *and* 11 *Vict. cap.* 14), *secs.* 44 *and* 45—*Diseases of Animals Act* 1894 (57 *and* 58 *Vict. cap.* 57), *sec.* 32 (3).

The Board of Agriculture are not bound to hear parties before approving of a bye-law in terms of sec. 32, sub-sec. 3, of the Diseases of Animals Act 1894.

The Magistrates of Glasgow, as the local authority under the Contagious Diseases (Animals) Act 1878, established in 1879 a wharf at Pointhouse, Glasgow, for the landing of cattle brought to this country from Canada and the United States. The wharf was a public market, and was the only landing-place in Scotland authorised by the Board of Agriculture, under the Diseases of Animals Acts 1894 and 1896, for the reception of Canadian and American cattle, which must all be slaughtered before being removed from the Wharf. Sale rings were provided at the wharf where imported cattle were sold by auction, and the business of the market was regulated by certain bye-laws enacted by the Magistrates.

On 7th June 1898 the Executive Committee of the Magistrates, acting under the Diseases of Animals Acts 1894 and 1896, and the Markets and Fairs Clauses Act 1847, enacted the following bye-law with reference to Pointhouse Wharf:—"1. The sale rings shall be used only for public sales of cattle by auction on conditions of sale which shall be equally applicable to all bidders and buyers. The sale rings shall not be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding or buying." Two other bye-laws of a subsidiary and executorial character were also enacted at the same time.

These bye-laws were approved of by the Board of Agriculture on 10th August 1898.

On 7th September 1898, Roderick Scott, cattle and dead-meat salesman, Glasgow, and others, raised an action against the Magistrates of Glasgow, to have it declared that these bye-laws were null and void, and for reduction of the same.

The pursuers challenged the bye-laws on two grounds. In the first place they pleaded that they were *ultra vires* of the Local Authority and the Board of Agriculture. In the second place they pleaded that they were incompetent, not having been made and approved in terms of the statute.

1. In support of their first contention the pursuers averred—"(Cond. 4) The pursuers, or some of them, are in the habit of importing cattle from the United States and Canada, and of selling the same at Pointhouse Wharf. These sales are attended, and the cattle bought, by the pursuers, or some of them, and by members of the Fleshers' Trade generally in Glasgow and elsewhere for retail disposal. It is in the interest of the pursuers to limit these sales to the trade, and not only are they in fact so limited, but many of the pursuers have for many years been in the practice of selling under conditions which expressly exclude all bidders and buyers not belonging to the trade. The object of the Local Authority in passing these additional bye-laws is to compel all auctioneers who sell cattle at Pointhouse Wharf to accept bids from all and sundry. This interference with the liberty of the pursuers, as importers, auctioneers, and buyers, to sell to and buy from whom they please, has been made by the Local Authority in the interest of the Co-operative Societies, between whom and the Fleshers' Trade considerable friction has recently arisen. These societies have not only no connection with the trade, but are professedly hostile to it. They announce as their main object the suppression of individual traders such as the pursuers, and they use every means in their power, not only in the way of ordinary competition, but by combination and exclusive dealing, and by public agitation, to drive individual traders, and, *inter alios*, the pursuers, out of the market, and to ruin their business. While their wholesale departments adopt the policy of dealing exclusively with co-operators, these societies have, as regards foreign meat, instead of themselves importing cattle at Pointhouse and auctioning or disposing of them there, as they are free to do, adopted to an increasing extent the plan of buying at the pursuers' sales at Pointhouse (although they are not members of the trade), in order to supply co-operative consumers buying retail at the stores at wholesale prices. For their own protection, and for the protection of their trade, the pursuers, or some of them, were compelled to enforce as a condition of their sales the exclusion of co-operative bidders and buyers. The additional bye-laws are intended to prevent and would prevent any auctioneer selling at the Pointhouse Wharf from putting in his conditions of sale any stipulation that he will not accept of bids from parties representing directly or indirectly any Co-operative Society. (Cond. 5) The said additional bye-laws are illegal, incompetent, and *ultra vires*. They are, moreover, contrary to statute, in respect that they deal with a matter with which the Local Authority have no concern, their sole interest being the prevention of the spreading of disease, and the bye-laws dealing, not with the 'use' of the sale rings, but with the conditions between the sellers and buyers who use the sale rings." . . .

2. In support of their second contention the pursuers founded on sections 44 and 45 of the Markets and Fairs Clauses Act 1847, and section 32, sub-sec. 3, of the Diseases of Animals Act 1894, and averred—"The procedure prescribed by these enactments was not followed in making and approving the said additional bye-laws. In particular, no hearing was fixed or held, and the pursuers, although they urgently asked the Board of Agriculture to appoint a hearing, were given no opportunity of being heard against the said bye-laws." With reference to the defenders' averments that there had been a hearing before the Board of Agriculture on 30th November 1897, the pursuers explain that that hearing was not

a hearing within the meaning of the Acts of Parliament bearing on the matter, in respect that neither the President of the Board nor any of the Officers of State mentioned in the Board of Agriculture Act 1889 were present, and that it is provided by said Act that the Board shall not be entitled to act unless the President or one of said Officers of State is present.

Upon the whole matter the pursuers finally averred—"The said additional bye-laws are injurious to the pursuers and to the trade to which they belong. Their business, whether as wholesale dealers or as retailers, would suffer serious damage if they are not to be permitted to confine the wholesale transactions which take place at Pointhouse to members of the trade. This restriction is universal in all departments of trade not carried on upon the co-operative principle, and the pursuers' businesses could hardly be carried on at all if it were to be declared illegal. Moreover, the said bye-laws constitute a serious and illegal attempt to encroach on the pursuers' freedom and rights as importers and auctioneers, and deprive them of the right to conduct their sales at Pointhouse with such persons and under such conditions as have hitherto been the custom, and as are found expedient, in order to further their business, and protect themselves against the hostile combinations of co-operators."

The defenders' answers on the first branch were to the following effect:—"Admitted that cattle are bought at the sales by butchers for retail disposal. Admitted that cattle have for several years been bought at Pointhouse Wharf by or on behalf of co-operative societies, and that the pursuers and others recently sought to prevent, not only the co-operative societies, but persons in any way connected with them, and even persons having members of co-operative societies in their employment, from buying at the auctions of foreign cattle at Pointhouse Wharf. In March 1897 the pursuers, along with certain other persons, instituted what was popularly known as the 'butchers' boycott,' a combination formed for the purpose of excluding persons in any way connected with the co-operative societies from bidding at the public auction sales at Pointhouse Wharf. Until the institution of this boycott in March 1897 no bid from a solvent purchaser was ever refused by the cattle salesmen at Pointhouse Wharf, and there was no restriction in force in the sale rings excluding any class of the public from buying. Explained further, that not only a very large portion of the community of Glasgow, but vast numbers of people throughout the country, are connected with co-operative societies, and are dependent upon the sales at Pointhouse Wharf for their supplies of American and Canadian meat. The proposed bye-laws are intended to prevent the salesmen at this public wharf refusing the bids of these people simply because of their connection with co-operative societies. Owing to the action of the pursuers and those associated with them, the number of cattle consigned to the Foreign Animals Wharf at Pointhouse has been greatly reduced, and cattle which in ordinary course would have come to Glasgow market are being sent to ports in England."

On the second head the defenders explained that in September 1897 they had promulgated three new bye-laws, one of which was identical with the principal bye-law now complained of. The pursuers lodged objections thereto, and parties were heard before the Board of Agriculture on 30th November 1897. [The hearing took place before Mr Elliott, secretary to the Board of Agriculture.] For certain reasons these proposed bye-laws were withdrawn, and the defenders subsequently advertised the bye-laws now in question, to which the respondents lodged objections with the Board of Agriculture. That Department took the view that they were not bound to give parties a hearing on the matter, and that in any event, as parties had already been heard, a second hearing was unnecessary.

The defenders pleaded, *inter alia*—"(3) The bye-laws in question not being *ultra vires* of the Local Authority, but being legal and valid, and having been regularly and competently passed and approved of, these defenders are entitled to absolvitor."

The Markets and Fairs Clauses Act 1847 (10 and 11 Vict. cap. 4), sec. 42, enacts—"The undertakers may from time to time make such bye-laws as they think fit for all or any of the following purposes (that is to say): For regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein, and for preventing nuisance or obstruction therein, or in the immediate approaches thereto." . . .

Section 44—"No bye-laws under the authority of this or the special Act . . . shall come into operation until the same shall be allowed . . . by the Sheriff . . . and . . . approved under the hand of me, one of Her Majesty's principal Secretaries of State; and it shall be incumbent on . . . the Sheriff . . . to examine into the bye-laws . . . and to allow of or disallow the same." . . .

Section 45—"Provided always that no such bye-law shall be allowed in manner herein mentioned unless notice of the intention to apply for an allowance of the same shall have been given in one or more newspapers of the county in which the market or fair shall be situated, . . . and any party aggrieved by such bye-law, on giving notice of the nature of his objection to the undertakers ten days before the hearing of the application for the allowance thereof, may, by himself or his counsel, attorney, or agent, be heard thereon."

The Diseases of Animals Act 1894 (57 and 58 Vict. cap. 57), sec. 32, enacts—"(1) A local authority may provide . . . wharves . . . for the reception . . . or disposal of foreign or other animals . . . (2) There shall be incorporated with this Act the Markets and Fairs Clauses Acts 1847 . . . (3) A wharf or other place provided by a local authority under this section shall be a market within that Act; and this Act shall

be the special Act . . . and bye-laws shall be approved by the Board of Agriculture, which approval shall be sufficient without any other approval or allowance, notice of application for approval being given, and proposed bye-laws being published before application, as required by the Markets and Fairs Clauses Act 1847."

The Board of Agriculture Act 1889 (52 and 53 Vict. cap. 30), sec. 1, enacts—"(1) There shall be established a Board of Agriculture, consisting of the Lord President of the Council, Her Majesty's Principal Secretaries of State, the First Commissioner of Her Majesty's Treasury, the Chancellor of Her Majesty's Exchequer, the Chancellor of the Duchy of Lancaster, and the Secretary for Scotland, and such other persons (if any) as Her Majesty the Queen may from time to time think fit to appoint during Her Majesty's pleasure: Provided that the Board shall not be entitled to act unless the President or one of the Officers of State above mentioned is present." Subsection 2 empowers Her Majesty to appoint any member of the Privy Council to be President of the Board.

On 6th December 1898 the Lord Ordinary (KINCAIRNEY) found (1) that the bye-laws had been made and approved of in terms of the statute by which they were authorised; (2) that the said bye-laws were not *ultra vires* of the Local Authority and the Board of Agriculture: Therefore repelled the pursuers' pleas-in-law and assoilzied the defenders.

"*Opinion.*— . . . There is no doubt that these bye-laws are the outcome of a very pronounced antagonism which arose between a large number of butchers who kept butchers' shops, and co-operative societies who were in use to compete with the butchers at the Pointhouse sales; the view of the butchers (as I understand) being that the sales were to be regarded as wholesale sales, and the co-operative societies as practically and truly consumers, and that it was not fair—or at least that it was to the serious detriment of the butchers—that the co-operative societies being truly consumers should compete with the butchers who purchased there for re-sale by retail to other consumers. In order to give effect to this view a number of the Glasgow butchers in 1897 combined under the name of the Glasgow Fleshers' Trade Defence Association, and they intimated to the auctioneers who were in use to carry on the auction sales at Pointhouse that they would not bid at their sales unless they refused the bids of co-operative societies or of persons connected with co-operative societies. The auctioneers, fearing the loss of the custom of the butchers, yielded to this pressure, and inserted in their articles of sale provisions excluding co-operative stores, and the sales thereafter proceeded under these conditions.

"The Scottish Co-operative Wholesale Society raised an action in the Court of Session in order to try the legality of these proceedings. This action was called before me, and was defended by the Fleshers' Association, and by the auctioneers or salesmen. It is not necessary to detail the pleadings. It is sufficient to say that the result of the action was that on 14th January 1898 I pronounced a judgment by which I found in substance that the insertion by the auctioneers in their articles of roup of conditions excluding co-operative societies as bidders was not open to challenge as illegal or ineffectual, and (following certain recent decisions in England) that it was not relevantly averred that the Fleshers' Association had acted illegally in inducing the auctioneer to insert these conditions. My judgment is reported at page 645 of vol. 35 of the Scottish Law Reporter. It became final, and I am no doubt entitled—perhaps bound—to hold it in accordance with the law.

"But apparently the result did not commend itself to the Magistrates of Glasgow as Local Authority, or to the Board of Agriculture, as expedient, and hence the bye-law now in question, which certainly purports to provide a remedy for the state of matters brought about by the interference of the butchers, the concession of the auctioneers, and my interlocutor.

"There seems no doubt that these bye-laws resulted from the action taken by the butchers against the co-operative societies. But the pursuers in their argument put their case on a wider basis. They maintained that the question was not a question between butchers and co-operative societies only but a question between wholesale dealers, retailers, and consumers; that in the ordinary course of trade consumers buy from retailers, and retailers from wholesale dealers, who do not in the ordinary course of trade sell directly to consumers. They say that the effect of the bye-law is to prevent wholesale dealers in live Canadian and American cattle from refusing to deal directly with consumers, and from confining their transactions, if they so please, to sales or retailers, or, so to speak, middlemen, and they argue, I understand, that a bye-law having that effect is contrary to established usage and, as experience has proved, inexpedient and against the public interest.

"This is an action of reduction of the bye-laws, and it is defended by the Magistrates of Glasgow, the Local Authority. People may differ on the question whether it is most for the public benefit to confine such sales to the butchers, with a view to subsequent sale by retail, with the advantages which may arise from competition and individual enterprise, or to open the sales to consumers without restriction. But it is not for me, in disposing of this action, to consider the merits of that disputed point. It is a question with which I have nothing whatever to do. The only questions with which I am concerned, regard the validity or invalidity of the bye-laws, in respect of the manner in which they were enacted, and in respect of the power or want of power of the Local Authority and Board of Agriculture to enact them. . . .

"The next question in logical order is whether the bye-laws have been duly

enacted—that is to say, whether the statutory directions have been followed. There is no objection on this point to the actings of the Local Authority. The blot is said to be in the procedure of the Board of Agriculture; and what is said is, that whereas the Board is under statutory obligation to hear objections to a bye-law proposed by the Local Authority before approving of it, a hearing asked by the pursuers in support of their objections was refused.

"This point depends primarily on sub-section 3 of the 32nd section of the Diseases of Animals Act 1894; and secondly, but subsidiarily, on the 44th and 45th sections of the Markets and Fairs Clauses Act 1847, which Act is (with an immaterial exception) incorporated with the Act of 1894 (section 32, sub-section 2).

"Sub-section 3 of section 32 of the Act of 1894 enacts that a wharf provided by the Local Authority (which is the case of the Pointhouse Wharf), shall be a market within the Markets and Fairs Clauses Act, and that bye-laws shall be approved of by the Board of Agriculture, 'which approval shall be sufficient without any other approval or allowance,' notice of application for approval being given, and proposed bye-laws being published before application, as required by the Markets and Fairs Clauses Act 1847.

"There is here no provision for any hearing by the Board of Agriculture. The reference to the Markets and Fairs Clauses Act is to provisions in that Act as to notice of application for approval and publication of the proposed bye-law, but not (expressly at least) to any provisions in that Act about hearing objections.

"The sections of the Markets and Fairs Clauses Act referred to are 44th and 45th. By the 44th section it is provided that no bye-laws made under its authority (*i.e*; by the undertakers) 'shall come into operation until the same shall be allowed in the manner prescribed by the special Act' (*i.e*; in this case the Act 1894), or if there be no special Act, until it shall be allowed by the Sheriff and approved under the hand of a Secretary of State, and that it shall be incumbent on the Sheriff 'on the request of the undertakers, to examine into the bye-laws "tendered," and to allow or disallow them as may seem meet.'

"Section 45 provides that no bye-law shall be so allowed 'unless notice of the intention to apply for an allowance' shall have been given in the manner specified; 'and any party aggrieved by any such bye-law on giving notice of the nature of his objection to the undertakers ten days before the hearing of the application for the allowance thereof may, by himself, or his counsel, attorney, or agent, be heard thereon.'

"Under the provisions of the Act of 1894 no procedure takes place before the Sheriff. But the pursuers contend that the Board of Agriculture comes under the Act of 1894 in place of the Sheriff, and that it is by implication provided that the hearing allowed to objectors before the Sheriff by the Markets and Fairs Clauses Acts should now take place before the Board of Agriculture. It was argued that otherwise the provisions about notice and publication would not have been incorporated. The defenders contend that the Board of Agriculture takes the place under the Act of 1894 of the Secretary of State under the Act of 1847, and that the proceedings before the Sheriff, including necessarily the hearing before him, have all been abolished, and that nothing is required under the Act of 1894 except the approval of the Board of Agriculture, after the notice and publica- required by the Markets and Fairs Clauses Act, or such modification of these as was possible, which notice and publication might imply a right to object, but did not imply a right to insist on an oral hearing in support of objections. I have no hesitation in assenting to the latter contention, and I consider it quite illegitimate to hold that an obligation to hear objectors is imposed on the Board by a mere implication from the provisions of the Markets and Fairs Clauses Act for a hearing before the Sheriff. It is most reasonable to suppose that when a matter of this sort is committed to a public department such as the Board of Agriculture, it is left to the discretion of the Board to hear parties or not as might be deemed necessary, and in such form as might be thought expedient, more especially having in view the extensive discretionary powers expressly conferred on the Board by the Act of 1894, and also the fact that the initiative is in the hands of another public body—the Local Authority. I am of opinion, therefore, that the bye-laws cannot be reduced on the ground that the pursuers were not heard by the Board in support of their objections.

"It was further maintained by the defenders that (substantially) the pursuers had been heard by the Board, because they had been heard in support of their objections to other proposed bye-laws, the principal of which was identical with the first bye-law here in question, which bye-law had not come into force because there was one of them of which the Board had not approved. That hearing was before the Secretary of the Board. It is not necessary for me to decide that point, but I am not at present able to say that if the pursuers had a statutory right to be heard by the Board, that right could be held to be satisfied by the previous hearing, nor am I prepared to hold that a hearing by the Secretary of the Board was equivalent to a hearing by the Board, any more than a right to be heard before the Sheriff, conferred by the Markets Act, would be satisfied by a hearing before the sheriff-clerk.

"The third and much the most important question is, whether the first bye-law is *ultra vires?* If it is, of course the subsidiary bye-laws will fall along with it; if not, then the other bye-laws are not challenged.

"The bye-law is said to be *ultra vires* for two reasons—First, because it does not fall within the scope of the statute or statutes under the authority of which it is said to have been enacted; and secondly, because it is said to be repugnant to the law of Scotland. On the other hand, the defen-

ders maintained that the bye-law is within the scope of the statute which the defenders administer, and that it is in no respect repugnant to the law. The defenders supported the bye-law on a third ground, viz., that it is within the powers of the Local Authority, as proprietors of the wharf, without the sanction of the Board of Agriculture. I mention this third ground of defence because it was pleaded, but I shall not require to dispose of it.

"The first question is, Whether these bye-laws are *ultra vires* of the Local Authority? If they are, they could not be validated by the approval of the Board of Agriculture. If they are *intra vires* of the Local Authority, the approval of them was certainly and admittedly *intra vires* of the Board.

"The power of the Local Authority and of the Board of Agriculture, in virtue of which the bye-laws were enacted, is said to be conferred by the Diseases of Animals Act 1894, reading as part of that Act certain sections of the Markets Act which are incorporated; and it may be convenient here to notice the general character of the Act of 1894. It is entitled—An Act to consolidate the Contagious Diseases (Animals) Acts 1878 to 1893, which operation of consolidation is effected by the repeal of all these Acts with immaterial exceptions. Its short title (section 79) is the Diseases of Animals Act 1894. I do not find in the Act any clause which purports to express its general purpose, or the general scope of the powers of a local authority under it except the general provision that the Local Authority shall execute and enforce the Act. But, undoubtedly the principal object of the Act is the prevention of disease among animals used for food, whether foreign or not, and whether alive or dead. It is put under the administration and control of the Local Authority and the Board of Agriculture, and it seems to be framed on the plan of expressing in great detail the powers committed to the Board. Thus, in section 22 alone no less than thirty-seven matters are mentioned with regard to which the Board is empowered to make orders. The power so conferred on the Board appears to be unqualified, and to be entrusted to the Board on its own initiative and discretion. I may notice that among these clauses there is one (the 19th) by which the Board is empowered to make orders, subject and according to the provisions of the Act, 'for prohibiting or regulating the holding of markets, fairs, exhibitions, and sales of animals.'

"This provision was not referred to at the debate, and I was not informed what orders the Board of Agriculture had made under the powers. Both parties treated this part of the case as depending on the 32nd section of the Act by which the Markets and Fairs Clauses Act is incorporated, and on the clauses of the Markets Act so incorporated.

"The first sub-section of section 32 empowers the Local Authority to provide wharves and other places for 'the landing, reception, keeping, sale, slaughter, or disposal of foreign or other animals, carcases, fodder, litter, dung, and other things.'

"Sub-section 3, which has already been partially quoted, provides that such a wharf shall be a market within the Markets and Fairs Clauses Act, and 'bye-laws shall be approved of by the Board of Agriculture,' after notice and publication as required by the Markets and Fairs Act.

"It is provided by section 42 of the Markets and Fairs Act that the undertakers shall make such bye-laws 'for all or any of the following purposes,' and, *inter alia*, 'for regulating the use of the market place and fair, and the buildings, stalls, pens, and steadings thereon, and for preventing nuisances or obstructions thereon or in the immediate approaches thereto' . . . 'provided always that such bye-laws shall not be repugnant to the laws of that part of the United Kingdom where the same are to have effect.' Then follow the 44th and 45th sections already referred to or quoted providing for the approval of the bye-laws by a Secretary of State, for whom the Board is now substituted.

"It has been observed that the various powers conferred on the Board of Agriculture by previous sections of the Act are to be exercised simply by the issue of an order by the Board without the intervention of the Local Authority. The bye-laws authorised by section 32 are of the same general character as the orders mentioned in the previous sections. But apparently they are to be made in a different manner—no doubt for some good but not self-evident reason—namely, on the suggestion and action in the first instance of the Local Authority.

"Now, the statutory validity of the bye-laws in question depends on these provisions, and the question is, Whether they are thereby authorised, either expressly or by implication?

"It is maintained by the defenders that the bye-laws fall under the power, in section 32, imported from the Markets and Fairs Act, to make bye-laws for regulating the use of the market place or fair. The bye-law does, it is maintained, regulate the use of the Pointhouse Wharf, seeing that it provides that a part of it shall be used in a particular manner. The pursuers maintained that the clause in question relates only to the structure and area of the market and its approaches, and has no relation at all to the contracts between seller and buyer. They contended that it falls to be interpreted with special reference to the purpose and object of the statute, and that it could not empower a use of the market which bore no relation to that purpose and object. I think that this argument is sound to a certain extent, and that the power in question must be read with reference to the Act of 1894. I think that if the sole object of that Act were the prevention of disease and the regulation of the use of the wharf in carrying out that object, these rules could not be held as *intra vires*, because certainly they have no relation whatever to the prevention of disease, and no

tendency to carry out that primary object of the Act.

"But that is not the nature of the Act of 1894. It is a composite Act. Its main object, no doubt, is the prevention of disease; and that object is sought to be attained by very stringent regulations, requiring the slaughter of all cattle affected by disease, and the slaughter of all cattle sent from America and Canada, although not diseased. But then it provides not for their slaughter only but for their sale also; and it appears to come fairly within the scope of the Act that its administrators should take as much care as possible that their exclusion of food for the public benefit should be carried out with the smallest injurious effect to the food supply of the country. In committing to the Local Authority and Board the right and duty to regulate the use of the market, I think there was entrusted a power and duty to regulate the use of it in such a manner as to attain the double object of protecting the health of the public and of facilitating the access of the public to the food supply.

"Therefore, in the due execution of the part of the Act which regulates the sale of foreign cattle, I think that it was within the scope of the Act to have regard to the public interest in the sale of the cattle.

"A regulation for setting apart one part of the wharf for private sales, and another part for sales by auction, could not, I think, be challenged as not being a bye-law for the use of the wharf enacted in the due execution of the statute.

"Again, suppose the Local Authority and Board had been so much impressed with the views of both parties as to set aside one ring for sales by auction without restriction, and another ring for sales restricted to fleshers buying for retail, I think that such a rule, whether rational or not, must have been admitted to be a bye-law to regulate the use of the market, made in the due execution of the statute.

"And if that be so, it seems to me to follow that the enacting of the bye-law now in question was an exercise of exactly the same power. No doubt it has the effect of prohibiting altogether public sales of these animals, confined to members of the trade. But if it come within the character of a bye-law for the use of the wharf in execution of the Act, I am unable to see that that consequence can affect its validity.

"Had it seemed good to the Local Authority and the Board to prohibit sales by auction of the cattle absolutely, I am not prepared to say that such a rule could be characterised as altogether without validity, although it might possibly have been challenged as capricious and unreasonable. But when the power to make bye-laws is committed to the Local Authority and the Board of Agriculture, the public is sufficiently guaranteed against regulations which can be so designated.

"It was not maintained that the bye-laws in question could be held to be *ultra vires* on the ground of total unreasonableness, and I think it quite impossible so to hold. Whether the Local Authority and the Board of Agriculture have come to the right conclusion or not, it is certainly an intelligible and defensible view that the interests of the public would be best served by opening the markets unreservedly; and it seems to me that it was in their power to give effect to that view by this bye-law.

"It is said that the bye-law is so widely expressed that it will disable the salesmen from refusing the bids of insolvent offerers. But I think that is not a necessary or reasonable interpretation of the bye-law. It cannot bind the salesmen to contract with offerers who cannot fulfil their contracts; and having regard to the circumstances under which the bye-law was passed, it can only be held to mean that the sales were to be open to all *bona fide* bidders able to pay.

"It was further argued that the bye-law contravened the requirement in the Act that it should not be repugnant to the law of Scotland. The repugnancy was said to consist in this, that it prohibited the salesmen from attaching conditions to their sales, whereas it was otherwise the law that they were free to make their own conditions. I am of opinion that this objection is unfounded. It is not, I think, illegal to sell by auction to a limited class of buyers; but certainly, in general, sales by auction are open to all bidders, and would be held to be so if there was no stipulation to the contrary; and I think there is nothing repugnant to the law in a bye-law insisting that the sales on the Pointhouse Wharf shall be carried on under the usual conditions, and the bye-law does no more.

"The defenders referred to a passage in the judgment of Lord Campbell when Chief Justice in the case of *Edmunds* v. *The Watermen's Company*, 1855, 1 Jur. N.S. 727, in which the law on this point seems very clearly expressed. 'A bye-law,' his Lordship observed, 'cannot be said to be inconsistent with the laws of this country merely because it forbids the doing of something which might lawfully have been done before, or requires something to be done which there was no previous obligation to do, otherwise a nominal power of making bye-laws would be utterly nugatory.' I think that these observations apply to and meet the defenders' argument on this point.

"The defenders, the Local Authority, maintained that they could have made the regulation expressed in the bye-law in virtue of their proprietary right without the aid of either Board or statute. It is not necessary to deal with that argument, but I would not be understood as giving any assent to it. My opinion that the bye-law is *intra vires* is based solely on the statutes."

The pursuers reclaimed.

The arguments of parties sufficiently appear from the opinions of their Lordships.

At advising—

LORD PRESIDENT—The pursuers' objections to the procedure before the Board of Agriculture are in my opinion untenable, and I cannot say that this branch of the case seems attended with difficulty, Whereas under the Markets Clauses Act 1847 the bye-laws of the local authorities required the allowance of the Sheriff and the approval of the Secretary of State, the Act of 1894 requires for such bye-laws only the approval of the Board of Agriculture, which approval is to be sufficient without any other allowance or approval. The Sheriff's jurisdiction is thus cut out of the system. It is said, however, that inasmuch as when the Sheriff had jurisdiction he was required to hear parties, therefore the Board of Agriculture is bound to do the same. This seems to me by no means a natural result. It is manifest that procedure quite appropriate before a judicial officer may be much less appropriate before a Department of Government, and, as I read it, the Act of 1894 really leaves the Board of Agriculture to proceed according to its own methods. The argument of the pursuers on the statute rests on a very narrow ground. The Act of 1894, as I have said, makes the approval of the Board of Agriculture the only thing necessary to the validity of bye-laws; and then it adds—"Notice of application for approval being given, and proposed bye-laws being published before application, as required by the Markets and Fairs Clauses Act 1847." For the obvious purpose of explaining what are the methods of notice and publication thus referred to, the sections of the Act of 1847 relating to these points are incorporated. It so happens that in those sections the time for giving the notice has reference to the hearing by the Sheriff, for the good reason that this came first under the old procedure; and then the same section goes on (and this is what the pursuers found on) to require the Sheriff to hear objectors who give notice of objection. But if the pursuers' argument were good for anything, it must prove that the Sheriff's jurisdiction as to "allowance" still exists, for it is he and nobody else who is to hear the parties. This, however, being an impossible result, it is plain enough that what is meant is that notice of application for approval must have been given for a month before the Board of Agriculture can proceed to consider it. It is,. perhaps, doubtful whether the neatest way has been adopted of applying the old notice to the new approval; but this is merely a criticism on drafting. We are not required to use the sections referred to for any other purpose than that for which they are referred to; and, at all events, neither the sections referred to nor the section referring justify the application to the approving body of procedure which, so far as the old sections go, was enacted only for the Sheriff.

The other question in the case is more important and more difficult. We are asked to hold that the bye-laws were *ultra vires* of the Local Authority to make, and of the Board of Agriculture to approve. The pursuers' proposition is that those bye-laws are not made for regulating the use of the market-place, and the question primarily turns on the meaning of the word "use." I have found it difficult, and in the end impossible, to satisfy myself that the bye-laws in question do not regulate the use of the market. Stated generally, the bye-laws require that the auction marts which form part of the market are not to be used for sales restricted to certain buyers, but are to be used only for unrestricted sales. In so describing the controversy I think I employ the word "use" in a legitimate and ordinary sense, and if so this is a bye-law about use.

The pursuers' case is crisply stated in their record, when they say, by way of antithesis, that the bye-laws deal not with the use of the sale-rings but with the conditions between the sellers and buyers who use the sale-rings. But what I fail to see is that, for the reason given, they are not bye-laws about use. There is no inconsistency between the two. Nor do I think there is anything in the nature of the limitation effected by the bye-laws which compels us to place some restricted meaning on the word "use" in order to safeguard the pursuers against the interference proposed. The provision of the safeguards of the Act of 1847 and of the Act of 1894 does not encourage the idea that questions of use are mere mechanical detail; it suggests that matters relating to use may arise requiring broader views than might occur to the Local Authority.

The true nature of the question which we have to decide is the better understood by briefly reviewing the argument against the bye-laws on their merits. The case of the pursuers is seen at its best when stated from the point of view of the pursuer Roderick Scott. He is (or is assumed to be) an importer of cattle from America for sale in Scotland. He wishes to sell his meat to dealers in meat and not to others. His complaint is, that, being obliged under the Act of Parliament to bring his cattle to this particular market, these bye-laws will compel him to sell to people with whom he does not desire to contract. He goes on to say a great deal that is disputable about the merits of this exclusive system, but his most solid argument is that it is lawful and he prefers it.

Now, I shall suppose for the moment that the market in question was so limited in area that there was not room for holding two auctions, one restricted and the other unrestricted, but only room to hold one. In that case the Local Authority would have to decide which should be the terms (in this very matter) on which the one possible auction should be carried on. Conceding, as they might do, that the ideal state of things would be to allow those who liked restricted sale and those who liked unrestricted sale to gratify their tastes by each set having a sale of their own kind, the Local Authority would say that the exigencies of this market-place required them to elect between the two methods in order that

the market might be so used as most largely to subserve public convenience. In principle it is difficult to see an objection to this position, but my present purpose is to point out that a bye-law deciding the problem which I have put can hardly be denied to be a regulation of the "use" of the market. Now, I am not for a moment suggesting that the absence in the case which we have before us of any limitation of room in the market area does not make a great difference in the argument on the merits of the bye-law, but it does not make any difference at all on the question whether the bye-law is or is not a regulation of the use of the market. The difference is merely in the reason for regulating the use.

Again, suppose that for lack of room, or any other reason, it were deemed for the public convenience to put a stop to sales by auction in this cattle market, or (on the other hand) to stop private sales not by auction, this again would seem to be to regulate the use of the market, and it would at the same time be an interference with the choice by the seller of the kind of contract he might enter into.

My opinion is that the bye-laws in dispute are regulations of the "use" of the market, and I do not consider it a valid objection to them that they impose limitations on the contracts which may be made in the market. I do not think it contrary to law that these limitations should be imposed, and the very idea of bye-laws is limitation on the absolute freedom of choice by the persons using. I accept these conclusions the more readily because, both under the Act of 1847 and under the Act of 1894, there is careful provision for review of such bye-laws by authorities well qualified to restrain any unnecessary or impolitic interference with traders. As my view is that these bye-laws are *intra vires*, it would be inappropriate for me to discuss the soundness of the views upon which they are based. The question is an interesting one, and is on the confines of law, for it involves the application of general principles which animate both sound law and sound political economy. These are high matters, but they are not the less appropriate to be dealt with by a Department of Government. The fact, therefore, that what I consider the fair and ordinary meaning of the word "use" admits of questions which enter this region being raised by market bye-laws is not a conclusion repugnant to the scheme of administration which is before us.

I have discussed the question apart from a specialty to which I have come to think that not much importance belongs. The bye-laws relate not to the whole market but to that part of it which consists of sale rings. The defenders built those rings, and I daresay it is true that they need not have built them unless they chose. But, as things stand, these rings are the appointed places for auctions, and I make no doubt that the defenders could require that all auctions shall take place in these particular parts of the market-place and not in any other. Accordingly, I hardly think that there is room for the argument that the defenders having chosen to put up these buildings are entitled to prescribe their own terms for admission to them.

On the whole matter I am for adhering to the Lord Ordinary's interlocutor.

LORD ADAM—The bye-laws in question profess to have been made by the Local Authority of Glasgow under the provisions of the Diseases of Animals Act 1894, which incorporates the Markets and Fairs Clauses Act 1847, except sections 6 to 9 and 51 to 60 thereof. By the 42nd section of the last-mentioned Act authority is given to the local authority from time to time to make such bye-laws as they may think fit "for regulating the use of the market-place and fair, and the buildings, stalls, feus, and standings therein; and for preventing nuisances or obstructions therein, or in the immediate approaches thereto."

So far as I see, the only conditions necessary to the validity of such bye-laws are, as required by the same clause of the Act, that they shall not be repugnant to the laws of that part of the United Kingdom where they are to have effect—or to the provisions of the Act itself or the Special Act or any Act incorporated therewith—and, as required by the 37th section of the Act of 1894, that they shall have had the approval of the Board of Agriculture.

It appears to me, therefore, that the questions which arise for decision in this case are, whether the bye-laws in question are bye-laws regulating the use of the market-place and fair at Pointhouse Wharf; if so, whether they are repugnant to the laws of Scotland; and whether they have been validly approved of by the Board of Agriculture.

The first bye-law enacts that the sale-rings shall be used only for public sales of cattle by auction, on conditions of sale equally applicable to all bidders and buyers, and that the sale-rings shall not be used for private sales, or for sales to any limited number of persons, or for sales in which any class of the public are excluded from bidding and buying. Now, the enactment may be wise or foolish, it may or may not be repugnant to the laws of Scotland, it may or may not be *ultra vires*, but I certainly think that it regulates the use of the market-place and fair. The sale-rings are part of the market-place. It declares that these rings shall be used for sales by auction only when all persons are admitted to the sale on equal terms as bidders or buyers, and not otherwise. That appears to me to be a bye-law regulating the use of these rings, and therefore of the market-place. *Prima facie*, therefore, I think that the bye-law is one which was within the competency of the public authority.

The next question is, whether it is repugnant to the laws of Scotland. The object and effect of the bye-laws are sufficiently apparent.

The object is that the only sales by auction held at Pointhouse Wharf shall be such that all persons attending them shall be able to compete on equal terms, and to

prohibit all sales by auction at which particular persons—for example the trade—can be preferred. The result is that it prevents owners or consigners of cattle from selling them by auction to such persons or at such prices as they please. There is no interference with sales by private bargain in any way. Now, I can see nothing repugnant to the laws of Scotland in the owners of a public market so regulating their market, that only sales by auction, open to the whole public, shall be held therein; and if I am right in thinking that the bye-law is one such as the public authority was authorised to make—as being one regulating the use of the market—I do not think it is *ultra virès* because in its operation it may interfere in a greater or less degree with the right of private contract.

It may, for anything I know, be a most injudicious and inexpedient bye-law in that and other respects, and not one that should be approved of. But we are not the tribunal to judge of that. The Legislature has provided a far more fitting tribunal in the Board of Agriculture to protect the interests of all concerned in that respect.

The only other question is, whether the bye-laws have been validly approved of by the Board of Agriculture?

The pursuers claim that by statute they had a right to be formally heard before the Board of Agriculture on their objections to the bye-laws before they could be competently approved of by the Board, and that such a hearing was asked for and refused.

Under the Act of 1847 proposed bye-laws required both to be allowed by the Sheriff and thereafter by the Secretary of State. A hearing took place before the Sheriff, but not before the Secretary of State. It appears to me that by the procedure under the Act of 1894 the Board of Agriculture comes in place of the Secretary of State and not of the Sheriff, and that the Board were under no more obligation to have a formal hearing before them than the Secretary of State was under the former procedure.

I think the Lord Ordinary's interlocutor should be adhered to.

Lord M'Laren—The only question on which I desire to observe is the question whether the bye-law libelled is a valid bye-law in terms of the 42nd section of the Markets and Fairs Clauses Act 1847, which provides that the undertakers may from time to time make such bye-laws as they think fit "for regulating the use of the market-place and fair, and the buildings, stalls, pens, and standings therein." It seems to me that these are words of a very general and comprehensive character, and that they cover everything which could or might be a subject of regulation by a market authority. As the power is contained in a Markets and Fairs Clauses Act, it was necessary that the enabling words should be quite general, because the matters to be regulated might be very different according to the description of the market and the value of the goods intended to be exposed to sale.

One of the characteristics of the Pointhouse Wharf is that it is a monopoly market. The Legislature, for the purpose of preventing the spread of diseases amongst cattle, has decreed that under certain conditions, imported cattle shall only be landed at places approved by the Board of Agriculture, where facilities are provided for the slaughtering and immediate disposal of the imported animals. It is admitted that Pointhouse Wharf is the only existing market in the West of Scotland where imported American and Canadian cattle can be landed and sold. I can hardly doubt that in framing bye-laws it was a proper, that is, a relevant, topic of consideration on the part of the Magistrates of Glasgow that this was a monopoly market, and that it might be necessary to subject to regulation certain conditions of sale which in the ordinary course of business are best left to be settled by competition. The subject of the regulation which we are invited to reduce is the admission of the public as purchasers to sales held within the Pointhouse Wharf, and this is a subject which, as I think, is entirely within the powers of regulation given to the undertakers. I have difficulty in conceiving how there could be a process of regulation at all if it did not extend to such a matter as the admission of purchasers to the market. Of course there is a right way and a wrong way of using such a power, and I do not doubt that the Court has jurisdiction to correct an abuse of the power of regulation even when applied to a subject which is a proper subject of regulation. If, for example, a bye-law had provided that none but members of a butchers' association should be entitled to purchase at sales within Pointhouse Wharf, I should, as at present advised, consider that the bye-law was reducible, because in the case supposed it would be prohibition under the guise of regulation.

If the Magistrates had declined to make any regulation on the subject, or if the bye-law had set apart certain days and hours during which all sales should be public, allowing restricted sales to be held at certain other days and hours, it would then be a question of circumstances whether sufficient provision had or had not been made for the requirements of the public outside the trade. I do not think that it would be easy to displace the decision of the Board of Agriculture on such a question. In the case before us the bye-law in effect provides that all sales held within Pointhouse Wharf shall be open to the public, and I think it was for the Magistrates (subject to the confirmation of the Board of Agriculture) to consider whether within the limited space at their disposal it was expedient to permit sales limited to the trade, or whether the uses of the market would be best served by a system of sales in which no class of the public is excluded from bidding or buying. We are not entitled to review the bye-law as a discretionary regulation, but only to set it aside if it is *ultra vires*. I think the bye-law is not *ultra vires*, because no one is excluded, and no one can say that he suffers

any injury, except that he is obliged to submit to competition by persons that he does not like. Now, this is a kind of inconvenience which may cause discomfort to sensitive persons, but which seems to me to be more than compensated by the greater convenience in the case of a public market of throwing open the sales to every member of the public. The regulation is, I think, accordant with the character of the market as a public market, and an exclusive market for foreign cattle; the fact that certain exposers or purchasers find the regulation inconvenient does not necessarily make it an excess of power. I understand, however, that one of your Lordships considers the bye-law objectionable as going beyond regulation, and amounting to an interference with the conditions of sale. Now, in general a seller is entitled to select his buyer, and to confine his course of dealing to a particular class of buyers, and if the bye-law in question were applied to sales by private bargain, I should be disposed to hold that it was an undue interference with the rights of a seller making use of the market to say that he should not be entitled to confine his dealings to persons belonging to his trade. But having regard to the peculiarities of sales by auction, to which alone the bye-law applies, I think the objection is unsubstantial. There is no *delectus personæ* in a sale by auction, and I think that a seller who abandons the subject of sale to the person who bids the highest price, whoever he may be, cannot say that his contract rights are interfered with because for reasons of general convenience he is debarred from excluding certain possible purchasers to whom he does not wish to sell. Still less can the other competing bidders complain that they are injured in their rights because under the bye-law the auction is thrown open to every member of the public. The only effect of enlarging the circle of competitors (so far as they are concerned) is that the goods may be run up to a somewhat higher price than they would command under a system of restricted sales. But then this is an inconvenience to which the purchaser must submit, because it is not the result of anything unfair or one-sided in the bye-law, but is the natural and unavoidable result of giving free play to the principle of sale by auction, which is that the price is not determined by agreement but by competition.

In all the circumstances I see no reason to doubt that the Magistrates of Glasgow have the power to regulate auction sales as they have done, and that the regulations complained of are proper regulations in the sense of being intended to promote the convenient use of this public market.

On the other points in the case I concur with the Lord President.

Lord Kinnear—I concur entirely with your Lordships upon the first question which we have to consider, viz.—Whether the proceedings before the Board of Agriculture were regular or not? I agree, for the reasons stated by your Lordship in the chair, that the objection upon that ground is untenable.

But I regret that I am unable to agree with your Lordship upon the more material part of the case, although I am certainly diffident in dissenting from all the other members of the Court affirming the opinion of the Lord Ordinary upon that question. I think it is a question which depends exclusively upon the construction of the Markets and Fairs Act of 1847, on which the power to make bye-laws rests.

I should not attach any importance to the argument that the bye-law in question was objectionable, whether as applicable to sales by auction or to private sales.

I assume that it is a perfectly right and expedient bye-law for the public interest, but I express no opinion upon the subject, because I think that is not a question for this Court, and I think it is just as little a question for a local authority or for the Board of Agriculture, but for the Legislature alone.

The sole question for this Court appears to me to be whether the bye-law is or is not within the words of the Act properly construed.

Now, the statute authorises a local authority to make bye-laws for the purpose of regulating "the use of the market place and fair, and the buildings, stalls, pens, and standing-places therein," and for "preventing nuisances or obstructions therein, or in the approaches thereto."

I think that the construction of the more general words, "use of the market," is very much aided by the specific enumeration of particular uses which follows.

That all appears to me to point to the use of the market-place as constructed for a market or fair—that is, for a resort of buyers and sellers either for public or private sales.

Now, I do not think that the bye-law which the Local Authority has made is a regulation for the use of the market at all.

It is in terms a bye-law which directs that sale rings, which form a part of the market-place, shall be used only for public sales by auction "on condition that all such sales shall be equally available to all bidders and buyers." That is a regulation which appears to me to be in design and purpose a regulation of the conditions of contract, and not of the use of the market.

I do not think that that falls within the fair meaning of the words, and I think that it is an assertion of a power so inconsistent with all recent legislation that it would require very clear words indeed to enable us to ascribe to the Legislature an intention to entrust so large a power for the regulation and control of trade, not only to a local authority such as that now in question, which represents a large community, and which may very well be supposed to act with a view to public interests, but also to every society of persons who may be enabled to construct a public market-place in terms of the Act of 1847.

I do not think it at all necessary or desirable to enlarge upon or to illustrate the view which I take, because it cannot be stated more clearly than it was by the pursuers' counsel, whose main objection to the

regulation was that it was not a regulation for the use of the place where contracts are made, but a regulation for fixing the terms of the contracts themselves, and that appears to me to be *ultra vires* of the Local Authority.

I must say, with great respect, that I am not moved by the consideration that the Local Authority might within their powers have done something which might have had very much the same effect as the bye-law that is now objected to, provided the conditions of the market had made it necessary or appropriate for them to do so.

If the exigencies of the market should require those who manage it to say, "There is not sufficient room for all the public who resort to this market, or for all the sales that they desire to carry on, and therefore we must, for the purpose of enabling the market to be used at all, restrict the number of sales which may take place," it may very well be that it would be within their power to say that the greater number of frequenters of the market are the persons to be considered rather than the smaller number, and that since there is no room for everybody, those only shall be allowed to sell whom they consider to serve the greatest number of the public. That might very well be, and I quite concur with the observation of the Lord Ordinary, when he says that if the Local Authority had set aside one ring for sales by auction without restriction, and another ring restricted to fleshers buying for retail, such a rule, whether rational or not, must have been admitted to be a bye-law for the regulation of the use of the market made in due execution of the statute. I think that might very well be, because the hypothesis is that the convenient use of the market requires one part of it to be set aside for one purpose, and another part of it to be set aside for another. But then I confess I am quite unable to follow his Lordship when he goes on to say—"I think if that be so, it follows that the enacting of the bye-law now in question was an exercise of exactly the same powers.'

I must say, with great respect, that it does not seem to me to be good logic, because the objection to the bye-law now in question is that it does not profess, it does not purport in its terms, and it does not in fact operate, to provide accommodation for persons frequenting the market at all, but that it is in profession, as I think also in effect, a law for controlling the trade of persons who resort there.

It is one thing to say that you may regulate the use of the market-place so as to provide accommodation for buyers and sellers, although your regulations may confine the persons who choose to make a particular kind of contract to one part of the market, and exclude these from others, and it is a totally different thing to say that, irrespective of all considerations of accommodation or convenient use, you may forbid those who make use of the market to make contracts of which on economical grounds you do not approve, and to choose their own customers. I entirely agree that, if your Lordship's reading of the general words of the statute be the true one, then there is an end of the question; this bye-law is quite within the power of the magistrates, but if the question be whether that is or is not the true construction of the statute, then I think it does not at all aid one in coming to the Lord Ordinary's conclusion to find that other regulations might have been made which would not have been open to the same objection.

For these reasons I regret that I am unable to concur with your Lordships in the conclusion at which you have arrived, although I am entirely of the same opinion as to the objection to the procedure before the Board of Agriculture.

The Court adhered.

Counsel for the Pursuers—Balfour, Q.C. —Clyde. Agent—J. Gordon Mason, S.S.C.

Counsel for the Defenders—Ure, Q.C.—Cook. Agents—Simpson & Marwick, W.S.

Friday, February 3.

FIRST DIVISION.

[Lord Stormonth-Darling, Ordinary.

FRASER *v.* FORBES' TRUSTEES.

Succession—Testamentary Writing—Direction to Give Effect to Informal Writings under Hand of Testator.

A testatrix by formal trust-deed directed her trustees "to pay any legacies and to carry out any instructions I may give by any writing under my hand clearly expressive of my wishes, although the same may not be formal." In a desk belonging to the deceased there were found after her death an envelope containing a document signed but not written by the testatrix, and stating that she wished to bequeath sundry pecuniary legacies. *Held* that the document was a testamentary writing under her hand of the nature contemplated by the trust-deed, and must receive effect.

Succession—Double Provision—Cumulative or Substitutional.

When a testator bequeathes the same sums in two separate valid testamentary writings to the same legatees, the legacies must be regarded as cumulative unless there is something to show that a different construction is necessary and that the later legacies were substitutional.

Circumstances in which this presumption given effect to.

Mrs Forbes died 4th May 1896 leaving a trust-disposition and settlement dated 12th July 1893, which was formally executed and tested. It narrated that the truster considered "that my means have considerably increased since I made my former will in 1869, and that I consider that I had