On every ground, therefore, it must be regretted, that a matter of this kind resting purely on two or three very bad subtleties should have been brought up to your Lordships' bar. I therefore concur that the appeal ought to be dismissed with costs.

LORD COLONSAY.—My Lords, notwithstanding the ingenious criticisms that we have heard on the Factors Act, and the very ingenious arguments rested on these criticisms, I have not been able to arrive at any other conclusion than that to which my noble and learned friends have come. I think that this case comes clearly within the scope of the Factors Act, and that Campbell Brothers were entrusted with a document of title. That being so, on the grounds which have been stated by your Lordships, I can have no doubt in concurring in the judgment proposed. But I may say further, that, on the grounds on which the case was rested in the Court below, I should also have been of opinion that that judgment was well founded. The law of Scotland in regard to this matter had been, previously to the Factors Act, for a considerable time gravitating in that direction, and now that state of the law has been confirmed over the whole kingdom by the Factors Act. It was laid down by Mr. Bell in his Commentaries upon the law, that a factor had the power to pledge his principal's property. Upon every ground, therefore, I think the judgment of the Court below ought to be affirmed, and that the appeal ought to be dismissed with costs.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Appellants' Agents, A. K. Morison, S.S.C.; Simson and Wakeford, Westminster.—*Respondent's Agents,* Hamilton, Kinnear, and Beatson, W.S.; Grahames and Wardlaw, Westminster.

MARCH 20, 1871.

DAVID JAMES SMEATON, *Appellant*, *v.* THE MAGISTRATES AND COUNCIL OF ST. ANDREWS, as Commissioners of Police, *Respondents*.

Police Improvement (Scotland) Act, 1862—Contract with Owner of premises affected by works—Implement—*S., the owner of grounds, through which the Police Commissioners proposed to make a sewer, objected to it and suggested another route, but the Commissioners insisted on their original scheme. S. then made a large claim for compensation, whereupon a negotiation took place which ended in heads of agreement, purporting that the proposal of S. was accepted, subject to a slight alteration, and that a formal deed would be executed. The Commissioners afterwards abandoned this agreement, being advised that it was* ultra vires, *whereon S. raised an action concluding for implement.*

HELD (reversing judgment), *That it was competent for the Commissioners to enter into a binding agreement with individuals whose property was to be affected by the proposed works, and that S. was entitled to have the formal deed executed, but that after it is executed, notices must still be given under the 394th and 395th sections, and objections of third parties entertained.*[1]

The Police Commissioners of St. Andrews having resolved to make a sewer through the grounds near the appellant's house, which was used as an Academy for young gentlemen, the appellant stated objections to it, and proposed another line passing outside his grounds, and which would serve the same purpose and be less prejudicial to his premises. The Commissioners did not adopt this suggested alteration, and gave the statutory notice to all parties objecting to the line they proposed. Mr. Smeaton, by counsel, urged his objections before the Commissioners, but these were overruled. He then appealed to the Sheriff; who decided in favour of the Commissioners. Mr. Smeaton then made his claim for compensation, which claim was for £3000. At this point a negotiation was entered into between Mr. Smeaton and the Commissioners, and their respective agents and surveyors, and on 12th February 1866, an arrangement, embodied in certain "heads of agreement," was come to, whereby the Commissioners were to execute the sewer in a line pointed out by Mr. Smeaton, and he was to waive all right to compensation, and a formal deed was to be executed, embodying the stipulations and provisions of the agreement, and other necessary formal clauses. At a meeting of the Commissioners to consider Mr. Smeaton's proposed agreement, the Commissioners resolved, by a majority of 14 to 13, to adopt the agreement, subject to a small variation specified. They at the same time gave notice to their contractor not to proceed with the original scheme, and they obtained Mr. Smeaton's assent to the variation suggested. Mr. Smeaton on his part also withdrew his claim to compensation.

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[1] See previous report 7 Macph. 207; 41 Sc. Jur. 132. S. C. L. R. 2 Sc. Ap. 107; 9 Macph. H. L. 24; 43 Sc. Jur. 349.

At their next meeting the Commissioners, having meanwhile consulted counsel, resolved to abandon their former resolution, accepting Mr. Smeaton's propositions, and to carry out the scheme as at first proposed by themselves. Thereupon Mr. Smeaton raised an action to have the agreement implemented and the Commissioners interdicted from executing any other scheme than that agreed to by the heads of agreement. The Lord Ordinary held, that there had been a concluded agreement between the parties, but the Second Division reversed that judgment, and held that there had been no concluded agreement; whereupon Mr. Smeaton brought the present appeal.

Sir R. Palmer Q.C., and *H. J. Moncreiff*, for the appellant.—The judgment of the Court below was wrong. In the circumstances admitted on the record a final agreement had been entered into between the parties. There is nothing in the Statute to shew, that the Commissioners are not as much bound by a contract as any individual would be. If the interests of third parties are involved, that will be for future consideration, and the directions of the Statute must be obeyed in the future action of the Commissioners. But it is enough for the present to say, that as between the appellant and respondents, the contract must be taken to be concluded, and the respondents must execute the formal deed agreed upon.

Jessell Q.C., *Pearson* Q.C., and *J. Campbell Smith*, for the respondents.

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

Now there are several objections taken to this agreement. The first I have already dealt with, namely, that Mr. Grace is supposed not to have had any authority to intimate to Mr. Smeaton its acceptance by the Commissioners, and I say no more upon that subject.

Then it is said, that it was not competent to this Board to enter into any agreement whatsoever, of the character in question, first on this ground, that the Sheriff's decision for the original line of sewer was final under the Act of Parliament, and the Sheriff's decision being final, it was not competent for the Commissioners to go back from the line which had been determined upon by the Sheriff, and to substitute another line even by consent. And that indeed was the view which was in the first instance taken by the Lord Ordinary in the course of this litigation, but the Court of Session held, that the Lord Ordinary was in error upon that conclusion, and I think justly so held. The decision of the Sheriff is to be final in this sense, that when a party complains of a course of dealing with his property with reference to the line of sewerage which may be adopted, he has it open to him to go before the Sheriff, and to make out such a case as he may be advised, as to the propriety of the adoption of the line. The Commissioners, if they persist in that line, state their case before the Sheriff, and the Sheriff comes to his own determination as between the lines proposed by the parties before him upon that occasion. But the Act of Parliament never meant to state that the Sheriff was to do more than, when these matters were brought before him, to say, that as between the two parties to this agreement, namely, the Commissioners on the one hand, and the party whose property was to be taken on the other, the Commissioners were entitled to do that which was the right and proper thing to be done. That determination being made, there was nothing to prevent the Commissioners, in lieu of entering into expensive contests, and subjecting themselves to heavy damages in consequence of the line they had taken upon a full review of all the circumstances of the case, from coming to an arrangement with those who opposed them, and taking a different course for the purpose of saving money to those whose funds they have to deal with, namely, the rateable inhabitants of the town, in the execution of works of this description. In truth, this objection is very nearly allied to a subsequent objection as to whether it was competent to the parties to enter into any agreement at all. I think it is founded upon a misconception of the compound problem. which has to be solved by the Commissioners. It is not the mere dry problem whether or not a line in a particular direction in an engineering point of view will be more convenient than another, because it may be convenient to take the sewerage through some very valuable property ; indeed, it might be convenient to take it through the middle of a manufactory which would be able to make out a serious grievance, and be able

to obtain exceedingly heavy damages in consequence of it. Their judgment is to be exercised in the best manner in the interest of the town.

The question they have to determine is, what would be the best, all things considered; taking expense into consideration amongst other things ; taking the expense of the work and the amount of compensation that they may have to pay for injury to parties who may be affected by the proposed line, and any other expense, into their full consideration, and taking into consideration the engineering question as to the merits of the proposed line, and to say what, on the whole, is it best for us to do for the interests which are entrusted to our charge? I apprehend, therefore, that they had a perfect right, notwithstanding that the Sheriff had come to that decision, to enter into the negotiation they did enter into.

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

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

Now, with regard to the power to enter into the agreement, I am content to rest on the decision of the Judges and the reasons there given. I need not read them, but Lord Cowan states them very fully. They are pretty much what I have ventured to give. Their reasons were, that the Commissioners were competent to act to the best of their judgment in laying down the line of sewerage, and that upon that ground they did not conceive that there was any obstacle, from the Sheriff having come to a certain conclusion of a defined character to prevent their entering into the consideration of all that was best for the interest of the property entrusted to their charge. Lord Neaves also, I think, assented to that proposition of the first interlocutor of the Lord Ordinary. Then the case went back to the Lord Ordinary, and there arose this last objection that I have to deal with, and which is at the foundation of the present appeal. The Lord Ordinary having had the case remitted to him with a declaration of his having been in error as regards the finality of the decision of the Sheriff, he, on reconsideration, came to the conclusion, that the agreement was effective. He, having been instructed by the higher Court to determine that question, held, that it had been proved, taking the view which I ventured to take, to be a binding and conclusive agreement between the parties. Then it came in the last instance before the Judges of the Court of Session, and they were of opinion that, looking to all the circumstances, it must not be taken to be a final and concluded agreement, and, amongst other things, they relied a good deal upon the form in which the matter was presented as being the basis of an agreement and not an agreement itself, and upon the circumstance of its referring to a future deed to be executed, for which instructions were given, and they relied also upon what they considered to be the impropriety of allowing a body of this kind to be hastily surprised into an agreement, and they considered that this agreement, come to by a majority of one voice, indicated that to have been the character of the agreement thus entered into.

I will read the opinion of Lord Cowan upon this part of the case. He says, "taking the terms of the memorandum, and of the resolution together, therefore, I cannot hold the parties definitely and absolutely bound themselves and the community of St. Andrews to these heads of agreement. The parties were still *in nudis finibus contractus*, and until the formal deed was written out and duly subscribed by the parties respectively, by the pursuer on the one hand, and by the preses and clerk of the meeting on the other, it seems to me that they are to be regarded as still entitled to resile, especially should good ground for doing so meanwhile arise to induce the one or the other so to act."

Now the point with reference to the preses and the clerk I confess appears to me to be not sustainable. It rests upon the clause of the Act which says, that contracts with regard to works should be signed by the preses and the clerk. I very much doubt whether that relates to a

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

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

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

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

It seems to me, therefore, that our course is plain, namely, that we have simply to follow the interlocutor of the Lord Ordinary, which declares, that according to the first conclusion of the summons the Commissioners are bound to execute the deed which they have agreed to execute, and which was in truth agreed to be executed, when the parties attempted to resile from the agreement. I am of opinion that they had no power to resile. I think that after the execution of the deed the matter must be remitted to the Court below, who will see that all proper steps are taken with regard to it. I think there was nothing at all judicial upon the part of the Com-

missioners with reference to the determination of the line which they proposed, as a matter originating in their own minds, and as to which they were to hear all the objections that might be made against it. But now they will take it as a matter which did not originate in their own minds, but which originated in another mind, and to which objections may be made by others. It seems to me that they will stand in exactly the same position as they would have stood in, if, by a majority of 13 to 12, they had originally resolved to carry the line in this particular direction.

They have resolved to carry it in this particular direction after considering all the circumstances, and calculating all the chances, including the chance of having to pay heavy damages in the usual way by the verdict of a jury.

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

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

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

The determination of this question depends upon whether the agreement mentioned in the summons was a concluded and binding agreement between the parties. The Lord Ordinary by his first interlocutor found, that "an agreement was entered into and was concluded between the pursuer and defenders in the manner, and to the effect, stated in the 18th and following articles of the condescendence on his behalf." But the defenders having, by their 3d plea in law, pleaded, that "The Sheriff having already sanctioned a certain line of main sewer through the pursuer's lands, and the decision being by the Police Act declared to be final and conclusive, it is not now competent for the defenders to adopt a totally different line of sewers through the said lands," the Lord Ordinary found, "that assuming the said agreement to have been concluded as alleged, the execution of the same as such is not capable of being specifically enforced by the pursuer, or being executed by the defenders, in so far and in respect that the terms thereof are inconsistent and incompatible with the terms of the decision of the Sheriff above mentioned," which is declared by the Act "to be final and conclusive, and not subject to review by suspension, reduction, or advocation, or in any manner or way." He therefore sustained the 3d plea in law of the defenders, and assoilzied them from the conclusions of the summons.

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

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

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

The question as to the competency of the Commissioners to enter into agreements with individuals, whose property is to be affected by the proposed works, was before the Court of the Second

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

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

It was not denied, that if the memorandum of agreement had been entered into between private persons, it might have been specifically enforced against the parties refusing to perform it. But it was held by the Second Division, that the memorandum was a proposal merely to pave the way for a final settlement; and to use the language of Lord Cowan, "the parties were still *in nudis finibus contractus*, and until the formal deed was written out and duly subscribed by the parties respectively, by the pursuer on the one hand, and by the preses and clerk of the meeting on the other, they were to be regarded as still entitled to resile."

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

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

At the morning sitting of the Commissioners on the 12th February 1866, the "Memorandum of the proposed Heads of Agreement" was laid before the meeting.

After specifying the terms to be agreed to on both sides, it concludes in these words, "A formal deed of agreement embodying the stipulations and provisions above written, and other necessary formal clauses, shall be prepared by the Commissioners' agent, and revised by the agent of Mr. Smeaton (in duplicate), within 14 days from this date, the expense of said deed to be defrayed by the parties mutually." And this was signed by Mr. Nicholson on behalf of the pursuer.

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

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

It seems to have been considered by the Court below, that the resolution adopting the memorandum was not binding on the Commissioners until it was communicated to the appellant, and that there was no regular communication made to him, as the clerk had no authority from the Commissioners to communicate the resolution. But I apprehend, that the resolution of the meeting, and the direction to carry out the agreement, bound the Commissioners without any formal communication of their proceedings to the appellant. The Commissioners must have been informed by their clerk from time to time of the progress which was making towards the preparation of the deed, and they never appear at any time to have suggested, that there was no

final agreement, or that their clerk had no authority to communicate with the appellant on that footing. In particular, the letter of Mr. Grace to Messrs. Drummond and Nicholson of the 16th of February 1866 could not have been written without authority of the Commissioners. He there says, "In consequence of the arrangement that has been made between the Commissioners and Mr. Smeaton I think it would be satisfactory that you wrote me withdrawing the notice given by him to have the compensation fixed by a jury, and I beg you will write me accordingly." I think that it was on the following day that Mr. Smeaton wrote a letter, withdrawing the notice which had been given to the Sheriff. That the Commissioners considered the agreement (if legal) to be a concluded one appears also from the report of the committee to which my noble and learned friend has alluded, in which they speak of this agreement, and of the reluctance to withdraw from it, but say that in consequence of legal difficulties they feel themselves bound to do so.

Lord Cowan thought the parties entitled to resile, "especially (as he said) should good ground for doing so meanwhile arise to induce the one or the other in good faith so to act." "And," he adds, "so it happened with the Commissioners, for having consulted their counsel, they were advised that their reduction was illegal and *ultra vires*." But this turned out to be an erroneous opinion of counsel, as the Court of Session decided that the agreement was not *ultra vires*.

Another ground suggested for rescinding the agreement was, that the surveyor to the Commissioners would refuse to certify for a sewer in the direction specified in the agreement. But the certificate of the surveyor is required under the 395th section of the Act only where an objection has been made to the intended work, and after the person making the objection has been heard; and *non constat* that there will be any objection.

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

There seems to me to be nothing in the objection, that the conclusion of the summons asks for a declarator, that the Commissioners are bound to execute a deed of agreement embodying the stipulations and provisions contained in the memorandum or heads of agreement signed by Alexander Nicholson, whereas that memorandum was not accepted simply by the Commissioners, but with a variation. It is to be observed, that the appellant's 1st plea in law is founded upon a valid and binding agreement having been constituted by the memorandum of agreement; and the defenders' acceptance and adoption thereof at a meeting of the 12th February 1866, and the pursuer's acceptance by his letter of the following day. But upon the conclusion of the summons itself, I think that if the Commissioners objected to a declarator of their being bound to execute a deed in the terms of the summons on account of their acceptance of the memorandum or heads of agreement, with a variation, the appellant might at the hearing consent to have the deed with the variation introduced by the Commissioners.

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

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

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

But there has been, and still is, an awkwardness in the position into which this case has been

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

But another thing has been fixed in this case which is of some importance, and that is by the judgment of this Court repelling the 3d plea in law for the respondents. The Lord Ordinary dismissed the action and assoilzied the respondents, on the ground, that the proceedings before the Sheriff had already fixed the line of the sewer, and that it was not competent to the parties to come to the Court in the form in which they did. His first interlocutor is to the effect, "that assuming the said agreement to have been concluded as alleged, the execution of the same was not capable of being specifically enforced by the pursuer, or of being executed by the defenders, in so far and in respect that the terms thereof are inconsistent and incompatible with the terms of the decision above mentioned, and which decision is under the terms of the 397th section of the Statute (25 and 26 Vict. cap. 101) declared to be final and conclusive." And therefore he sustains the 3d plea in law for the defenders, and assoilzies them from the conclusions of the summons. The 3d plea in law was this—"The Sheriff having already sanctioned a certain line of main sewer through the pursuer's land, and the decision being by the Police Act declared to be final and conclusive, it is not now competent for the defender to adopt a totally different line of sewers through the said land." That obstacle then to the proceedings of the Court of Session has been removed by the judgment of the Court, which alters the interlocutors of the Lord Ordinary, and repels that plea. There were two interlocutors, one on the 20th of March, recalling the interlocutors of the Lord Ordinary, and another of the 30th of March, repelling the third plea in law for the defenders.

Then there was another plea which the Court dealt with: "That on the assumption that the document does contain a completed contract, it was *ultra vires* of the defenders to enter into such a contract, and contrary to their duty to the public."

I do not know exactly upon what ground that plea of *ultra vires* was intended to be placed. I do not think much was made of it here. I see that, in the case of the respondents, the plea of *ultra vires* is put in this case "because it was *ultra vires* of the respondents to enter into a contract with the appellant of the kind alleged by him, without due notice to the ratepayers, and without affording them an opportunity of stating objections to this contract, and the stipulation contained in it," and "because the respondents had no power to fix on this deviation line of sewers without the public notice required by the Statute." I do not think there is much weight to be given to these objections, because, as I understand the matter, the Court below, in disposing of the 3d plea, stated their opinion, that it was competent for the Commissioners to enter into agreements and to alter their views as to the line that any particular sewer should take up, if they found sufficient reason for doing so, and probably sufficient reason would be found in the difference of expense of the two lines. Therefore the powers of the Commissioners to alter the direction of the line of sewer is a matter to which the Court has already given their assent. But as to the notion that it was *ultra vires* of the Commissioners to enter into an agreement, and that they had no power to fix upon a deviation line without public notice, the answer is, that before any public notices are given the Statute requires that the Commissioners shall have fixed upon the line. Therefore there is no inconsistency and there is no incapacity on the part of the Commissioners to enter into an agreement as to the line which they propose to take.

Being of opinion that the Commissioners fixed themselves, by the arrangements with Mr. Smeaton, that this should be the line which was to be executed, I think they cannot avoid putting their hands to the deed which is to be the formal fulfilment of that undertaking on their part. But then, what is to be the effect of that? I think it cannot have the effect that the appellant claims in his summons. I think that is out of the question. He maintains, in the conclusion of his summons, that they are to do everything that can be done for the execution of this line of sewers, which the respondents say would imply, that if they cannot get it sanctioned otherwise they must go to Parliament, and get the sanction of Parliament to taking this line. Those are extravagant views, which I do not think the appellant is entitled to insist upon, for I think it may turn out that the Commissioners are not bound to do so. Then the appellant concludes, that they shall not make the sewer in any other line than that which he has chosen. These conclusions, I think, are quite out of the question. I think the course to be taken ought to be this, and that the Commissioners will be doing their duty by following this course, viz. to give the statutory notices for the line which they have agreed to adopt, so as to give parties an opportunity of objecting, and I am by no means prepared to say, that if, upon those objections, the Commissioners are satisfied by the parties objecting, that the line is either

impracticable or wholly inexpedient, they would not then be entitled to pronounce judgment against it upon that ground. They are in no different position in this case from what they would have been in, if they had originally prescribed this line and given notice for it. All that they do is subject to the qualifications and conditions of the Act of Parliament. They must give the required notices; they must allow parties to object; the surveyor, who is the statutory officer, is to be called on to give his certificate, and whatever judgment may be pronounced by the Commissioners, on hearing the whole matter, it will be competent to the parties interested to make it the subject of an appeal to the Sheriff. I doubt very much whether the Court of Session could deal with some of the matters indicated in the opinions of the Judges, which seem to be raised by the summons, viz. as to the merits of this particular line of sewers. I doubt whether that is a matter for the consideration of the Court of Session. I think the true question we have to deal with, and which the Lord Ordinary dealt with, is whether or not there is an executory agreement. It would not be enough to abide by the interlocutor of the Lord Ordinary, because that finds only in terms of a declarator; there are no operative words in it—nothing out of which operative words can be extracted, and, therefore, I think the best course is that which has been suggested by my noble and learned friend on the woolsack, that we should reverse the judgment of the Court of Session, and send the case back to the Court below, expressing the opinion we entertain as to the proper course to be followed. I am not without hopes that when the parties come to look at their true position, they will find it more expedient for both of them to go to their work more smoothly than they seem disposed to do at present.

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

Interlocutor appealed from reversed, and cause remitted with declaration.

Appellant's Agents, Maclachlan and Rodger, W.S.; Markby, Wilde, and Burra, Lincoln's Inn.—*Respondents' Agents*, Maitland and Lyon, W.S.; William Robertson, Westminster.

MARCH 27, 1871.

M'LEAN AND HOPE, *Appellants*, *v.* GEORGE FLEMING, and Others, *Respondents*.

Ship—Bill of Lading—Charter Party—Authority of Master of Ship—Lien for Dead Freight—*D., the master of a ship, chartered to bring a cargo of bones from certain ports in the Black Sea to Aberdeen, signed bills of lading for quantities delivered on board at each port, but expressed in Turkish dialect, which he did not understand. It turned out on arrival, that the quantities delivered were far short of those stated in the bills of lading, and amounted to a short cargo.*

HELD (affirming judgment), *That the quantities stated in the bills of lading were not binding on the shipowner, who was entitled, on explanation of the mistake, to recover freight for the quantity actually carried.*

HELD FURTHER, *That, the charter party expressly stipulating, that the captain was to have an absolute lien on the cargo for dead freight, the shipowners were entitled to the lien, and to recover for the deficiency in the full cargo, according to the rate stipulated for freight.*[1]

This was an appeal from a judgment of the Second Division. The respondent was the owner of the barque "Persian," and the appellants entered into a charter party at Constantinople, whereby it was agreed, that the ship should load a full cargo of cattle bones from certain ports named. The captain was to sign bills of lading at each port, and when the vessel was loaded, he was to proceed to a safe port in the United Kingdom. The ship went to the ports named, and the bones were delivered on board, but the bills of lading being in Turkish, the master signed them without being informed accurately as to the meaning of the quantities, or being able to test their accuracy. When he left the last port, he had misgivings as to the correctness of the quantities, and entered into a protest as to his cargo being mixed up with sand and rubbish. The total quantity shipped, according to the bills of lading in Turkish dialect, amounted to 701 tons; but on arriving at Aberdeen, only 386 tons were found and delivered, and there was a

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[1] See previous report in part 5 Macph. 579: S. C. L. R. 2 Sc. Ap. 128: 9 Macph. H. L. 38; 43 Sc. Jur. 365.