LORD KINNEAR—I agree with your Lordships. The Lord Ordinary allowed one of two issues proposed by the pursuer subject to a certain amendment which he made upon it, and then he disallowed the second issue altogether. I think that is in effect and substance a judgment that the statement which forms the subject of the second issue contained no issuable matter. The issue is disallowed because in the opinion of the Lord Ordinary the words complained of are not slanderous, and are not injurious in such a sense as to entitle the person complaining to an issue. That appears to me to be a judgment upon the merits of one part of the case; and I agree that it cannot be brought under review except by the ordinary process of presenting a reclaiming-note. I do not say that it might not be possible to substitute two issues for one, on a motion to vary issues, if it were quite clear that the substitution was not intended to present entirely different questions to the jury from those presented in the issue allowed, but was in truth a mere amendment of the terms in which the Lord Ordinary had sent the questions to the jury; but I think the purpose of the present note is to submit to the jury a totally different question from that raised in the issue which the Lord Ordinary has allowed, and one practically identical with that raised in the issue which the Lord Ordinary has refused to allow. I therefore agree with your Lordship irrespective of any question that may arise upon the merits of the issue proposed to be submitted.

LORD PRESIDENT—With regard to the alteration suggested by Lord M'Laren on the issue, I had understood in expressing my opinion that this matter was not discussed in argument, and accordingly I was in favour of adhering to the terms of the Lord Ordinary's interlocutor. Not that I differ from Lord M'Laren.

The Court refused the motion.

Counsel for the Pursuer—Guthrie—Glegg. Agent—Robt. D. Ker, W.S.

Counsel for the Defender—Shaw, Q.C.—W. Thomson. Agent—John Veitch, Solicitor.

Wednesday, March 4.

SECOND DIVISION.

METCALFE *v.* UNIVERSITY OF ST ANDREWS.

(*Ante*, 32 S.L.R. 182 and 402, 22 R. 211, and H.L. 13).

Jurisdiction—Exclusion by Statute—Privy Council—Ordinance of University Commissioners — University (Scotland) Act 1889 (52 *and* 53 *Vict. cap.* 55), *sec.* 16, *and sec.* 20, *sub.-sec.* 2.

An Ordinance of the University Commissioners affiliating the University College of Dundee to the University of St Andrews, and proceeding upon an alleged agreement between the College and the University, was set aside by the House of Lords in respect it was *ultra vires* of the Commissioners, they having failed to observe certain procedure prescribed by the Universities (Scotland) Act 1889, necessary to give their Ordinance validity. The House of Lords in their judgment remitted to the Second Division of the Court of Session "to dispose of the conclusions of the summons" with respect to the agreement which was also sought to be reduced as *ultra vires*.

After the Ordinance had been challenged, but before it had been reduced, the Commissioners issued another Ordinance, also proceeding on the alleged agreement, and affiliating the College to the University. In regard to this last Ordinance the procedure prescribed by the statute, as interpreted by the House of Lords, was followed. It was before the Privy Council for approval or disapproval under sec. 20, sub-sec. 2, of the Act.

Held that the question of the legality of the agreement fell within the jurisdiction of the Privy Council, as subsidiary to the Ordinance, and the conclusion for reduction *quoad* the agreement *dismissed*.

(Sequel of case reported in the Court of Session December 19, 1894, 32 S.L.R. 182, and 22 R. 211, and in the House of Lords, April 8, 1895, 32 S.L.R. 402, and 22 R. (H.L.) 13.)

On 8th April 1895 the House of Lords, after disposing of the first conclusion of the summons by declaring that the pursuers were entitled to decree reducing and setting aside the orders of the Commissioners dated 21st March and 10th April 1890, remitted to the Second Division of the Court of Session "to pronounce decree to that effect and to dispose of the conclusions of the summons with respect to the documents first, second, and third called for and sought to be reduced."

On 4th June 1895 the Court pronounced decree reducing the orders of the Commissioners.

Argument was thereafter heard in respect to the documents first, second, and third sought to be reduced. These documents were (1) a minute of the University Court of the University of St Andrews dated 15th February 1890, bearing to consent to the union of University College Dundee and the University of St Andrews; (2) the agreement between the University of St Andrews and the University College Dundee dated 15th February 1890, on which the order of the Commissioners was based; and (3) a docquet appended to a copy of a letter of the clerk of the Commissioners dated 4th March 1890, bearing to be a consent by the University Court of the University of St Andrews to the alteration made by the Commissioners on the terms of the agreement.

Argued for the pursuers—The agreement must be taken in its integrity, and must

stand or fall as a whole. To strike out one of its clauses would make the agreement materially different from that which had been come to by the parties. In short, the agreement must be set aside if it contained any conditions which it was *ultra vires* of the parties to enter into. But it was plain that it did contain such conditions. One was that the union should be dissoluble by Act of Parliament only. This was at variance with section 15, subsection 3, of the Universities Act of 1889. This was only one of several instances in which the agreement was at variance with the statute. These conditions were material to the contract, and no amount of *rei interventus* could set up an agreement which was *ultra vires*. Decree of reduction should therefore be pronounced.

Argued for the defenders—The parties to the agreement had acted within their powers, and the agreement was binding. The union agreed to was to be as permanent as the parties could lawfully make it. The agreement had been acted upon by both parties, and could not be resiled from even if it had been decided that an impossible term of duration had been stipulated for. In any event, a new Ordinance, subsequent in date to the order reduced by the Court, had been issued by the Commissioners, and was now before the Privy Council for approval or disapproval under section 20 of the Universities (Scotland) Act 1889. This Ordinance proceeded upon the documents now sought to be reduced. The matter was therefore before the Privy Council, who would judge as to whether this agreement and the conditions therein should stand or fall. As regards the documents in question the action should therefore be dismissed.

At advising—

LORD JUSTICE-CLERK—When this case was formerly before us, the question was whether an order pronounced by the Universities Commission professedly under section 16 of the Universities Act should be reduced, because it was an order not issued after the procedure prescribed in the Act, as applicable to ordinances to be pronounced by the Commission. The Commission had proceeded on the footing that they had special powers in regard to the matter they dealt with, which made the other parts of the Act in regard to ordinances inoperative. That view was held to be unsound in the House of Lords, and accordingly that order has been reduced. The question now before the Court is whether the pursuers are further entitled to reduction of certain documents, viz., a minute of agreement between the University of St Andrews and University College, Dundee, as the basis of arrangement for affiliation of the latter to the former, and a relative minute and docquet of the University Court of St Andrews.

The position of matters is this, that the Universities Commission have now to proceed by Ordinance in the order required by the statute in dealing with the affiliation of these two educational bodies. The statute in its clauses regarding such procedure provides the most ample means for securing that no arrangement shall be sanctioned without the fullest consideration by responsible authorities, and that the consent of Parliament shall also be necessary. Ordinances before being passed must be sent in draft to the university and college authorities affected, and must be published by the Commissioners, and they must hear all objections to the terms proposed by those directly interested, or any public body or persons directly affected, and three months are to be allowed for such procedure (section 19). When an ordinance is issued, it must be published in the *Gazette*, and laid before both Houses of Parliament, and submitted for approval of Her Majesty the Queen in Council, and either House may present an address praying that consent be withheld from the ordinance in whole or in part. Further, the University Court, Senatus Academicus, or the General Council, or any governing body, or any trustee or patrons of any foundation, mortification, bursary, or endowment, or any other person directly affected, may petition Her Majesty to the same effect, and Her Majesty may remit the matter to the Universities Committee of the Privy Council, who must report specially to Her Majesty in Council. Her Majesty may then by Order in Council approve in whole or in part, or disapprove in whole or in part.

It appears to me that the Legislature has thus provided the machinery for dealing with ordinances issued by the Commission, and that it is for the authorities nominated in the statute to deal with any case which may be brought before them. The documents which we are asked to deal with depend necessarily for the operative effect of anything contained in them—whether the whole or a part—upon their receiving the imprimatur of the authorities provided by the statute for dealing with them. I am therefore of opinion that they are not documents with which this Court should deal as the pursuers propose, by considering the question of subjecting them to reduction. It is for the Queen in Council to deal with questions relating to them.

LORD YOUNG—I concur. The only difficulty which occurred to me was the direction in the judgment of the House of Lords. Their judgment bears—"It is further ordered that the cause be, and the same is hereby remitted back to the Second Division of the Court of Session, with directions to pronounce decree to that effect." We have done that. But it goes on—"And to dispose of the conclusions of the summons with respect to the documents first, second, and third called for and sought to be reduced." I read upon consideration that word "dispose" as meaning merely to deal with—to deal with these conclusions—and we deal with them, and in that sense dispose of them as your Lordship has proposed, in which proposal I concur.

LORD TRAYNER—This action was instituted primarily for the purpose of having reduced and set aside an Ordinance issued by the University Commissioners by which they affiliated University College, Dundee, to the University of St Andrews, and declared that College to be part of the University. Other writs, which I shall notice immediately, were also sought to be reduced, and certain declarators were sought as following upon or in connection with the reductive conclusions. By a judgment of the House of Lords, reversing a judgment of this Court, the Ordinance issued by the University Commissioners has been reduced, along with a declaration or order by the Commissioners, dated 10th April 1890, being two of the writs reduction of which was concluded for. The case has come back to us under remit from the House of Lords to dispose of the conclusions of the summons 'with respect to the documents first, second, and third called for and sought to be reduced,' and under that remit we have heard the parties on the matters remitted. The documents referred to in the remit are:—(1) Minute of the University Court of St Andrews bearing to consent to the College being affiliated to and made to form part of the University; (2) An agreement between the University Court and the Council of the College setting forth the terms and conditions of the affiliation and union; and (3) A minute consenting to certain alterations in the agreement. A decree reducing these writs is still sought by the pursuers.

The Ordinance of the Commissioners which has been reduced was set aside by the House of Lords (to state it generally) in respect it was *ultra vires* of the Commissioners, they having failed to observe certain procedure prescribed by statute necessary to give their Ordinance validity. After that Ordinance had been challenged, and before any judgment on the merits had been pronounced in this action, the Commissioners issued another Ordinance, in regard to which, so far as we know, the prescribed statutory proceedings were observed. This last Ordinance is now before the Privy Council for approval or disapproval under the second sub-section of the 20th section of the Universities (Scotland) Act 1889. It appears to me that the effect of that section is to reserve to Her Majesty in Council the right to approve or disapprove in whole or in part of any such Ordinance, and of the conditions on which such approval, if given, should proceed. The three writs I have above mentioned as being still unreduced are challenged on the ground that they were *ultra vires* of the parties to them. They all related to the same subject-matter, that is, they all have reference to the terms and conditions on which the representatives of the University and the College respectively consented, or are said to have consented, to the affiliation in question; and on a consideration of which, *inter alia*, the Commissioners proceeded in issuing the Ordinance now before the Privy Council. Any reduction of them appears to me to be unnecessary, because if they are lawful and proper agreements and conditions they will be given effect to; if not, they will be disregarded by the Privy Council. In a word, their legality and effect will be considered as bearing directly on the question whether the Ordinance is to be approved of or disapproved, and if approved, on what conditions. Not only do I think reduction of these writs unnecessary, but I venture to think that in the circumstances any judgment of this Court in regard to them would be encroaching on a jurisdiction expressly reserved for another tribunal.

LORD RUTHERFURD CLARK was absent.

The Court dismissed the action *quoad* the first three documents sought to be reduced, and found no expenses due to or by either party.

Counsel for the Pursuers — Sol.-Gen. Graham Murray, Q.C.—Dickson—Pitman. Agents—J. & F. Anderson, W.S.

Counsel for the Defenders—H. Johnston —Clyde. Agent—J. Smith Clark, S.S.C.

Friday, March 6.

SECOND DIVISION.

[Lord Kincairney, Ordinary.

THE ASSETS COMPANY, LIMITED *v.* LAMB & GIBSON.

Property—Superior and Vassal—Restrictions on Building—Reference to Feuing-Plan annexed to Deed.

A feu-disposition contained the following declaration by the superior—"Declaring that we and our foresaids shall be bound, as we hereby bind and oblige ourselves and our foresaids, to adhere to the general feuing-plan of our said lands, and to erect on the said lands houses of the character and style indicated thereupon, . . . a reduced copy whereof is hereto annexed and signed as relative hereto, and to give effect to this condition in all feu-contracts, dispositions, and other conveyances of the plots of ground shown on the said feuing-plan, and which declaration is also hereby declared to be a real lien and burden upon our said lands."

The plan annexed to the disposition was a plan of the surface. It did not indicate the character or style of the buildings by any elevation or sketch, but showed only the line of the terraces and streets. On the line of the buildings so indicated were the words "for self-contained lodgings and corner tenements."

In a question between the superior and vassal, *held* (*rev.* judgment of the Lord Ordinary) that there was no restriction upon building validly imposed on the superior.