sion that the defender was due a larger sum than his own costs would amount to, and in such a case the section might not be applicable, but here it is averred that the sums due by the defenders are wiped out by various counter-claims detailed on record, so that if the defenders were successful there will be no sums wherewith to pay their costs. I think the defenders have sufficiently shown that facts exist here which justify the Lord Ordinary in exercising the discretion conferred upon him by the section I have read, and that your Lordships have no other course open to you than to uphold his decision.

LORD KINNEAR—I concur.

LORD DUNDAS—I am entirely of the same opinion.

LORD M'LAREN was absent.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—D. Anderson. Agents—Cowan & Stewart, W.S.

Counsel for the Defenders (Respondents)—Hon. W. Watson. Agents—Davidson & Syme, W.S.

Tuesday, July 20.

SECOND DIVISION.

[Lord Salvesen, Ordinary.

PEDRUS STEAMSHIP COMPANY, LIMITED *v.* BURNTISLAND HARBOUR COMMISSIONERS.

Harbour—Ultra Vires—Harbours Clause Act 1847 (10 *and* 11 *Vict. cap.* 27)*—Bye-laws Empowering Commissioners to Reserve Berth for Steamers Trading Regularly—Direction that Berth Occupied by Last Arrived Non-Regular Trader should be Reserved Berth for Time Being—Proviso that Vessel in Berth not to be Removed till Loaded—Applicability to Steamer Occupying Reserved Berth for Regular Traders.*

The bye-laws passed by Harbour Commissioners for the regulation of a harbour pursuant to the Harbours Clauses Act 1847 enacted:—"10. . . . The Commissioners may specially reserve or set aside for the accommodation of steamers or other vessels trading regularly with the port any berth or berths in the docks. 11. Steamers arriving in the harbour or docks shall rank for loading immediately they are ready to take in cargo, and that although sailing vessels which have arrived before them may also be ready for loading, but a vessel already in berth will not be removed therefrom until loaded if her cargo is on the quay or in the dock sidings. The Commissioners may set aside one of the berths in the docks for the accommodation of sailing vessels, and in that event sailing vessels shall take their turn for loading at such berth. Should a steamer be loading at such berth and the loading can be continuously proceeded with the steamer will not require to remove from the berth for a sailing vessel."

The Harbour Commissioners directed that, instead of any one particular berth being solely set apart as a preference berth, the last arrived non-regular trader should be turned out of her berth as soon as a regular trader arrived, and that that berth should be regarded as the preference berth until the regular trader had finished her loading.

Held (*diss* Lord Ardwall) that the Harbour Commissioners were not acting *ultra vires* of the powers conferred on them under the 10th bye-law in adopting this system inasmuch as (1) it did not amount to a reservation of all the berths, only one being reserved at a time; and (2) assuming that the proviso in the 11th bye-law that "a vessel already in berth will not be removed therefrom until loaded if her cargo is on the quay or in the dock sidings," could be regarded as applying to a steamer, it had no application to the preference berth, and therefore did not entitle the last arrived non-regular trader to remain in berth till loaded after the arrival of a regular trader.

Process—Reclaiming Note—Competency—Printing—Amendment of Record—Court of Session Act (*Judicature Act*) 1825 (6 *Geo. IV, cap.* 120, *sec.* 18—*A.S., 11th July* 1828, *sec.* 77.

The Court of Session Act (Judicature Act) 1825, section 18 provides that a party reclaiming against an interlocutor "shall along with his note put into the boxes printed copies of the record authenticated" by the Lord Ordinary. The Act of Sederunt, 11th July 1828, section 77, provides that reclaiming notes "shall not be received unless there be appended thereto copies . . . of the papers authenticated as part of the record in terms of the statute . . . and also copies . . . of the summons with amendment, if any. . . ."

The defenders in an action of declarator lodged a minute of amendment of the record, and the Lord Ordinary by interlocutor allowed the defenders to amend the record in terms of their minute, and of new closed the record. The pursuers presented a reclaiming note against a subsequent interlocutor, and did not print the amendment or the interlocutor allowing it. The amendment was not written on the process copy of the closed record till after the reclaiming note was boxed. The defenders objected to the competency of the reclaiming note on the ground that section 18 of the Judicature Act 1825 and section 77 of the Act of Sederunt of 4th July 1828 had not been complied with.

Held (1), following *Montgomerie &*

Company v. *Young Brothers*, January 29, 1904, 6 F. 340, 41 S.L.R. 241, that no amendment had been made at the date of the reclaiming note; and (2), following *Fisken* v. *Fisken*, October 20, 1900, 3 F. 7, 38 S.L.R. 4, that it was not necessary to print the interlocutor allowing the amendment; and objection *repelled*.

On 12th May 1908 the Pedrus Steamship Company, Limited, registered owners of the steamship "Trieste," raised an action against the Burntisland Harbour Commissioners concluding for (*a*) declarator (*First*), "that the defenders are not entitled for the purpose, or to the effect, of giving precedence in loading to any other vessel, whether trading regularly with the port of Burntisland or not, to remove or cause to be removed from any berth in the harbour of Burntisland, where she has been duly berthed for loading, a steamer which is ready to take in cargo, and whose cargo is on the quay or in the dock sidings, until her loading is completed, provided such loading is continuously proceeded with: Or otherwise (*Second*), . . . that the defenders are not entitled for the purpose, or to the effect, of giving precedence in loading to any vessel trading regularly with the port of Burntisland, to remove or cause to be removed from any berth where she has been duly berthed for loading in the harbour of Burntisland, a steamer which is ready to take in cargo, and whose cargo is on the quay or in the dock sidings, until her loading is completed, provided such loading is continuously proceeded with, unless the defenders shall, previously to said berth being taken up by such steamer, have specially reserved or set aside said berth for the accommodation of a vessel or vessels trading regularly with said port, in terms of bye-law 10 of the bye-laws enacted by the Burntisland Harbour Commissioners for the regulation of Burntisland Harbour, pursuant to the Harbour, Docks, and Piers Clauses Act 1847, dated 27th May 1902, and approved of and confirmed by the Sheriff-Substitute of Fife and Kinross on 10th September 1902: (*Third*), . . . that the defenders had not, as at 18th November 1907, specially reserved or set aside for the accommodation of any steamer or other vessel trading regularly with said port, in the sense of bye-law 10 of said bye-laws, the berth in said harbour of Burntisland at which the pursuers' steamship 'Trieste' was then lying, duly berthed for loading and ready to take in her cargo, which was then on the quay; and that the defenders were not entitled at said date to remove or cause to be removed the pursuers' said steamship from said berth for the purpose and to the effect of giving precedence in loading to the steamship 'Harpalus': And (*Fourth*), . . . that the pursuers' said steamer was unwarrantably and illegally removed by the defenders' harbour-master from said berth to give precedence to said steamship 'Harpalus,' and that the defenders are liable to the pursuers for the loss occasioned to the pursuers thereby," and (*b*) payment of the sum of £55.

The pursuers averred—"(Cond. 2) On 18th November 1907 the steamer 'Trieste' obtained from the harbour officials, who are the servants of the defenders, a berth at Burntisland Harbour to enable her to load a cargo of coals, which was then on the quay alongside the berth awaiting shipment in the said steamer. The 'Trieste' had started to load her cargo when she was ordered by the harbour-master, for whom the defenders are responsible, to vacate the berth in order to allow the steamship 'Harpalus' of London into the berth. In terms of the bye-laws of the defenders, those in charge of the 'Trieste' were bound to obey the harbour-master's orders, and they accordingly acted as instructed by him. (Cond. 3) Owing to this action of the defenders' harbour-master, the 'Trieste' was detained at Burntisland Harbour until the 'Harpalus' had finished her loading, when the 'Trieste' again got into her berth and finished her loading. This caused a detention of two days, and resulted in loss and damage to the pursuers to an amount not less than the sum sued for. (Cond. 4) . . . The defenders' harbour-master was not entitled under said bye-laws to require the pursuers' vessel to be removed from said berth. Under the eleventh bye-law referred to she was entitled to remain at said berth until her loading was completed, whether or not any reservation of said berth had been made in favour of the said s.s. 'Harpalus.' In any event, no such reservation had been made by the defenders in the sense of bye-law 10. Further, no intimation was given to the master of the s.s. 'Trieste' when she was put into her loading berth by order of the harbour-master that the berth was reserved or set aside or would be required for the 'Harpalus' or other steamer; nor was the loading berth proffered to the master of the 'Trieste' on condition that he should vacate it in favour of the 'Harpalus,' or other steamer, if such should arrive before the 'Trieste' had finished loading. With reference to the statement in answer, it is denied that it is in the interest of the coal trade to carry on the present practice at said harbour. Preference is given to certain steamers, with the result that all the other steamers frequenting the port are placed at a disadvantage, and their arrangements for loading and discharging dislocated, by the uncertainty as to their being allowed to occupy any of the berths in said harbour for the period sufficient to enable them to complete their loading or discharge. The defenders originally by notice set aside one particular berth at which preference was given to certain steamers, but they subsequently altered this system without intimation to any of the traders, who now find that they may be ordered to leave any berth in the harbour while they are in the course of loading and discharging, although no notice has been intimated or published by the defenders to the effect that all berths are reserved. *With reference to the amendments of the defenders added after the proof, it is admitted that prior to November* 1903 *the defenders set aside No.* 5

berth in the East Dock for regular traders. Denied that the arrangement was altered at the request of the shipping agents at Burntisland. The instructions given to the harbour-master are referred to for their terms. Explained that the said instructions were never published or in any way communicated to the pursuers and other traders. Admitted that the 'Trieste' was loading at berth No. 6 *upon the occasion in question, and that Nos.* 4 *and* 5 *were occupied by non-regular traders, and that the 'Trieste' was at the time the last non-regular trader to berth, and that no regular trader was in the East Dock. Quoad ultra the statements in the said amendments are denied.*"

The defenders averred—"(Ans. 4) . . . Explained that the 'Harpalus' was a steamer trading regularly with the port, and that the *defenders prior to November* 1903 *set aside No.* 5 *berth in the East Dock as a berth for regular traders. In November* 1903 *they altered this arrangement at the request of the shipping agents in Burntisland, and gave the following instruction to the harbour-master—'In place of No.* 5 *hoist (East Dock) being solely set apart as a preference berth, that either Nos.* 4, 5, *or* 6, *be made use of accordingly, and that the last steamer on turn in the East Dock be turned out of its berth to give place to the preference boat, always provided that only one regular trader at a time is to be entitled to be put into a preference berth.'* The berth at which the 'Trieste,' which is not a regular trader, was loading *when she was ordered to vacate it, was berth No.* 6, *and as berths Nos.* 4 *and* 5 *were then occupied by non-regular traders, and the 'Trieste' at the time was the last non-regular trader to berth, and no regular trader was in the East Dock, she was liable to be turned out to make way for a regular trader.* And the other berths in the docks suitable for the loading of coal were and are specially reserved and set aside for the accomodation of steamers or other vessels trading regularly with the port. Explained further that the owners and master of the 'Trieste,' or their agents at Burntisland, were well aware that her loading, at whatever berth she was stationed, was liable to be interrupted by the arrival of a steamer trading regularly with the port, *and they accepted the berth on that footing.* It is desirable in the interests of the coal trade generally that steamers trading regularly should have on arrival immediate access to berths."

[The deletions (underlined) were made and the passages in italics added at amendment mentioned *infra.*]

On 15th and 16th December 1908 proof was led, the import of which appears from the opinion of the Lord Ordinary *infra.* On 16th December the defenders lodged a minute of amendment craving leave to amend answer 4 to the effect indicated *supra*, and on 22nd December the pursuers lodged a minute craving leave to add the italicised passage to condescendence 4.

The Lord Ordinary (SALVESEN) pronounced an interlocutor bearing date 16th December 1908 in these terms—"The Lord Ordinary having taken the proof and heard counsel, opens up the record; allows the defenders to amend the record in terms of minute No. 101 of process, and the pursuers to answer same in terms of their answers No. 102 of process, and this having been done, of new closes the record, reserves all questions of expenses caused by said amendment, and makes avizandum."

By interlocutor dated 7th January 1909 the Lord Ordinary assoilzied the defenders.

Opinion.—"This case raises an important question relating to the regulation of traffic in Burntisland Harbour. The facts are not in dispute, and may be briefly summarised.

"The steamer 'Trieste,' belonging to the pursuers, obtained, at 3 a.m. on 18th November 1907, a berth at Burntisland Harbour to enable her to load a cargo of coal, which was then on the quay alongside the berth awaiting shipment. She had loaded a considerable proportion of her cargo when the harbour-master ordered her out of her berth at noon to let the steamer 'Harpalus' into the berth; and she did not get into a berth until 5·30 a.m. on the 19th. The loading of the 'Trieste' then proceeded continuously until it was finished at 4·20 a.m. on the 20th. But for the interruption she would have completed her loading and been ready to sail at first high water on Tuesday the 19th, whereas she was not able to sail until about noon on the Wednesday. She was bound for Kiel, where she arrived the following Monday, the 25th of November, at 9 p.m. Under her charter-party she fell to be discharged at the rate of 400 tons per day; and as she carried some 2170 tons of cargo her discharging days did not expire until the following Monday forenoon. Had she been loaded on the morning of the Tuesday the 19th of November she would in all probability have arrived fully a day earlier and have saved the week-end. The pursuers accordingly claim the sum of £55 as the extra expense they incurred and the profit they lost in consequence of the vessel's detention due to the 'Harpalus' having been given a preference in the matter of loading.

"The traffic of the port of Burntisland is carried on under bye-laws enacted by the Burntisland Harbour Commissioners, and confirmed by the Sheriff-Substitute of Fife and Kinross. These bye-laws have been in existence since 1902. There are two docks, each containing three loading berths and three coal hoists, so that six vessels can load coal at the same time. Only the East Dock, however (which is the more recent of the two), has sufficient depth of water to accommodate vessels carrying 2000 tons cargo or upwards. As the 'Trieste' was a vessel of this kind, the East Dock was the only one where she could load her cargo. By bye-law 10 the Commissioners are specially empowered to set aside for the accommodation of steamers or other vessels trading regularly with the port any berth or berths in the docks. This power they

exercised at first by reserving a berth No. 5 of the East Dock (the berths there being numbered 4, 5, and 6), for the accommodation of regular traders. Other vessels were admitted into this berth when it was not actually occupied by preference boats, but as soon as the preference boat arrived the non-regular trader was turned out of the berth until the loading of the preference boat was completed. The local agents of the vessels frequenting the port were duly notified that No. 5 was to be treated as a preference berth; and they accepted the berth when vacant for their clients on the footing that the non-regular trader was liable to be displaced at any moment on the arrival of a preference steamer.

"The reservation of a particular berth for preference steamers was found in some cases to create hardship. It might happen that three steamers, all non-regular traders, were occupying the berths in the East Dock at the time when a preference steamer arrived; and the vessel which was loading at No. 5 might be the first in turn. In such circumstances it appeared to be a hardship that that vessel should be displaced, and that the other two, which had arrived after her, should be permitted to finish their loading without interruption, more especially as in the ordinary case the vessel which had arrived first might be assumed to have got more of her cargo than the subsequent arrivals. Accordingly, the Harbour Commissioners, at the instance of the shipping agents in Burntisland, agreed to make an alteration of this system, and substituted the present system, under which the berth at which the last-arrived vessel of the three loading in the East Dock happens to be lying is treated as the preference berth. Under this system the latest arrival is liable at any time to be displaced from a loading berth, whether she is loading at Nos. 4, 5, or 6, whenever a berth is wanted for a preference steamer. On the other hand, as soon as another vessel has got a berth after her, she is secured against interruption so long as her own cargo is coming continuously forward. The pursuers' witnesses favour a return to the old practice on the ground that if a vessel was loading at No. 4 or No. 6 berth she was never liable to be displaced; whereas they say there is greater uncertainty now, as any one of the berths may in turn be treated as the preference berth. The uncertainty, however, is not really materially greater under the present system; and it has this advantage over the other, that it secures that all the cranes in the East Dock shall be continuously used; for if a vessel's loading was almost completed at No. 4 or No. 6 berth, it might be to the advantage of the next vessel in turn rather to wait for one of these becoming vacant than to go into No. 5 with the risk of being displaced whenever a preference steamer arrived. It follows, I think, that the new practice must be in the general interest of the steamers frequenting the port; and, on the whole, is not liable to create more hardship in individual cases than the old system.

"The pursuers' claim is based, in the first instance, on the view that it was illegal under the bye-laws for the defenders' harbour-master to displace the 'Trieste' in favour of the 'Harpalus' after the 'Trieste' had commenced loading and had the rest of her cargo available. This contention is founded on the 11th bye-law, which provides as follows:—[*His Lordship quoted the 11th bye-law, supra in rubric.*] Under this bye-law the pursuers contend that it is an absolute rule that no vessel already in berth shall be removed therefrom until loaded if her cargo is on the quay or in the dock sidings; and if so the 'Trieste' was undoubtedly improperly removed. According to this construction of the bye-law, the only right that the preference steamer would have would be to get into the first berth that became vacant after her arrival, although there might be other vessels in turn before her.

"I am unable to accept the pursuers' construction. Bye-law 11 appears to be primarily concerned with the preference to be given to steamers over sailing ships. When a berth becomes vacant the steamer first in turn is entitled to this berth, although there may be several sailing ships in turn before her which are equally ready for loading. If the sailing vessel, however, is already in berth, she is not to be removed until loaded if her cargo is on the quay or in the dock sidings. The counterpart of this provision is, that while the Commissioners may set aside one of the berths for the accommodation of sailers, at which berth sailing vessels are to take their turn for loading, nevertheless a steamer which has been admitted into this berth shall be allowed to occupy it until her loading is completed if it can be continuously proceeded with, although a sailing ship may arrive which, but for the fact that the berth was already occupied, would have the first claim to it. It may be that the bye-law cannot be construed as applying to sailing ships only in their relation to steamers, otherwise there would seem to be no reason why the word 'vessel' should not have been described as sailing vessel; but in any event it is plain that it falls to be qualified, in the case of steamers, by the reserved power of the Commissioners to set aside a berth or berths for the accommodation of regular traders. Under the old system where a particular berth was so set aside there was no difficulty in harmonising these two bye-laws, for the non-regular trader which was admitted into berth 5 was so admitted on the implied condition that she must leave it as soon as a regular trader arrived if she had not previously completed her loading. Under the present system I do not think there is any greater difficulty. The three berths in the new dock are all set aside as preference berths to be used as such, one at a time; and the non-regular trader is therefore admitted into a berth only on the implied condition that she vacates it if she happens to be the last boat on turn which is loading when a preference steamer arrives. It was contended that the right reserved to

the Commissioners of setting aside any berth or berths in the docks for the accommodation of regular traders did not entitle them to set aside all the berths for that purpose. I think that is probably true; but at the worst for the defenders they have only set aside three out of the six berths available for loading coal cargoes as preference berths; and it seems to me that their action cannot be declared illegal simply because it happens that the three particular berths reserved are the only berths at which vessels of the draught of the 'Trieste' can load.

"The alternative ground upon which the pursuers base their claim proceeds upon the view that the only legal way by which the reserved power contained in bye-law 10 can be exercised is by setting aside special berths for the accommodation of preference boats. According to this contention, the Commissioners might have excluded the non-regular traders entirely from two of the three berths in the East Dock, but were not entitled to make each of these in turn a preference berth, on the principle of selection already explained. I have already sufficiently indicated the grounds upon which I reject this contention, and I think it would be unfortunate for non-regular traders as a whole if it were given effect to. The system which the defenders have now adopted is the one which in my opinion causes least disadvantage to the non-regular traders, consistently with the exercise of the powers which the defenders admittedly have. I do not propose to discuss the vexed question whether it is fair that any preference should be given, because under the existing bye-laws the power to give such a preference is expressly conferred; but as the amount of coal shipped from Burntisland in preference steamers is about fifteen per cent. of the total shipments, it does not seem unreasonable that one berth out of six should be reserved for preference steamers; although in individual cases affecting vessels of large tonnage the preference may give rise to considerable hardship. On the whole matter I am of opinion that the defenders did not act *ultra vires* in directing the removal of the 'Trieste' from the berth at which she was loading so as to accommodate the 'Harpalus,' and that they are entitled to be assoilzied from the conclusions of the action."

The pursuers reclaimed against the interlocutor of 7th January 1909. The record appended to the reclaiming note did not contain the amendments, but was printed as it originally stood. The interlocutors appended to the reclaiming note did not include the one bearing date 16th December, but did include one dated 15th December whereby the Lord Ordinary made avizandum, but which, it appeared, was never pronounced.

When the case was called in the Short Roll the respondents objected to the competency of the reclaiming note on the ground that the amendments and the interlocutor allowing them had not been printed. It was admitted at the bar that the interlocutor bearing date 16th December 1909 was in point of fact not signed till the 22nd or 23rd, when both minutes of amendment were in process; and that the amendments were not written on the process copy of the closed record till after the reclaiming note had been boxed.

Argued for the respondents—The provisions of the Judicature Act 1825 (6 Geo. IV, cap. 120), section 18, and of the Act of Sederunt 11th July 1828, section 77, requiring the record to be boxed as authenticated by the Lord Ordinary, were imperative—*Williamson* v. *Howard*, May 18, 1899, 1 F. 864, 36 S.L.R. 645; *Wallace* v. *Braid*, February 16, 1899, 1 F. 575, 36 S.L.R. 419; *M'Evoy* v. *Braes' Trustees*, January 16, 1891, 18 R. 417, 28 S.L.R. 276; *Muir* v. *Muir*, October 17, 1874, 2 R. 26, 12 S.L.R. 11; *Carter* v. *Johnston*, February 6, 1847, 9 D. 598. The circumstances here did not bring the case within the exception given effect to in *Montgomerie & Company* v. *Young Brothers*, January 21, 1904, 6 F. 340, 41 S.L.R. 241. In that case the amendment was made at the bar and not reduced to writing. The interlocutor allowing the amendment did not state what the amendment was, and therefore it was necessary that it should be written on the process copy of the record and on the summons before the interlocutor was pronounced. Here, however, the interlocutor allowed amendment in terms of minutes which were in process, and the effect of that was to import the amendments into the record without the necessity of writing them on the record at all. Further, the reclaimers had not printed the interlocutor of 16th December which authenticated the record as amended. Though, no doubt, that was not necessary where the record as amended was printed—*Fisken* v. *Fisken*, October 20, 1900, 3 F. 7, 38 S.L.R. 4.—if the reclaimers printed neither the amendments nor the interlocutor authenticating them then the reclaiming note was incompetent. The objection to the competency could be taken in the Short Roll—*Williamson* v. *Howard*, *cit.*

Argued for the reclaimers—The case fell within the rule in *Montgomerie & Company* v. *Young Brothers*, *cit.* The record was never amended, and the reclaimers therefore were bound to print it without the alleged amendments. It did not matter whether the amendment was made verbally at the bar or was embodied in a minute lodged in process; there was no amendment made till it was written on the record, and that must be done when the interlocutor allowing amendment was pronounced. Substantial compliance with the statutory provisions was all that was demanded — *Adam* v. *Adam's Trustees*, March 20, 1903, 5 F. 863, 40 S.L.R. 598,—but the reclaimers here had exactly carried out the directions of the statute. It was not necessary to print the interlocutor allowing the amendment—*Fisken* v. *Fisken*, *cit.* Further, that interlocutor referred to a minute which was not lodged till some days after the date of the interlocutor. In that view also there was no amendment

and there was no interlocutor allowing it. In any event the objection to the competency of the reclaiming note could only be taken in the Single Bills, and was so taken in the cases cited by the respondents. That was the general rule with regard to objections to competency—*per* Lord M'Laren in *Hillhouse* v. *Walker*, November 3, 1891, 19 R. 47, 29 S.L.R. 85.

LORD JUSTICE-CLERK—This case is in an unfortunate position, due, as it seems, to mistakes on the part of everybody connected with it. It is conceded now that one of the interlocutors printed by the reclaimers is an interlocutor which was never pronounced. Then it is also satisfactorily made out, and not denied, that the interlocutor which bears to be dated 16th December could not have been signed earlier than the 22nd or 23rd of that month, and that interlocutor is not printed at all by the reclaimers.

Now that, to begin with, presents a most unfortunate state of things, in which it would be extremely likely that mistakes would be made, and a party who made a blunder in presenting a reclaiming note would be very little to blame for it.

I shall assume that the Lord Ordinary's interlocutor, which is said to be of date 16th December 1908, was in fact pronounced on that date. The Lord Ordinary thereby opens up the record and allows the defenders to amend the record in terms of minute No. 101 of process. He assumes that that has been done, and of new closes the record. I leave out of view all question about the answers to the amendment, because it is not necessary to consider anything more than the minute of amendment.

Now what is it that the Lord Ordinary allows to be done? He allows some action to be taken by the defenders to amend the record, provided they do it in terms of the minute which was lodged. That means simply that he ties them up to its terms, sees the amendment they are to put on, and opens up the record to allow them to put it on. They do not do it; nothing is done to the record at all; they take no action whatever. But after a judgment has been pronounced (whether they believed that this amendment was on or not I do not think matters), and after a reclaiming note has been presented they for the first time come forward and write their amendment on the record.

Now it is clear as I think that until that amendment was made upon the record there was no amendment which the party taking the reclaiming note was bound to print.

It is said by Mr Cooper that the putting in of a minute of amendment is the same thing as the amendment of the record which the Lord Ordinary allowed. That might be so. I think possibly the Lord Ordinary in the case of a very long minute of amendment might so express his interlocutor as to import into the record what was said in the minute without its being required to be written upon the principal copy. It is not necessary to consider what the terms of such an interlocutor should be, but I do not think it would be impossible for that to be done. But that is not what was done here. What the Lord Ordinary did here was to open the record, and give authority to amend that record, which it is quite plain was not done at the date of the interlocutor reclaimed against.

Now I think this case comes practically to be ruled by the cases of *Montgomerie* (6 F. 340) and *Fisken* (3 F. 7). In the first case the objection taken was that at the date of the signing of the interlocutor reclaimed against there was nothing on the record to indicate that the amendment had been made. Now what more is there here? It is admitted that the amendment was not written on the principal copy of the record until some days after the reclaiming note was boxed. Whether it was written on the day after or fifty days after does not matter; it was not placed on the record so as to put the party reclaiming into the position of having to print it as part of the record. That seems to me to be conclusive upon that matter.

But then we have the case of *Fisken* (3 F. 7) upon the question whether the interlocutor allowing the amendment and closing the record required to be printed. I assume in what I am going to say upon this matter that the interlocutor was duly pronounced on the date that it bears. I think the case of *Fisken* plainly decides that it is not necessary that the interlocutor should be printed. That the Judicature Act 1825 does not require the interlocutor to be printed is the opinion of Lord Trayner, concurred in by Lord Moncreiff and myself. Without going into more detail upon that case I think it disposes of the second question—whether the failure to print the interlocutor is fatal to the reclaiming note.

I am of opinion that the objections raised to the reclaiming note are not well founded, and must be repelled.

LORD LOW—I am of the same opinion. I think with your Lordship that this case is ruled by the decision in the case of *Montgomerie* (6 F. 340). Mr Cooper tried to draw a distinction between that case and the present, in respect that in the present case the terms of the amendment were stated in the minute, while in that case they were stated at the bar, I suppose for the reason that the amendment there was a trifling one. I do not think that is any distinction at all, because I take it that the only reason why a minute is offered and is generally required is that—unless the amendment is very trifling or merely verbal—it is desirable that the precise terms of the proposed amendment should be before the Court and before the other side.

But whether the amendment is allowed as proposed verbally by counsel at the bar, or is allowed in terms of a minute which has been lodged, it is not the allowance of the amendment which actually makes the amendment, but the putting of it on the record, That was the ground upon which

it was held in *Montgomerie's* case that it was sufficient compliance with the Act of Parliament and the Act of Sederunt to print the record without the amendment, because although the amendment had been allowed it had not in fact been added to the record at the date of the interlocutor reclaimed against. That is exactly the case here, assuming the amendment was properly allowed. On that assumption it was not in fact made by being added to the record before the date of the interlocutor reclaimed against. I think the case of *Montgomerie* is clearly in point.

As regards the other question, whether it is imperative to print the interlocutor, I think that matter was settled, and I have no doubt rightly settled, in the case of *Fisken* (3 F. 7).

LORD ARDWALL—I agree with both your Lordships. I wish to say that there is another question, which it is not necessary to decide at present but which will require some day to be considered, that is, whether it would not be well that a rule be laid down to the effect that objections of a purely technical nature such as this should be taken in the Single Bills, and if not taken there should not be allowed at all.

LORD DUNDAS—The variety of blunders in this case has been extensive and peculiar. But I think that the course proposed will meet the justice of the matter, that it is in accordance with the authorities which have been referred to, and that it will do no violence to the salutary rules which exist for the enforcement of proper pleading.

The Court repelled the objection, and thereafter allowed the record to be amended as indicated *supra*, and counsel were then heard on the merits.

Argued for the reclaimers (pursuers)—The preference was not to be extended beyond what a strict reading of the bye-laws justified. The system inaugurated in 1903 was *ultra vires* of the powers conferred by the 10th bye-law. That system involved either the reservation of the whole dock, which was incompetent — *Macbeth* v. *Ashley*, April 17, 1874, 1 R. (H.L.) 14, 11 S.L.R. 487—or that no berth was specially reserved, in which case it was incompetent to turn any steamer out if she had got a berth and was continuously loading. There was no reservation as contemplated by the 10th bye-law unless it was always possible for a steamer to know from which berth she was liable to be turned out. In any event, even if the new system was a good exercise of the power conferred by the 10th bye-law, the bye-laws as a whole, and No. 11 in particular, made it illegal to turn a steamer out of a berth before she had finished loading, if her cargo was on the quay or in the dock sidings. If the proviso to that effect in the 11th bye-law was meant to apply only to sailing vessels, the expression "sailing vessel" would have been used, as was done elsewhere in the bye-laws where sailing vessel was meant. That was not inconsistent with the reservation of a berth for regular traders, for any regular trader would be entitled to the first vacant berth, though there were non-regular traders waiting which had arrived first.

Argued for the respondents (defenders)—The system in question was within the power conferred by the 10th bye-law. The discretion given to the Commissioners was very wide, and there would have been no incompetency in selecting a different berth as the preference berth every day. That was the same in principle as the effect of the system introduced in 1903. The Commissioners had not reserved all the berths in the East Dock, because there was also a proviso that only one regular trader at a time should have a preference berth. So long as there never were two preference berths at one time—and there never could be under the new system—the Commissioners were not exceeding their powers. There was no difficulty in ascertaining at any given time which was the preference berth. The construction contended for by the reclaimers of bye-law No. 11 was wrong. It was clear that that section was dealing with the rights of sailing vessels and steamers *inter se*, and in any event it could not modify the power conferred in bye-law 10 in the way the reclaimers argued.

At advising—

LORD LOW—The question in this case is whether the method adopted by the defenders, the Burntisland Harbour Commissioners, of reserving or setting aside a loading berth for the accommodation of vessels trading regularly with the port, is within the powers conferred upon them by the bye-laws which have been adopted for the regulation of the harbour?

By the 10th bye-law the Commissioners are, *inter alia*, empowered to "specially reserve or set aside for the accommodation of steamers or other vessels trading regularly with the port any berth or berths in the docks." There are two docks in the harbour each containing three berths, but only the East Dock has sufficient water to enable vessels carrying 2000 tons and upwards to load. The berths in the East Dock are numbered 4, 5, and 6, and at first the Commissioners exercised the power conferred upon them by the 10th bye-law by setting aside No. 5 berth as the preference berth for regular traders. No doubt that may be said to have been the natural and obvious way of reserving a berth, but I do not think it was the only way in which that could be lawfully done. So long as there was a berth to the use of which regular traders had a preference over non-regular traders, the Commissioners were in my opinion entitled to reserve or set aside from time to time such berth as might be most convenient for all parties using the harbour. It was only because the Commissioners believed that the method of reserving a berth which they subsequently adopted was more generally convenient that they made the change.

The memorandum which the Commissioners issued to the harbour-master informing him what was the new method of reserving a berth which they had

adopted is not very skilfully framed, but its meaning is clear enough, and it is not said that any difficulty has been found in carrying it out. The method is this—The last arrived non-regular trader gives way to the first regular trader which requires a berth, but when a regular trader has obtained a berth by displacing a non-regular trader, that berth is for the time the reserved berth, and no preference is given in regard to the other two berths until the regular trader in the reserved berth has finished loading. When that has been accomplished the rule that the last arrived non-regular trader gives way, again comes into operation and the process which I have described is repeated.

It was argued that such an arrangement, if it could be regarded as being the reservation of a berth at all, amounted to a reservation of all the three berths in the dock, which was beyond the power conferred upon the Commissioners. If that were the case the objection would be fatal, but I do not think that all the three berths can be said to be reserved in any reasonable sense. Although any one of them may be the reserved berth, and although which of them is the reserved berth may vary from day to day, or even from hour to hour, only one berth can be reserved at a time, and there is no difficulty in ascertaining which of the berths is the reserved berth, because that depends upon the circumstances existing at the time, about which there cannot be, or at least ought not to be, any mistake. It seems to me that under this arrangement there is always one berth specially reserved or set aside for regular traders, in the sense that there is always a berth to the use of which a regular trader has, in a question with non-regular traders, a preference. So long as that end was attained, it seems to me that the Commissioners were entitled to attain it by the method which to them appeared to be most in accordance with the general interest.

The pursuers contend alternatively that in any view the "Trieste" being already at a berth and her cargo being on the quay, she was entitled in terms of the 11th bye-law to remain at the berth until she had completed loading. It is not altogether clear that the words in the 11th bye-law upon which the pursuers found refer to steamers, but assuming that they do so I do not think that they apply to a berth reserved under the 10th bye-law. It seems to me that a berth could not properly be said to be specially reserved or set aside for regular traders if a non-regular which had been allowed to use the berth because it happened to be unoccupied could remain in the berth for an indefinite time although a regular trader required it. It was admitted that so long as No. 5 was earmarked as the reserved berth, a non-regular trader which had been allowed to occupy it would have been bound to give place to a regular trader which required a berth, and if the new method of fixing a reserved berth was competent, it seems to me that the same result must follow.

I am therefore of opinion that the interlocutor of the Lord Ordinary should be affirmed.

LORD ARDWALL—The pursuers in this case, who are the owners of the s.s. "Trieste," sue the Burntisland Harbour Commissioners for damages, in respect that after said vessel had obtained from the defenders' harbour officials a berth at the harbour to enable her to load a cargo of coals which were then on the quay, and after she had started to load her cargo, she was ordered by the harbour-master to vacate the berth in order to allow the steamship "Harpalus" of London into the berth. Owing to this the "Trieste" was detained two days, which ended in the pursuers sustaining loss and damage to the amount of £55.

The pursuers maintain that the removal of the "Trieste" from her berth in order to make room for the "Harpalus" was an act not sanctioned by the bye-laws of the harbour enacted by the defenders in terms of the Harbours Clauses Act 1847, and approved of by the Sheriff-Substitute of Fife and Kinross on 10th September 1902, and was accordingly an illegal act and *ultra vires* of the defenders.

The vessels resorting to Burntisland harbour may be divided into three classes—first, sailing vessels; second, steamers which trade regularly with the port; and third, steamers which just come there for cargoes from time to time as suits their convenience. The defenders being desirous of favouring steamers which regularly resorted to the port, enacted the bye-law No. 10 in their favour, the important clause for the purposes of this case being in the following terms:—". . . (*quotes, v. sup. in rubric*) . . .

There are two docks in Burntisland, in only one of which (the East or New Dock) can steamers of two thousand tons and upwards load coals. That dock contains three berths known as Nos. 4, 5, and 6. In pursuance of the above bye-law No. 10 the Commissioners by resolution reserved and set aside berth No. 5 for the accommodation of steamers regularly frequently the port, which may be referred to as "preference steamers," and from January 1902 until November 1903 the harbour-master reserved No. 5 for preference steamers, other steamers being allowed to use it only on the footing that if a preference steamer arrived they would require to leave No. 5, but any steamer was secure in the possession of Nos. 4 or 6 once she was berthed. That arrangement continued in force until November 1903, when the Harbour Commissioners, at the request, the harbour-master says, of some shipping agents, and as they allege for greater public convenience generally, adopted a new method of, as they supposed, carrying out the bye-law. This method is set forth in a memorandum which they requested the harbour-master to give effect to, and which is dated 19th November 1903. It is in the following terms:—"In place of No. 5 hoist (East Dock) being solely set

apart as a preference berth, that either Nos. 4, 5, or 6 be made use of accordingly, and that the last steamer on turn in the East Dock be turned out of its berth to give place to the preference boat, always provided that only one regular trader at a time is to be entitled to be put into a preference berth."

It was in pursuance of the directions to the harbour-master contained in this memorandum that the "Trieste" was put out of No. 6 berth in order to allow the "Harpalus" to get into it, the "Harpalus" being a steamer trading regularly with the port, while the "Trieste" was a steamer which just happened to come there for a cargo on such occasions as suited her convenience.

The question on which this case turns is whether the memorandum and the practice thereby directed to be followed is or is not inconsistent with the bye-laws. If it is, then it follows that the defenders had no right to remove the "Trieste" from her berth in the way they did, and they will be liable in damages for having done so.

It is well to keep in mind the legal position of the defenders with regard to shipping frequenting the harbour of which they have charge. Under the Harbour Acts and at common law harbours are open to all the public equally; indeed this is implied in every grant of harbour. But under the Harbour Acts power may be granted to the Commissioners of particular harbours enabling them in the interests of the harbour to bestow preferences and make other regulations for the harbour traffic. In the present case the defenders were empowered to enact such bye-laws and to put them in force, provided they were approved of and confirmed by the Sheriff of Fife and Kinross as judge ordinary of the bounds. Before any bye-laws are confirmed they have to be duly advertised, and opportunity given for any persons interested who may wish to oppose them to appear before the Sheriff and do so. It necessarily follows that so far as the granting of preferences to particular shippers is concerned, the powers of the defenders were strictly limited by their bye-laws as approved by the Sheriff, both as to the preferences to be given and as to the method of enforcing it. Accordingly, any preference given or enforced in a manner not consistent with the bye-laws is illegal and *ultra vires* of the defenders as Harbour Commissioners, they being bound to treat all vessels equally except in so far as provided by the bye-laws.

Now I do not think this question a difficult one if attention is concentrated simply upon the bye-laws and the memorandum which have been quoted, and I think that, attending to these, it is very clear that the memorandum is at variance with and contrary to the bye-laws. Bye-law 10 provides that the defenders may specially reserve or set aside for the accommodation of steamers or for vessels trading regularly with the port any berth or berths in the docks. Under the former practice this was carried out, and properly carried out, by specially reserving and setting aside No. 5 berth for regular traders, and that was the obvious way of carrying out the bye-law. In the memorandum, as indeed that document itself sets forth, no berth is under it to be "solely set apart as a preference berth." These are the words of the memorandum itself, and it proceeds to direct that either Nos. 4, 5, or 6 berths be made use of "accordingly," meaning of course that none of these berths was to be solely set apart as a preference berth.

I pause here to remark that it is quite clear upon the very terms of the two documents that the one is wholly inconsistent with the other. The 10th bye-law directs that the defenders may specially reserve or set aside any berth or berths in the docks; the memorandum says that no berth is to be solely set apart as a preference berth. The memorandum thereafter proceeds to provide that the "last steamer on turn in the East Dock be taken out of its berth to give place to the preference boat, provided that only one regular trader at a time is to be entitled to be put into a preference berth." I do not just now stop to inquire whether this was a good or a bad arrangement in the general interests of the public. Though I may remark that the position under the memorandum introduced great insecurity as regarded all three berths, whereas formerly any steamer was secure to order forward her cargo of coal from the mines so soon as she got into either No. 4 or No. 6 berths. It appears to me, however, that we have nothing to do with that question in considering the present case. It is, however, I think, perfectly clear that the arrangement introduced by the memorandum is not an arrangement authorised by the 10th bye-law. It is true that it is an arrangement which gives a preference to regular traders, but it does not do so in the only way in which the 10th bye-law directs that such preference may be given by specially reserving or setting aside a berth as a preference berth. Now if the bye-laws authorise a preference to be given to certain vessels in a certain way, I take it that harbour commissioners cannot give a preference in a totally different way, because they are only entitled to give preferences in the way prescribed by the bye-laws and no other. The memorandum alters entirely the nature and quality of the preference given by the bye-laws, and it was *ultra vires* of the defenders to do that without enacting a new bye-law and having the same confirmed by the Sheriff, with opportunity to all concerned to oppose the change if so advised.

It was argued, however, that the practice authorised by the memorandum sufficiently fulfilled the requirements of the bye-law that a berth or berths should be appropriated to preference steamers, but that is not the word used in the bye-law. The bye-law provides that the defenders may "specially reserve or set aside" a berth for preference steamers, and that does not mean that they may allow preference steamers to occupy as a preference berth one that has not been so set aside. This I

think is very plain if we look to the meaning of the words "set aside" as used elsewhere in the bye-laws. In bye-law 11 it is provided that "the Commissioners may *set aside* one of the berths in the docks for the accommodation of sailing vessels, and in that event sailing vessels shall take their turn for loading at such berth." It can never be pretended that this meant anything else than setting aside a specific berth for the use of sailing vessels, and by parity of reasoning and interpretation I think the same meaning must be put upon the phrase "set aside" in the preceding bye-law.

The Lord Ordinary in the latter part of his note rejects the interpretation of bye-law 10, which as above set forth I think ought to be adopted, and he does so on the ground that apparently the system set forth in the memorandum causes least disadvantage to the non-regular traders consistently with the exercise of the powers which the defenders admittedly have, and indeed from his whole opinion he seems to consider this a question of convenience or inconvenience, without, as it appears to me, any regard to the terms of the bye-laws or the fundamental legal relation of the Harbour Commissioners to the general public.

If, however, the practice introduced by the memorandum is considered with the bye-laws, then it appears to me that bye-law 11 comes into play, because if no special berth is reserved or set aside for preference steamers, the provision in bye-law 11 to this effect, "A vessel already in berth will not be removed therefrom until loaded if her cargo is on the quay or in the dock sidings" comes into play. Reading bye-law 10 as I think it ought to be read, it is plain that this provision (as the Lord Ordinary himself puts it) falls to be qualified in the case of steamers by the reserved powers of the Commissioners to set aside a berth or berths for the accommodation of regular traders, and the Lord Ordinary goes on to say that under the old system where a particular "berth was so set aside there was no difficulty in harmonising these two bye-laws, for the non-regular trader which was admitted into berth No. 5 was so admitted on the implied condition that she must leave it as soon as a regular trader arrived if she had not previously completed her loading." In these observations I entirely agree, but I cannot follow the Lord Ordinary in thinking that the above provision in bye-law 11 is excluded when no particular berth is set aside. In short, I think that bye-law 11, if properly enforced, practically renders nugatory the directions in the memorandum, because I think it clearly applies to such a case as we have in the present one, where the "Trieste" was already in her berth, not being a berth set aside in terms of bye-law 10. Accordingly, reading bye-law 10 as I think it ought to be read, it harmonises perfectly with bye-law 11, whereas the memorandum does not do so, and this to my mind is an additional reason for holding that the memorandum is inconsistent with the bye-laws.

I am accordingly of opinion on the whole case (1) that the defenders were not entitled to give any preference except in the precise terms of the bye-laws approved of by the Sheriff; (2) that the preference given to the "Harpalus" on the occasion in question was not a preference authorised by bye-law 10, and was therefore a preference which it was *ultra vires* of the defenders to give; (3) that assuming that the defenders were entitled to give the directions contained in the said memorandum, they were precluded by the provisions of bye-law 11 from removing the "Trieste" from her berth at the time and in the manner they did; (4) that it is of no relevancy to the present question to consider whether the practice under the memorandum was more or less convenient than that which formerly obtained under bye-law 10, the whole question in the case being whether the preference given to the "Harpalus" on the occasion in question was a preference which the defenders were entitled to give under the bye-laws. I accordingly am of opinion that the judgment of the Lord Ordinary ought to be recalled and decree pronounced in the pursuers' favour for £55 in name of damages.

LORD JUSTICE-CLERK — There being a difference of opinion on the Bench, it has been necessary to consider this case with some anxiety. But I have come to the conclusion that the opinions given by Lord Low and the Lord Ordinary are right. The view expressed by Lord Ardwall is, as I think, giving too rigid a reading to the words of the bye-law, which was intended to enable the harbour authority to give a limited preference to steamers loading regularly at the port, under which they might remove other vessels from berths in which they were loading, so as to allow the preference steamers to obtain cargo without delay. In practice, one of the three berths at which large steamers can be loaded was formally set apart by port regulation. Later it was found more convenient to use berths in rotation as preference berths, but so that only one berth should be occupied by preference at a time, as has been described in the opinions delivered by your Lordships. The procedure appears to me to amount to nothing more than this, that from time to time there is set apart a berth, into which a preference steamer may be put as against a non-preference vessel instead of a more or less permanent setting apart of one berth; in other words, the respondents by a harbour regulation carry out the bye-law in exactly the same manner as if they issued a separate regulation, by which berth A was appropriated to be the preference berth for a certain tide, and then issued a separate regulation before next tide to say that B should now be the preference berth. I see nothing to compel them to fix on any particular time during which a selected berth shall be a preference berth, and as long as they do not

by any regulation cause the preference to be exercised in a way which puts an ordinary trader to a different disadvantage from that which he must suffer from the bye-law as approved of by the Sheriff being carried out by a fixed appropriation, I can see no ground for holding their action to be incompetent. I cannot see that they by appropriating berths from time to time, instead of setting aside a berth for a longer tract of time, are doing anything different from what the bye-law sanctions. What they practically do is to set apart a berth which an ordinary trader knows he can only enter on the footing that he cannot remain if a preference steamer comes forward. The regulation, although it might have been much better worded, does certainly not put any trader to disadvantage as compared with the former mode of working under the bye-law. In my view they are not extending the operation of the bye-law beyond its intent.

To me it appears that the only plausibility in the objection to the regulation lies in the form in which it is worded. It could easily have been expressed in terms which, while not affecting the operative effect of it, could not have been even with plausibility impugned as *ultra vires*.

I hold that what was done in fact was not in contravention of the bye-law, and that the regulation is so expressed as to authorise what is done, and that this regulation could be competently issued by the respondents.

LORD DUNDAS was sitting in the First Division.

The Court adhered.

Counsel for Pursuers (Reclaimers) — Horne — J. G. Jameson. Agents — Boyd, Jameson, & Young, W.S.

Counsel for the Defenders (Respondent) —Cooper, K.C. —Morison, K.C.—Constable, K.C.—Grierson. Agent—James Watson, S.S.C.

HOUSE OF LORDS.

Monday, June 28.

(Before the Lord Chancellor (Loreburn), Lord Ashbourne, Lord James of Hereford, Lord Gorell, and Lord Shaw of Dunfermline.)

GREENOCK HARBOUR TRUSTEES *v.* GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Sale—Sale of Heritage—Price—Interest on Price—Rate—Harbour—Railway.

In 1881 Harbour Trustees made an agreement with a railway company whereby each was to convey to the other for their respective undertakings certain lands which were to be acquired or had already been acquired. The agreement provided the mode in which, calculated according to the cost of acquisition of the lands to be acquired, the price chargeable to the parties for the lands to be conveyed to them respectively was to be fixed. By 1885 the parties were in possession of the respective lands, but owing to disagreement arising out of the terms of the agreement and from the fact that difficulties unforeseen at its date had had to be surmounted, no conveyances had been executed and no adjustment of accounts had been made. In 1906 the Harbour Trustees brought an action to have the agreement finally implemented and to recover a sum alleged to be due to them on a balancing of accounts. They claimed interest.

Held (*dub.* the Lord Chancellor and Lord James) that the circumstances of the case disclosed no specialties sufficient to take it out of the established rule that where a purchaser of heritage entered into possession before the purchase price was paid, interest on the price from the date at which he had obtained full possession ran in favour of the vendor, and that the rate of interest to be charged in the particular case should be 3½ per centum.

In 1906 Greenock Harbour Trustees raised an action against the Glasgow and South-Western Railway Company, in which they sought to have the defenders ordained to deliver to the pursuers a valid disposition of certain lands, to accept from the pursuers a valid disposition of certain other lands, and to pay certain sums as being due on a balancing of accounts, all in implement of an agreement between the parties dated 10th, 15th, and 16th March 1881. The only question of general interest in the case, the agreement being very special, was as to whether interest on the price of the lands should be chargeable by the one party against the other—if so, from what date and at what rate.

The *clauses* of the *agreement* which gave rise to the case and were in question were these—"3. The company shall, within three years after the passing of the Bill into an Act, acquire the properties lying between the turnpike road leading from Port Glasgow to Greenock and the river Clyde belonging to the Marine Investment Company, the Clyde Pottery Company, William Watson, Messrs Sommerville & Company, and John Fullarton (in this agreement called 'the owners'), with all the rights and privileges thereto belonging, and shall thereupon sell to the Trustees so much of the foreshore of the river Clyde as lies to the north of the line C, D, E, F, G, shown on the plan, at the prices per square yard at which the company purchased the same. 4. The company shall purchase from the Trustees the land and foreshore of the river Clyde, coloured yellow on the plan, at the average price per square yard of the land to be purchased under article 3 hereof. 5. After the company shall have acquired the properties belonging to the owners, they