in any event legislation was the only appropriate remedy for the abuse there adverted to. (*a*), (*b*), and (*h*) of the objects introduced carriage by air, but the general business of the petitioners was carriage — by air was simply a new mode of carriage, and its introduction was modernising the business methods of the petitioners. The part in square brackets in (*c*) was dropped. (*d*) contained power to amalgamate; that power had not been objected to by the reporter; it was a useful power, and had been sanctioned, at least where there was already power to amalgamate—*Union Bank of Scotland*, 1918 S.C. 21, 55 S.L.R. 62; *Aberdeen Steam Navigation Company*, 1919 S.C. 464, 56 S.L.R. 343; *Macfarlane, Strang, & Company*, 1915 S.C. 196, 52 S.L.R. 113 — but it had been refused in the earlier case of *John Walker & Sons*, 1914 S.C. 280, 51 S.L.R. 246. Palmer's Company Precedents, 11th ed., part i, p. 504, was referred to. (*k*), power to lend money, would be restricted to power to lend money to customers, and for that there was authority — *London and Edinburgh Shipping Company*, 1909 S.C. 1, 46 S.L.R. 85. In view of the decision in *Walker's* case (*q*) was dropped. The petitioners were willing to drop out of (*r*) the words "or for any other purpose which may seem expedient;" with that alteration the power to promote provisional orders, &c., should be sanctioned. Similarly, subject to the deletion of the words "all or," the power to sell (*s*) should be sanctioned — *Walker's* case (*cit.*). (*v*), Power to promote freedom of contract, &c., was found in practice — Palmer (*op. cit.*), i, p. 516. The words at the end of (*w*) were designed to prevent freedom of operation arising out of the rule of *ejusdem generis* and should be sanctioned—Palmer (*op. cit.*), i, p. 513; *London and Edinburgh Shipping Company's* case, though *Walker's* case was *contra*.

The Court confirmed the form of the petitioners' constitution and the alterations made with respect to the objects of the company as above shown.

Counsel for the Petitioners—Macmillan, K.C. — Cooper. Agents — Macpherson & Mackay, W.S.

Friday, July 2.

FIRST DIVISION.

[Lord Hunter, Ordinary.
[Lord Anderson, Ordinary.

OVENSTONE *v.* DUNDEE DISTRICT COMMITTEE OF FORFAR COUNTY COUNCIL.

Process—Jurisdiction—Declarator—Road—Competency—Taking Material for Road Purposes—Declarator in Court of Session that Road Authority not Entitled to Take from Place in Question—General Turnpike Act (1 *and* 2 *Will. IV, cap.* 43), *sec.* 80.

Held per Lord Hunter (Ordinary) that notwithstanding the proviso to section 80 of the General Turnpike Act 1831 giving the Sheriff power to "authorise or prohibit" the road authority to take materials for road purposes, an action of declarator in the Court of Session to have it declared that the road authority was not entitled to take material from the place in question was competent.

Local Government — Roads and Bridges — Statute—Construction—Taking Material for Repair—"Policy"—"Inclosed Ground Planted as Shelter to a House"—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 123, *incorporating General Turnpike Act* (1 *and* 2 *Will. IV, cap.* 43), *sec.* 80.

In an action to restrain a district committee from taking road material from ground in the proximity of a mansion-house, *held* upon the evidence in the case (*rev.* judgment of Lord Anderson, Ordinary) that the ground in question was "inclosed ground planted as shelter to a house" within the exception in the General Turnpike Act, section 80.

Opinion per Lord Anderson that a policy in the sense of the Turnpike Act was the "ground in the vicinity of a mansion-house dedicated in a greater or less degree to its service, with the objects of securing privacy, effecting ornamentation, and providing shelter.

The General Turnpike Act (1 and 2 Will. IV, cap. 43) enacts—Section 80—"It shall be lawful for the trustees of any turnpike road or any person authorised by them to search for, dig, and carry away, materials for making or repairing such road and the footpaths thereof, or building, making, or reparing any . . . bridge, or any other work connected with such road, from any common land, open uncultivated land, or waste . . . without paying any surface damages or anything for such materials . . . and also it shall be lawful for such trustees and other persons authorised by them as aforesaid to search for, dig, and carry away any such materials in or out of the inclosed land of any person where the same may be found, and to land or carry the same through or over the ground of any person (such materials not being required for the private use of the owner or occupier of such land, and such land or ground not being an orchard, garden, lawn, policy, nursery for trees, planted walk or avenue to any house, nor inclosed ground planted as an ornament or shelter to a house, unless where materials have been previously in use to be taken by the said trustees), making or tendering such satisfaction for stones to be used for building and for the surface damage done to the lands from whence such materials shall be dug and carried away or over or on which the same shall be carried or landed as such trustees shall judge reasonable. . . . Provided always that before taking such materials from any inclosed land from which the same shall not previously have been in use to be taken, fourteen' days previous notice in writing, signed by two trustees, shall be given to or left at the usual residence of the proprietor and

occupier of the land or quarry from which it is intended to take the same, or his or her known agent, to appear before the Sheriff or any two justices of the peace acting for the shire where the said lands are situate to show cause why such materials shall not be so taken; and in case such proprietor, occupier, or agent shall attend pursuant to such notice, or shall neglect or refuse to appear (proof on oath in such case being duly made of the service of such notice) such Sheriff or justices shall authorise or prohibit the trustees to take such materials or make such order as they shall think fit."

The Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), by its section 123 incorporates, *inter alia*, section 80 of the General Turnpike Act 1831 (*sup.*)

On 4th April 1919 Charles Barrie Ovenstone of Duntrune, *pursuer*, brought an action against the Dundee District Committee of the County Council of the County of Forfar, *defenders*, concluding for declarator that the defenders had no right or title to search for, dig, or carry away materials for making or repairing highways or the footpaths thereof, or for building, making or repairing bridges or any other works connected with such highways or for any purpose whatsoever without the consent of the pursuer, in or from or out of certain inclosed land forming part of the pursuer's estate of Duntrune, and for interdict against them for so doing.

The pursuer *pleaded, inter alia*—"2. The pursuer is entitled to obtain decree of declarator and interdict in terms of the conclusions of the summons in respect that (*a*) the quarry in question is within the policy of the mansion-house of Duntrune; (*b*) it is situated within enclosed ground planted as an ornament and shelter to the said mansion-house."

The defenders pleaded—"1. In respect the defenders do not claim the right to take materials from the quarry in question unless and until they should be authorised to do so by Order of the Sheriff under section 80 of the Act 1 and 2 Will. IV, cap. 43, the action is incompetent, or at all events premature and unnecessary, and should be dismissed. 2. The pursuer's statements being irrelevant and insufficient to support the conclusions of the summons the action should be dismissed. 3. The defenders, being entitled under the Road Acts to take materials from the quarry in question for making or repairing the roads under their charge should be assoilzied. 4. The statements of the pursuer, so far as material, being unfounded in fact, the defenders should be assoilzied."

On 26th June 1919 the Lord Ordinary (HUNTER), after a discussion in procedure roll at which were cited *Grahame* v. *Magistrates of Kirkcaldy*, 1882, 9 R. (H.L.) 91, 19 S.L.R. 893; *Duke of Sutherland* v. *Reed*, 1890, 18 R. 252, 28 S.L.R. 217; *Whitson* v. *Blairgowrie District Committee*, 1897, 24 R. 519, 34 S.L.R. 395; *Sitwell* v. *Macleod*, 1899, 1 F. 950, 36 S.L.R. 762; *Stirling County Council* v. *Magistrates of Falkirk*, 1912 S.C. 1281, 49 S.L.R. 968; *Dumbartonshire Water Commissioners* v. *Lord Blantyre*, 1884, 12 R. 115, 22 S.L.R. 80; *Main* v. *Lanarkshire and Dumbartonshire Railway Company*, 1893, 21 R. 323, 31 S.L.R. 239; *Passmore* v. *Oswaldtwistle Urban Council*, [1898] A.C. 387; *Moore* v. *M'Cosh*, 1903, 5 F. 946, 40 S.L.R. 690; *Lawrence* v. *Comptroller-General of Patents*, 1910 S.C. 683, 47 S.L.R. 524—repelled defenders' first and second pleas and allowed a proof.

Opinion.—. . . "It appears that under a minute of agreement, dated December 1895, between the pursuer's predecessors in title and the defenders, the latter received permission from the former to work the quarry situated on that part of the pursuer's estate to which the declarator refers. On the pursuer's succeeding to the estate the defenders continued to work the quarry for some time, but the pursuer gave the defenders formal notice revoking and recalling the permission to them under the agreement as at the term of Martinmas 1918.

"On 28th March 1919 the defenders served upon the pursuer a notice in the following terms—'Take notice that the Dundee District Committee of the County Council of the County of Forfar, appointed under the Local Government (Scotland) Act 1889, and as road trustees acting under and in virtue of the Roads and Bridges (Scotland) Act 1878, in exercise of the powers conferred upon them by the said Acts and statutory provision therewith incorporated, but always upon the terms and conditions thereby provided for, intend by themselves or such persons as may be authorised by the said Committee to search for, dig, and carry away materials for making or repairing highways (as highway is defined by section 3 of said Act of 1878) within the said district, and the footpaths thereof, and for building, making, or repairing bridges or other works within the said district connected with such highways, from the enclosed land, tinted pink on the plan served on you along with this notice, part of the estate of Duntrune, whereof you are the proprietor, and particularly from that portion of the ground, tinted pink on said plan, forming the metal quarry, which up to Martinmas 1918 was occupied and worked by the said District Committee; and you are hereby required to appear before the Sheriff of the said county or his Substitute within the ordinary Sheriff Court-House at Dundee upon the sixteenth day of April, Nineteen hundred and nineteen years, at 10·30 o'clock forenoon, being the time and place appointed by the said Sheriff or his Substitute for such appearance, to show cause, if any such there be, why such materials should not be so taken.'

"In pursuance of said notice the parties were heard before the Sheriff at Dundee on 16th April 1919. The Sheriff sisted the defenders' application pending the decision of the present action in the Court of Session. For the defenders, however, it is maintained that the action is incompetent, and it was upon this plea that I heard parties in the Procedure Roll.

"By section 80 of the Act 1 and 2 Will. IV, cap. 43 (which is incorporated with the Roads and Bridges (Scotland) Act 1878 by

section 123 thereof) it is, *inter alia*, enacted as follows . . .'

"There is a proviso to the above section to the effect that the trustees are to give fourteen' days notice to the proprietor of land from which it is intended to take material to appear before the Sheriff to show cause why such materials shall not be taken, and the Sheriff may authorise or prohibit the trustees to take such materials or may make such other order as he shall think fit.

"As I read the statute the Sheriff has no jurisdiction to authorise the trustees to take materials from land which comes within one or other of the enumerated exceptions, *i.e.*, *inter alia*, policy land, avenue to a house or enclosed ground planted as an ornament or a shelter to a house. Even if he were incidentally to the application before him to consider the character of the land from which it was proposed to take the materials, I see nothing in the words of the statute to indicate that he was made the final judge of this question of fact. In the present case there are averments by the pursuer that the quarry in question is within the policy of the mansion-house of Duntrune, and that it is situated within enclosed ground planted as an ornament and shelter to the said mansion-house. If these averments are established I do not think that the Sheriff will be entitled to give the defenders the authority they ask. In my opinion he took the right course in sisting their application.

"I was referred to a number of cases where in arbitrations the Courts have refused to interfere with an arbiter *ab ante* on the footing that he might entertain a claim with which he had no power to deal. These cases do not appear to me to assist the defenders' contention. I do not think that where it is maintained that the whole or a clearly separate part of a reference is *ultra vires* of an arbiter the Court will throw out as incompetent an action declaring that the arbiter cannot entertain the claim, or defining the limits of his jurisdiction. I propose to repel the first and second pleas-in-law for the defenders, and *quoad ultra* to allow parties a proof of their averments."

On 26th November 1919 the Lord Ordinary (ANDERSON) after the proof sustained the fourth plea-in-law for the defenders and assoilzied them.

Opinion, from which the *facts* of the case appear:—"I have now taken the proof allowed by Lord Hunter by his interlocutor of 20th June 1919.

"The questions which fall to be decided on the evidence are these—(1) Whether the ground from which the defenders propose to quarry metal is within the policy of Duntrune mansion-house? or (2) Whether said ground is enclosed and has been planted (*a*) as an ornament, or (*b*) as a shelter to said mansion-house? . . .

"Proceeding then to consider the questions I have mentioned, I take them in the order I have specified—1. Is the ground claimed by the defenders within the policy of Duntrune mansion-house?

"The statute does not define any of the terms included in the clause of exceptions. Nor has it ever been judicially decided what a 'policy' includes in a question of this nature. The nearest approach to judicial definition of 'policy' is to be found in the opinion of the Lord Ordinary (Stormonth Darling) in the above-mentioned case of *Mercer Henderson's Trustees*, 1899, 2 F. 164, 37 S.L.R. 119, where he takes 'the word "policy" to mean the pleasure ground surrounding a gentleman's seat.' But in that case it was not seriously disputed by the defenders that the quarry was situated within the policy, and the real controversy had reference to other topics. Lord Stormonth Darling therefore was not really concerned with the question raised in the present case, and the foresaid phrase, being descriptive rather than definitive is not of much assistance.

"If it could be held that a 'policy' was equivalent to what is taken by the eldest heir-portioner as a *præcipuum* along with the mansion-house, it would not be difficult to decide the case against the pursuer's contentions. By the *jus præcipui* the eldest heir-portioner takes, without recompense to her sisters, the mansion-house on the estate and those adjuncts which are necessary for its comfortable enjoyment. Thus it has been decided that along with the mansion-house the eldest heir-portioner takes the offices attached thereto, barnyard, garden, and orchard—Ersk. iii, viii, 13; *Cowie*, M. 5362; *Forbes*, M. 5378; *Wight*, 12th December 1798, M. *voce* 'Heir-portioner,' App. No. 1; *Maclauchlane*, 27th May 1807, *ibid.* No. 3. If Duntrune House were taken *jure præcipui* by an heir-portioner she would take along with it the garden and offices lying to the east of the farm-steading road and the plantation and shrubberies to the east of that road lying between the house and the highway. It is doubtful if she would take the two fields situated in front of the house. She would not in my opinion take any field to the east of these last-mentioned parks, nor Duntrune Hill to the north of the highway, nor the home farm-steading or mill, or any ground lying to the west of the service road leading to the home farm-steading. It is probable, however, that the term 'policy' in the sense of the said statute is of wider extension than the subjects taken by an heir-portioner as adjuncts of a mansion-house.

"Where there is no statutory or judicial definition of a statutory term, the rule of construction is to read the term according to its ordinary or popular signification.

"The first step therefore is to formulate a definition of 'policy.' Therefore my task is to endeavour to ascertain whether the ground claimed by the defenders is within or without that definition. . . .

"Seeking then for a standard in the shape of a definition of 'policy' to apply to the ground in question, it is to be noted in the first place that the use of the term, as applying to ground adjoining a mansion-house, is peculiar to Scotland. In England the term *demesne* is employed to describe what is called in Scotland a policy; but the former term is of wider extent, as it includes the

mansion-house as well as its adjuncts. The term 'policy' as used in its Scottish sense has the same derivation as the well-known word 'police' (Greek, *politeia;* Latin, *politia*). The term therefore connotes, or at all events originally connoted 'guardianship.' I have not been able to trace the origin of the word in its Scottish signification, but I have no doubt that it took its rise in mediæval times when every mansion-house was a fortress. It was then customary for the purposes of defence to clear the ground in the vicinity of the house of trees, shrubs, and bushes, which if left would serve to conceal the approach of an enemy. It will be remembered that in 'Quentin Durward' the foreground of Plessis-les-Tours was thus cleared of obstructions, and was rendered dangerous to those approaching the castle by secret traps and pitfalls. If this original signification of the term is to be applied to the present question, then much of what the pursuer claims to be policy would have to be excluded. It would not have been considered necessary for purposes of defence to clear ground which did not command and was not commanded by the mansion-house.

"Under modern conditions the meaning of the term has, however, entirely changed. In endeavouring to ascertain its present-day signification it is legitimate and usual to have recourse to dictionaries. In Dr Murray's Oxford Dictionary 'policy' in the Scottish sense is defined as 'The enclosed, planted, and partly embellished park or demesne land lying around a country seat or gentleman's house.' A shorter definition may be given from a more popular dictionary, that of Chambers—'The pleasure grounds around a mansion.' In Jamieson's Scottish Dictionary 'policy' is defined as 'The pleasure ground or improvements about a gentleman's seat, especially in planting' (polesye, Lyndsay). Illustrations of the use of the term, according to Jamieson, are to be found in the Statutes James V, 1535, cap. 10, and James VI, 1579, cap. 84. Two quotations are given from Bellenden's Chronicle, the former of which seems to support the views I have expressed as to the original meaning of the term—'The Pychtis spred fast in Athole and maid syndry strengthis and polecyis.'—Bk. vii, cap. 6. 'Scho knew the mynd of Kenneth geuyn to magnificent building and polesy.'—Bk. xi, cap. 10.

"From Pennant's Tour in Scotland, 1769, p. 94, this extract is quoted—'His Lordship's policy surrounds the house. The word here signifies improvements or demesne.'

"Jamieson mentions another meaning which policy has, namely, 'The alterations made in a town for the purpose of improving its appearance.'

"The leading idea conveyed by the term at the time when Jamieson compiled his dictionary seems therefore to have been that of 'ornamentation.' I preferred, subject to one qualification, to any of the definitions I have mentioned that which was suggested by Mr Constable, namely, 'ground dedicated in a greater or less degree to the service of the mansion-house.' The qualification of this, which seems to me to be necessary, has reference to the contiguity of the ground to the house. Obviously, ground at a considerable distance from the house and separated from it, it may be by other ground which had none of the characteristics of a policy, could not be held to be part of the policy although such separated ground might be dedicated to the service of the mansion-house. Limiting the above-mentioned definition therefore to ground in the vicinity of the mansion-house, I am quite content to adopt it as the test of the present question. Mr Brown, who addressed me for the pursuer at the hearing on evidence, amplified his colleague's definition by suggesting that the objects for which ground was so dedicated were these—to secure privacy, effect ornamentation, and provide shelter. In larger policies the additional object of obtaining sport may be in view, but in the case of a small policy like that of Duntrune, Mr Brown's enumeration is probably exhaustive. Combining therefore the suggestions made by the pursuer's counsel with the qualification I have mentioned, the complete definition to be applied would read—'A "policy" is the ground in the vicinity of a mansion-house dedicated in a greater or less degree to its service with the objects of securing privacy, effecting ornamentation, and providing shelter. . . .

"I therefore hold on this first point in the case that the ground claimed by the defenders is not within the policy.

"2. Is the ground claimed by the defenders, although not within the policy, enclosed ground planted either (*a*) as an ornament, or (*b*) as shelter to the mansion-house? I have already foreshadowed the answer which falls to be made to this part of the case. The ground is admittedly enclosed but the defenders maintain that when the ground claimed was covered with trees, these did not constitute an ornament to the house. If they did, as I have pointed out, the letting of a part of this ornamental ground as a quarry in 1895 is inexplicable. But I am unable to hold that trees which are invisible from the house, and from which the house cannot be seen, constitute an ornament of the house. This is admitted by the pursuer's witness Mr Ogilvie. The planting of trees on this waste land in 1826 or thereby undoubtedly beautified the estate, but this is not enough to satisfy the statute, and I have no difficulty in holding that the presence of trees on the ground claimed would not be an ornament to the house.

"Was the house sheltered by the trees which stood on the ground claimed prior to 1895? If in point of fact it was, then the inference would probably be justified that the trees were originally planted for the purpose of affording shelter to the house. The transaction of 1895 must again be emphasised. If the trees then existing were necessary for shelter of the mansion-house, how can that transaction be explained? The only reasonable explanation is that the agreement of 1895 was entered into because the trees on the ground to be taken as a quarry were not necessary for shelter. The house, as I have pointed out,

is really sheltered on this side partly by the rising ground between it and the quarry and partly by a belt of trees in the immediate vicinity of the house. Any trees which may be planted on the further slope of this rising ground would not add to the shelter afforded by the ground itself, or would do so only to an immaterial extent.

"Much reliance was placed on the pursuer's complaint in a letter of 27th November 1912. . . . The said letter was written after some slight damage had been done by a gale of exceptional strength. In my opinion the pursuer was in error in attributing these results to the gap made in the plantation by the felling of trees in 1911.

"I therefore reach the conclusion on the whole case that the pursuer has failed to show that he is entitled to the declarator and interdict which he craves. I shall accordingly sustain the defenders' fourth plea-in-law and assoilzie them from the conclusions of the summons."

The pursuer reclaimed.

The following authorities were referred to—*Yeats* v. *Taylor*, 1863, 1 Macph. 221; *Whitson* v. *Blairgowrie District Committee*, 1897, 24 R. 519, 34 S.L.R. 395; *Mercer Henderson's Trustees* v. *Dunfermline District Committee of the County Council of Fife*, 1899, 2 F. 164, 37 S.L.R. 119; *Callander* v. *Harvey*, 1916 S.C. 420, 53 S.L.R. 344.

The Court (LORD PRESIDENT, LORDS MACKENZIE, SKERRINGTON, and CULLEN), after delivering opinions in which it was found unnecessary to decide whether the land was or was not part of the policy of Duntrune, but in which LORD PRESIDENT (CLYDE) and LORD MACKENZIE expressed the general view that "policy or policy grounds are grounds which are dedicated or appropriated to a house with one or other of four objects in view, privacy, shelter, amenity, and pleasure, held, upon the evidence, that the land was enclosed ground planted as a shelter to the mansion-house and therefore fell within the exception of section 80 of the Act 1 and 2 Will. IV, cap. 34; and recalled the interlocutor of the Lord Ordinary and granted decree in terms of the conclusions of the summons.

Counsel for the Pursuer—Chree, K.C.—A. R. Brown. Agents—Henderson, Munro, & Aikman, W.S.

Counsel for the Defenders—Sandeman, K.C.—Wark. Agents—Alexander Morison & Company, W.S.