then mean that goods conveyed on the river should pay a rate, and that goods unshipped should pay a rate, and there would be no reason why the same goods should not pay both rates. At all events, goods "conveyed upon," though neither shipped nor unshipped, would be liable. This, however, would be wholly unreasonable, and it is admittedly contrary to the practice. The draftsman used "or" for "and," which is shown by his second use of the word "or" when clearly an addition and not an alternative was meant. Again, in the note to the schedule, goods are spoken of in a way which shews that goods on board vessels were meant. Still further, Part 2 of the schedule in words applies to animals and carriages only when "shipped or unshipped." No reason can be given why if other goods should pay which are "conveyed" only, these should not. To hold that the words "shipped or unshipped" in section 98 are extended by the schedule would be to hold that they are as to some things and not as to others. For these reasons I think not only that the schedule does not extend section 98 in plain language, but I really think there is no reason for saying that it does. And I believe that the draftsman in section 98 used the right words to express the intention he had.

But it was said that assuming that goods to be liable to rates must be shipped or unshipped, this timber was unshipped. Now, I agree that almost any construction is allowable to prevent something worse. Unless for such reason I should say it was impossible to hold that this timber was "unshipped" in the river. I must repeat what I have said on a former occasion, namely, that I can give no reason for this except that it was not "unshipped." It is for those who say it was to make it out. It is for them to show that detaching a float of timber from a tug, and each log from the other, is "unshipping." All I can say is that in my judgment it is not. I cannot help thinking that the opinion that it was must have been brought about by some feeling that it was just that it should be. I cannot see this. I think it would be unjust to make this timber pay which has no benefit, or but little, from the improved navigation, and none from the wharves. I think if Parliament had been asked to make this charge it should have refused it. I am of opinion that this appeal should be disallowed.

Lord Fitzgerald—My Lords, the noble and learned Lord on the woolsack has in his judgment stated the terms of the interdict granted in this action of suspension and interdict, and made perpetual by the interlocutor of the 10th March 1882, and I desire to confine myself to cases coming within the terms of that interdict, and not to go beyond it.

I do not intend to express any opinion as to the case so much discussed, of timber built up into rafts outside the limits of the undertaking of the Trustees, and then conveyed over the waters of their portion of the river to the Broomielaw or other part of the harbour of Glasgow, its ultimate destination, or as to timber originally shipped and destined for Glasgow, but unshipped outside the western limit of the waters of the Trustees, and thence conveyed over those waters to the harbour of Glasgow or a landing-place within its limits. The complainers are timber measurers in Port-Glasgow, and proprietors of certain ponds situated on the south bank of the Clyde, above Newark Castle, between high and low water-mark. Timber in logs unshipped in the harbours of Port-Glasgow and Greenock is floated up the river to those ponds for storage purposes. The Trustees of the Clyde Navigation propose to levy rates on this timber. The question is, Are they entitled to do so? That question in the end was reduced to the construction of section 98 of the Trustees' Act of 1858. I put aside all other questions.

It seems to me to be quite clear and free from any doubt that the Trustees are not entitled under section 98 to levy rates on goods unless the goods be shipped or unshipped within their waters. "Shipped" means put on something which answers the description of a ship or vessel, no matter what its shape or form may be, for the purpose of being conveyed therein to some destination; and "unshipped" means equally taken out of the ship or other vessel in which the article has been conveyed or carried, and delivered to or placed within the dominion of the consignee or owner. The unshipping of the timber-logs in question took place in the ordinary course of business either at the port of Greenock or at Port-Glasgow, and was there complete. The complainants were either the owners of the logs at the time of unshipping or became subsequently owners by purchase. There was no unshipping within the limits of the jurisdiction of the Trustees. The state of circumstances, then, is wanting on which, and on which alone, the authority of the Trustees to levy rates arises.

But it was contended that the 98th section should be read as if the heading of Schedule H was incorporated in it, or by the light of that heading. My Lords, I concur in and adopt the criticism of the noble and learned Lord (Lord Blackburn) on this contention, and also his conclusion. We must reject the words "conveyed upon" altogether; or if we are to take them into consideration, I cannot construe them as making the change in section 98 which the respondents have so strenuously urged.

My Lords, I have listened with pleasure to the judgment of the noble and learned Lord opposite (Lord Watson), and to the terse judgment of the noble and learned Lord beside me (Lord Bramwell), in both of which I entirely concur.

Interlocutor appealed against affirmed, and appeal dismissed with costs.

Counsel for Appellants—Lord Advocate—(Balfour, Q.C.) — Solicitor-General (Asher, Q.C.). Agents—Webster, Will, & Ritchie, S.S.C.—W. A. Loch, Westminster.

Counsel for Respondents — Solicitor-General (Herschell, Q.C.).—Trayner. Agents—Archibald & Cuningham, W.S.—Simpson, Wakeford, Goodhart, & Metcalf, Westminster.

Monday, July 23.

(Before Lords Blackburn, Watson, and Fitzgerald.)

OSWALD *v.* AYR HARBOUR TRUSTEES.

(*Ante*, p. 327, and 10 R. 472.)

Harbour—Statutory Trustees—Land Acquired for Statutory Purposes—Ultra vires.

Where the Legislature has for a public pur-

pose granted power to a public company to take lands compulsorily, such company cannot bind itself only to make a use of the lands so acquired more limited than for the public advantage the Legislature has entitled it to make.

Harbour trustees having power to take certain lands for the use of the harbour, and thereon to form wharves, erect buildings, and form roads, served upon the proprietor statutory notice to take a piece of ground lying next the harbour, and the erection of buildings on the part of which nearest the harbour would shut off the remainder from its frontage to the harbour. In the course of an arbitration to fix the compensation payable to the proprietor, the trustees put in a minute agreeing that the conveyance to be granted by the proprietor should be qualified by a declaration that they should not erect sheds or warehouses on the ground, and should form and maintain a road adjoining the remainder of the proprietor's ground. *Held* (*aff.* judgment of Court of Session) that the trustees being entitled under their statutes to erect warehouses, &c., on the ground if the public advantage required it, and to a full use of the ground for the purposes of the harbour, could not bind their trust to a restricted use of it, and therefore that the proprietor was entitled to compensation on the footing that the ground was acquired absolutely, and that the frontage might at any time be cut off.

This case is reported January 26, 1883, *ante*, p. 327, and 10 R. 472.

The defenders the Ayr Harbour Trustees appealed to the House of Lords.

At delivering judgment—

Lord Blackburn—My Lords, this is an appeal against an interlocutor by which the Lords of the Second Division, along with three consulted Judges, having heard the parties on the reclaiming-note against Lord Kinnear's interlocutor, in conformity with the opinions of the majority of all the Judges present at the hearing, recalled the interlocutor, and ordained the defenders, now appellants, to make payment to the pursuer, now respondent, of £4900 with interest.

There were three dissentient Judges, so that of the eight Judges below who have given judgment, four—viz., the Lord President, the Lord Justice-Clerk, Lord Mure, and Lord Young—have decided in favour of the respondent, and four—viz., Lord Shand, Lord Craighill, and Lord Rutherfurd Clark, who thought Lord Kinnear's interlocutor right, and Lord Kinnear himself as Lord Ordinary—have decided in favour of the appellant. I need hardly say that where there is such an even division below the case is one of doubt, and requires careful consideration.

The question is raised by the decreet-arbitral of the oversman in a reference between Mr Oswald and the Ayr Harbour Trustees. The Trustees had given a notice that they required to take a portion of land belonging to Mr Oswald for the purposes of the Ayr Harbour Improvement Act 1879, which incorporated the Lands Clauses Consolidation (Scotland) Act, and had in that notice stated, as required by the Lands Clauses Consolidation (Scotland) Act, that they were willing to treat for the purchase thereof, "and as to the compensation to be made to all parties for the damage that may be sustained by reason of the works authorised by the Ayr Harbour Act 1879."

This had the effect of a purchase by the Trustees absolutely of the piece of land, and the Trustees and Mr Oswald not being able to agree as to the amount of compensation, it fell to be settled by arbitration; the arbitrators duly appointed an oversman, who had all the powers given by the Lands Clauses Consolidation (Scotland) Act, and no more.

What the oversman had to determine was not only the sum of money to be paid for the purchase of the land actually taken, as to which no question is now raised, but also, to quote the words of the 48th and 61st sections of the Lands Clauses Consolidation (Scotland) Act, "the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of the said owner, or otherwise injuriously affecting such lands by the exercise of this or the Special Act."

The clauses of the Special Act, "The Ayr Harbour Amendment Act 1879," which are material, are the following—"4. Subject to the provisions of this Act, the Trustees may make and maintain, in the lines and according to the levels shown on the deposited plans and sections, the works hereinafter specified, and all proper approaches and other works and conveniences in connection therewith respectively; and may enter upon, take, and use such of the lands delineated on the said plans, and described in the deposited book of reference (except as hereinafter provided), as may be required for and in connection with those works, and for the other purposes of the harbour. The works hereinbefore referred to, and authorised by this Act, are—(1) A slip-dock extending from the southern bank of the river Ayr at a point about fifty yards northward from the lifeboat-house at the harbour to a point about ninety yards north-westward from Cromwell Cottage, with a draw-bridge or swing-bridge across the same near the lifeboat-house, and ways, rails, an engine-house, hydraulic and other machinery and appurtenances; (2) a road of access and wharf along and adjoining the north quay of the harbour and the quay on the eastern side of the entrance to the said wet-dock, commencing at or near the junction of York Street with North Harbour Street, and terminating at or near the entrance gates of the said wet-dock; and (3) a draw-bridge or swing-bridge across the entrance to the said wet-dock at or near the dock-gates thereof." "10. The Trustees may from time to time erect sheds, warehouses, offices, workshops, hydraulic and other machinery, and cranes, and lay down wharves, lines of rails and sidings, and construct other works and conveniences upon and around the docks, quays, and other portions of the harbour and make junctions between the said lines of rails and sidings and the Ayr Dock lines authorised by the Railway Act of 1878, and any other lines of railway which may hereafter be formed to the harbour, and may from time to time maintain, remove, and alter the said several works and conveniences: Provided always, that nothing in this section shall authorise the Trustees to take any lands other-

wise than by agreement: Provided further, that the power hereby conferred of working junctions shall be subject to the provisions of section 9 of the Railway Clauses Act 1863 with respect to junctions."

I think—and I believe no one of the eight Judges below expresses a contrary opinion—that the Trustees, though taking the land for the main purpose of making a road of access and wharf along and adjoining the north quay of the harbour as described in section 4, sub-section 2, are not restricted from using from time to time parts of the land so taken for the purposes mentioned in section 10. I do not think they have unlimited power to erect across that land continuous warehouses or sheds so as to intercept all access along that quay, but so long as they give effect to the main purpose they may and ought to make such erections as they in a *bona fide* exercise of their discretion think for the benefit of the harbour, and if in a *bona fide* exercise of their discretion they think it fit to make them on the portion of land taken from Mr Oswald there is nothing in the Act to prevent their doing so, even though the effect should be to deprive his remaining land of a frontage to the new road and of access to the quay. Such a deprivation of frontage would beyond controversy be an injurious affecting of Mr Oswald's land.

I think the oversman in estimating the compensation for such injurious affecting ought to take into account very much the same considerations as those which, in case Mr Oswald were selling it, would influence a purchaser who wanted it for a purpose requiring the use of the frontage. Such a purchaser would give a higher price if convinced that the Trustees could not legally interfere with the frontage—a smaller price if the right to use the frontage was liable to be injured by an exercise by the Trustees of powers which he was convinced they would not or at least were very unlikely to ever use—and a much smaller price if he thought it probable that they were likely to exercise such powers, if indeed in the case last supposed he would buy at all. The oversman is to fix the sum. In cases where, to adopt Lord Young's phrase, there is "a possible and more or less probable injury," I do not think that he is bound to act on the supposition that the Trustees will exercise their powers in the way most injurious to the land, but he is to fix the sum at what seems on the evidence a fair estimate of the probabilities. In doing so he may over-estimate the probabilities, or not estimate them high enough, but the Court has not the jurisdiction, nor if it had the jurisdiction has it the materials, for reviewing his estimate. But in this case the Trustees during the course of the arbitration endeavoured by a minute to fix once for all the way in which they and their successors in office would use their powers. And if they could at that time bind themselves by a bargain with Mr Oswald, if he had agreed to it, and that agreement would prevent his land from being injuriously affected, I should be unwilling to hold that he could, by refusing his assent to that agreement, get compensation for the injury which he might have prevented. As Lord Shand says, "he cannot insist on being injured that he may get money." There are great technical difficulties in the way of working out this, but if I thought that his assent to the minute would have made the minute effectual to prevent the Trustees and their successors from using their powers so as to injuriously affect the lands, I should have tried to overcome them. But I do not think that if Mr Oswald had assented to the minute it would have bound the successors of the present Trustees.

I think that where the Legislature confers powers on anybody to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body empowered to take the land compulsorily are entrusted to them and their successors to be used for the furtherance of that object which the Legislature has thought sufficiently for the public good to justify it in entrusting them with such powers, and consequently that a contract purporting to bind them and their successors not to use those powers is void. This is, I think, the principle on which this House acted in *Staffordshire Canal* v. *Birmingham Canal*, L.R., 1 Eng. & Ir. App. 245, and on which the late Master of the Rolls acted in *Mulliner* v. *Midland Railway Company*, L.R., 11 Chan. Div. 611. In both those cases there were shareholders, but, said the Master of the Rolls—"Now, for what purpose is the land to be used? It is to be used for the purposes of the Act—that is, for the general purposes of a railway. It is a public thoroughfare subject to special rights on the grant of the railway company working and using. But it is in fact a property devoted to public purposes as well as to private purposes, and the public have rights no doubt over the property of the railway company. It is property which is allowed to be acquired by the railway company solely for this purpose, and it is devoted to this purpose."

This reasoning, which I think sound, is *a fortiori* applicable where there are no shareholders and the purposes are all public.

Much stress was laid both in the judgments below and in the arguments at the bar on the supposed hardship of obliging the Trustees to buy and pay for the whole interest in the land when the purchase of a more limited interest would be cheaper and would answer the purposes of the Trust as well. I think that was a matter to be considered and provided for when passing the bill through Parliament.

I do not know whether the Legislature would have passed an Act giving the promoters power at their option to take the whole interest in the land or a more limited interest. They were apparently not asked to do so, and they certainly have not done so. But it appears that there was an endeavour to obtain for Mr Oswald a proviso which, if it had passed, would have prevented the possibility of his land being injuriously affected by the exercise of the powers in question, and would therefore have prevented his claiming any compensation for such use.

It is stated and admitted in the 10th condescendence and answer that when before Parliament the counsel for the respondent sought to add to the 10th section a proviso in the following terms:—"Provided also that nothing in this Act shall authorise the Trustees to construct between any part of the lands of R. A. Oswald, Esq. of Auchen-

cruive, situate on the north side of the harbour of Ayr, and the face of the quay-wall in front of such lands, any sheds, &c., which might interfere with the full and free use of the said road of access and wharf;" and that the counsel for the Trustees successfully opposed it. I do not think this can have any effect on the construction of the Act. Whatever powers the Trustees had given them by the Act as it passed they may exercise, and whatever rights Mr Oswald has under the Act as it passed he may insist on, just as much and no more than if no such proviso had been proposed and rejected. It does, however, appear that at that time both parties thought it not only possible but probable that the Trustees would exercise their powers in such a way as to injuriously affect the respondent's land. This, I think, rather bears on the question whether the oversman may not have over-estimated the probabilities when fixing the compensation—a question which (as I have already said) we have neither jurisdiction to enter upon nor materials to enable us to decide.

There is only, I think, one further point on which I think it necessary to remark. The Trustees are under no obligation to make erections on any part of the land. If they, in the *bona fide* exercise of their discretion, think it best for the interests of the harbour to leave the portion of the land between Mr Oswald's land and the quay-wall open as a road of access and wharf they may do so. If they think it best to make erections there not inconsistent with the main purpose of leaving a road of access from York Street to near the gates of the wet-dock, though injuriously affecting the frontage of Mr Oswald's remaining land, they may do so, and it was strongly argued that the Trustees at the present time, in the exercise of their general administrative powers, may fix what is to be done now, and that if they do so they practically fix what will be done for all time to come; if the present Trustees now lay out an open road, 30 feet wide, along the inner side of the land, erecting what erections they think advisable on other parts of the wharf, their successors can hardly be supposed likely to change this plan.

I think that it is quite true that as to all such things as from their nature must be done once for all at the beginning of the Trust, the present Trustees must bind their successors. And if the Act had required the Trustees to make and maintain a road 30 feet wide upon the land taken along the north quay, I am by no means prepared to say that their successors could have closed the road they laid out and made a new one—something would depend on the very terms of the enactment. But such is not the enactment in this Act. And though I think that the mode in which the Trustees now lay out the road of access and wharf will probably have great influence on the exercise of the discretion of their successors, and is therefore an element which ought to be, and I do not doubt was, considered by the oversman in fixing the fair compensation for the probable injury to the frontage, it goes I think no further.

I come therefore to the conclusion that the interlocutor appealed against should be affirmed, and the appeal dismissed with costs.

Lord Watson—My Lords, I am of opinion with your Lordship that the judgment under appeal must be affirmed.

If the appellants have not the right which they assert to fix and determine, now and for all time coming, the particular statutory uses to which the land compulsorily taken by them from the respondent is to be turned, their case entirely fails.

If, however, the right thus asserted by the appellants be conceded or established, the question arises, whether they are entitled to diminish the amount of compensation payable to the respondent by imposing an obligation upon themselves and their successors in the Harbour Trust to use the land taken by them for no other purposes than those specified in the minute of the 17th November 1880? On the one hand, it was not disputed that by the provisions of their Special Act and of the Lands Clauses (Scotland) Act 1845 therewith incorporated, the appellants must take and pay for the whole proprietary interests of the respondent, and that they cannot reduce the compensation payable to him by giving him back an integral part of what they are under obligation to take. On the other hand, it was mutually conceded in argument that statutory trustees like the appellants may, whenever they have the power, so limit and define the uses which they and their successors in office are to make of the ground taken by them as to minimise the injury which will be occasioned by the execution of their works to the lands from which that ground is dissevered. Accordingly the controversy between the parties, assuming the validity of the minute, was narrowed to this point. The respondent maintains that to give effect to the minute would be in substance to give back to him part of the proprietary interest taken in the shape of a predial servitude *non ædificandi*, whilst it was contended for the appellants that the undertaking given in their minute, though in form somewhat analogous to the creation of a servitude right, was in reality nothing more than a declaration, binding on themselves and their successors, of the harbour purposes for which the ground was to be used in perpetuity.

I do not consider it necessary to determine which of these views as to the character and effect of the minute ought to prevail, because I am of opinion that the appellants have not the power to subject future Trustees of the Harbour to the restraints which the minute professes to impose upon them. All the Judges in the Court below held—and in my opinion rightly held—that their Special Act gives the appellants power now or at any future time to make erections upon the piece of ground taken from the respondent which would effectually destroy the frontage of his remaining ground to the harbour, but they differed as to the competency of the appellants to dispense with the future exercise of that power by themselves or their successors in the trust. It humbly appears to me that the Lord Ordinary and the learned Judges who constituted the minority in the Inner House, in coming to the conclusion that the appellants could by a present resolution deprive the Harbour Trustees in all time to come of the right to exercise the powers conferred upon them by statute, did not sufficiently keep in view the very specific provisions of "The Ayr Harbour Amendment Act 1879."

The 4th section of the Act empowers the

Trustees to make and maintain, in the lines and on the levels shown on the deposited plans, the works thereinafter specified, "and all proper approaches and other works and conveniences in connection therewith respectively;" and authorises them to take and use such of the lands scheduled (including the piece of ground taken from the respondent) as may be required in connection with those works "and for the other purposes of the harbour." The works so referred to are particularly described in the two sub-sections forming part of section 4, and the second of these sub-sections includes "a road of access and wharf along and adjoining the north quay of the harbour and the quay on the eastern side of the entrance to the said wet-dock." The only works shown by the deposited plans upon the respondent's land which has been taken are the said "road of access and wharf;" but neither on the plans nor in the words of the Act is there to be found any indication of what part of that land is to be used as road and what as wharf. That is a matter left to the discretion of the Trustees. "The other purposes of the harbour" for which the land in question was to be used are defined in the 10th section of the Act. It provides that the Trustees "may from time to time" erect sheds, warehouses, offices, workshops, &c., upon the docks, quays, and "other portions of the harbour," and also that they "may from time to time" maintain, remove, and alter the said several works and conveniences. The Lord Advocate ingeniously argued that these enactments are permissive and not imperative, and consequently that the powers which they confer might be waived by the Trustees; but the fallacy of such reasoning is transparent. Section 10 is permissive in this sense only, that the powers which it confers are discretionary, and are not to be put in force unless the Trustees are of opinion that they ought to be exercised in the interest of those members of the public who use the harbour. But it is the plain import of the clause that the Harbour Trustees for the time being shall be vested with and shall avail themselves of these discretionary powers whenever and as often as they may be of opinion that the public interest will be promoted by their exercise.

The case, according to the view which I take of the provisions of the Harbour Act of 1879, stands thus:—The statute expressly says that the Trustees shall in all time coming possess, and may whenever they think fit exercise, the power of altering the condition of the harbour works *ex adverso* of the respondent's land so as to exclude direct access from it to the harbour. The minute lodged in the arbitration by Provost Steele as representing the present body of Trustees explicitly declares that in future the Trustees shall not possess or at least shall not exercise that power. To give effect to the terms of the minute would in my opinion be to affirm that the appellants have power to repeal the provisions of the Act in so far as these apply to the land taken from the respondent; and as I can find no indication of an intention on the part of the Legislature to vest any such power in the appellants, I think the minute is altogether invalid.

Lord Fitzgerald—My Lords, I concur in the judgments of the noble and learned Lords, but do not desire to rest my opinion on the technical though substantial ground that the defenders had no right to create an easement or servitude over the land acquired by them under the powers of The Ayr Harbour Amendment Act of 1879. I prefer adopting the language of the contention of the defenders "That the substance of the proposal by the Harbour Trustees was not to constitute a servitude but to bind themselves to abstain from an apprehended use injurious to Mr Oswald's adjoining land so that they should not be required to pay him compensation on the footing that such use was open to them."

My Lords, when the defenders shall have completed their title to the land in question, they will acquire that land in full ownership for the purposes defined by their Special Act, and cannot lawfully accept it otherwise. My Lords, I am of opinion that having so acquired that land for the purposes expressed in section 4 and amplified in section 10 of their Special Act, they have no power in law to preclude themselves or their successors from the exercise of their statutable powers over it as should be from time to time required for the purposes of the harbour. The minuters are not bound by their own minute.

My Lords, I am further of opinion that even if the minute was not *ultra vires*, yet the minuters had no right at the time and under the circumstances stated to force on the pursuer a minute of doubtful import and effect in lieu of the compensation to which he was otherwise entitled.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Counsel for Pursuer (Respondent)—Solicitor-General (Asher, Q.C.)—Davey, Q.C. Agents—Dundas & Wilson, C.S.—W. A. Loch, Westminster.

Counsel for Defenders (Appellants) — Lord-Advocate (Balfour, Q.C.)—Webster, Q.C. Agents — Gordon, Pringle, Dallas, & Co., W.S. — Grahames, Currey, & Spens.

Friday, August 3.

(Before the Lord Chancellor, Lords Blackburn, Watson, and Fitzgerald.)

LEE *v.* ALEXANDER.

(*Ante*, p. 155, and 10 R. 230.)

Property— Conveyance—Dispositive Clause.

The terms of the dispositive clause in a disposition conveyed the superiority of the "whole lands and others . . . which belonged to me [the disponer] and my predecessors, and have been disponed by me or them to the Glasgow and South-Western Railway Company." *Held* that these words of conveyance were sufficient to carry to the disponee the superiority of all lands disponed to the railway company by the disponer without exception, and could not be controlled or modified by a reference made in another clause of the disposition to the antecedent agreement of parties.

Superior and Vassal— Mid-Superiority — Construction of Conveyance.

A disponed to B the superiority of "all the