that either at the time when such payments were made in respect of a particular contract, or at the time when they were appropriated by mutual consent to that contract, the parties intended and agreed that the contract work so far as then completed and existing *in forma specifica* should be "sold" to the purchaser. But in order to constitute an agreement to that effect it must appear that the purchaser consented to accept of the subject in the same condition in which it then was as part of the completed subject, which was to be subsequently delivered to him by the seller under the contract of sale.

I have come to the conclusion that the appellants' claim to the excepted items must fail, because I cannot find in the case of any one of them the least trace of an agreement or of an intention on their part to accept of it as in implement of the contract of sale. Had they inspected the work and material as the purchasers had done in *Clark* v. *Spence* and *Wood* v. *Bell*, there would have been room for the inference that they had accepted as in terms of the contract the work so far as completed and inspected, and that the bankrupt had no longer the right to alter or reconstruct any part of it, thereby necessitating a second inspection. Mr Seath, one of the partners of the appellant company, was from time to time in the bankrupt's premises, and had a general knowledge of the progress made in the work of each contract and in preparing materials for its execution, but it is not pretended that there was inspection either by him or any other person representing the appellants. There is in fact not a single circumstance, either admitted or established in evidence, sufficient to support the inference that they meant to accept or did accept the work executed as in implement *pro tanto* of the contract, whilst there are many circumstances which lead to an opposite conclusion.

I am accordingly of opinion that the interlocutors appealed from ought to be affirmed and the appeal dismissed with costs.

Lord Bramwell—My Lords, I agree in the conclusions of my noble and learned friends, and in the reasons which have led them to those conclusions. All I wish to say is that our opinions do not in any way impugn the principle of *Russell* v. *Woods* except as to the two chattels there mentioned—the rudder, and I think some rope; and I may repeat what Lord-Justice Mellish said, that I should be very sorry if anything we said did so or seemed to do so. Nor do our opinions in any way impugn the reasons given in that case for that decision. I also agree that the same reasoning would apply to any other chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state.

Lord Fitzgerald—My Lords, I have read and carefully considered the judgments which have been delivered by my noble and learned friends opposite, and I entirely concur in them. Those judgments render it unnecessary for me to express any opinion upon the question at all.

Lord Halsbury—My Lords, I have also had an opportunity of reading the judgments of the two noble and learned Lords, and I desire to express my concurrence.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuers (Appellants)—Solicitor-General Davey, Q.C.—Dickson—Greig. Agents—Holms, Greig, & Greig, Westminster, for J. Young Guthrie, S.S.C.

Counsel for Defender (Respondent)—Attorney-General Russel, Q.C.—R. V. Campbell—M'Clymont. Morton, Cuther, & Co., London, for Maitland & Lyon, W.S.

Thursday, February 18.

(Before Lord Chancellor Herschell, Lords Watson, Fitzgerald, and Halsbury.)

BLACKIE AND OTHERS (COMMITTEE OF MARKET GARDENERS) *v.* MAGISTRATES OF EDINBURGH.

(*Ante*, February 5, 1884, vol. xxi. p. 352, and (under date March 20, 1884) 11 R. 783).

Burgh—Magistrates—Administration of Burgh Affairs—Market—Power to Allow Market-place to be Used for other Purposes than those of a Market.

Prior to 1823 the Fruit and Vegetable Market of Edinburgh was in use to be held by the Magistrates, in virtue of their exclusive right to hold fairs and markets, conferred by royal grant and legislation following thereon, in public streets of the city, at places varying from time to time. In 1823 a market-place was set apart and enclosed. In 1860 this site was acquired by a railway company under an Act providing that they should be bound to construct and make over to the Magistrates another market-place, not in the open street, but enclosed, and of not less accommodation than that then existing, and the company subsequently agreed with the Magistrates to provide such a market-place, and constructed and gave over to the Magistrates in implement of the obligation a new market-place. In 1874 an Act was passed, of which section 8 provided that "the Corporation may cover in in a suitable and convenient manner the Fruit and Vegetable Market-place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, and may make such internal and other arrangements and divisions in regard to stands, stalls, and shops as to them may seem suitable; provided always that the ground floor only of such market-place shall be used for such Fruit and Vegetable Market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market-place, may be let or used by the Corporation for such purposes, and for such rents or rates as to them shall seem proper." Increased dues were levied by the Magistrates for the market gardeners' stances in respect of these improvements. The market-place, under the

bye-laws of the Magistrates, comprehended not only the market-house, but the streets, &c., within 100 yards measured from any part of it. The market was held on the mornings of three days in each week. The Magistrates having given for a public exhibition the use of the market-place for a period of three weeks, so as to exclude the market gardeners and their customers from the market-house, and caused the market to be held on the public street within the 100 yards radius, an action was raised by the market gardeners to try the question of the power of the Magistrates so to act. *Held* (*aff.* judgment of First Division) that the market-house was the "market-place "within the meaning of sec. 8 above quoted, and was held by the Magistrates primarily for use as a fruit and vegetable market; and (2) that it was beyond the powers of the Magistrates to exclude the market gardeners and the public using the market-house from the use of it for three weeks continuously, assigning them only unenclosed ground on the neighbouring streets.

Opinion (*diff.* from First Division) that the Magistrates had no discretion to exclude the public from the use of the market during market hours, whether such exclusion was to the extent of causing serious and material inconvenience or not.

This case is reported *ante*, vol. XXI. p. 352, and 11 R. 783.

The Magistrates of Edinburgh appealed.

The respondents' counsel were not called upon.

At delivering judgment—

LORD CHANCELLOR—My Lords, this is an action brought by a number of pursuers who have been in the habit of frequenting the Fruit and Vegetable Market in the city of Edinburgh. It is in the nature of an *actio popularis*, brought by the pursuers in respect of the Fruit and Vegetable Market to obtain a declaration that the Corporation of Edinburgh have acted beyond their power in excluding them during a certain period from the use of that market.

My Lords, some question appears to have been raised which had weight in the mind of one of the learned Judges of the Court below, as to the competency of such an action as this; but the matter was not seriously contested at your Lordships' bar, and I think it is clear that the decision of this House in the case of the *Duke of Athole* v. *Torrie*, in the 1st volume of Macqueen's Reports [p. 65, 4th June 1852], completely covers a case such as this, and establishes that it is competent to those who have been in the use of a right common to the public to bring an action, when that right is interfered with, in order to obtain a declaration establishing the right for which they contend. Therefore if the allegations in the summons are made out, I think there can be no question that an action will well lie; and your Lordships have therefore to consider whether the allegations in the summons in this case have been established or not.

Now, it appears that from an early period the Corporation of Edinburgh have enjoyed the franchise of a market for the sale of various commodities, amongst others fruit and vegetables; and it may not be unimportant to observe that the franchise has an operation beyond the limits of the city of Edinburgh, and that although the market is a market held within the city, yet the possession of that franchise by the Corporation entitles them to restrain acts from being done, in the way of interference with that market, beyond the limits of the city. It appears that for many years, indeed down to a comparatively recent period, the market has been held in the public streets of the city, different parts, first of the High Street, and then other parts of the streets of the city, having been allocated to the purposes of the market, and until about the year 1821 there was no enclosed market-place in which this Fruit and Vegetable Market was held; but in or about that year or shortly afterwards an enclosed market-place was created, in which the market was, as far as one can judge, ordinarily held. But that was not the limit within which the market could lawfully be held, because I think it is clear that the market might lawfully be held in certain streets in the neighbourhood of the enclosed market-place.

So matters remained, without any statutory regulation of the market, down to the year 1840, and in that year an Act was passed for the abolition of petty customs, which for the first time limited and regulated the charges which might be made by the Corporation for the use of the market-place by those who frequented it. I do not think it necessary at this moment to say anything further about that Act. I shall have to revert to it when I consider the effect of the subsequent legislation.

So matters remained until the year 1860; and between the years 1860 and 1866 various statutes were passed and agreements made having reference to the taking by the North British Railway Company, for the purposes of their railway, of certain portions of the market area. In the view which I take it is not necessary to go in detail into the effect of those statutes and agreements beyond stating generally that the railway company, in respect of their taking a portion of the market area for the purposes of their railway, and so depriving the city of it, were bound to substitute in the place of what they took a market area, and to construct, so far at all events as the previous market area had been a matter of construction, a building in substitution of that which they took.

Some reliance has been placed upon the Acts which were passed under which the Fruit and Vegetable Market was constructed which was in use at the time of the passing of the Act of 1874; but, my Lords, I think that there is much force in the contention on the part of the appellants that those Acts did not in any way affect the rights of the Corporation with regard to the mode in which it was competent to them to deal with the market-place as constructed by the North British Railway Company; that they merely substituted the market-place so constructed for the market-place taken, and that whatever rights existed with regard to the market-place taken, remained with regard to the market-place substituted in its stead. My Lords, I am content, for the purposes of this argument, to concede that that was so, for I prefer to base my judgment exclusively upon the statute of 1874, and what I apprehend to be the true construction of that statute.

Now, my Lords, it is necessary to see what was the state of things existing at the time when that statute passed. There did, in point of fact, exist an enclosed area, which, I have no doubt, was known as the Fruit and Vegetable Market, and the charges which might be lawfully made by the Corporation in respect of that enclosed area were limited and regulated by statute. I quite agree with the argument urged before us, that it was competent to the Corporation to allocate such parts of the market area as they thought fit for the purposes of the different markets, the franchise of which they enjoyed. At that time the whole of the area was uncovered, and I think it was competent for the Corporation to determine in what part of that which formed the market area a particular market was to be held. But we now come to the statute of 1874, and it is necessary to examine the language of that statute in order to see whether it did not change the position of affairs and create in the Corporation duties or obligations with respect to the market-place which had not existed down to that date.

The preamble of that statute recites that "the Corporation of Edinburgh possess a Fruit and Vegetable Market-place situated in the parish of St Andrews and City and Royal Burgh of Edinburgh," and the first question which I think it is necessary to consider is, what is the meaning to be attached to the words "market-place" when found in this statute? Now, my Lords, when the whole of the statute is looked at, I can entertain no doubt that by the words "market-place" in this statute is meant that enclosed space to which I have already referred, and not the entire market area within the ambit of which it was lawful to hold the market, even although in a certain sense it might properly be termed the market-place, because, my Lords, the 8th section, which is the most important section in the statute for your Lordships' consideration, empowers the Corporation "in a suitable and convenient manner to cover in the Fruit and Vegetable Market-place." Now, is it seriously open to contention that the market-place there referred to is this enclosed area, and can it seriously be contended that power either was given to the Corporation, or was intended to be given to them by that section, to cover over not merely that enclosed space but the whole of the surrounding streets within the area in which this market might lawfully be held?" I think that this is made still clearer when the language of Schedule A is examined, because the very first provision is a charge "for each stall on the ground level of the market-place." Now, I think there can be no doubt that the ground level there referred to is the same thing as the "ground floor" spoken of in section 8. The very use of the term "ground level" implies something existing above that level, and I think points to the ground level of the area which was so covered over. Then, again, later on a poll-tax is for the first time created "from every person entering the market-place on any day and for each time he shall so enter." There again, I think it would be difficult to contend that the term "market-place" is used in any sense other than that which I have suggested.

Then, my Lords, if that be so, we find this state of things, that by section 8 power is given to the Corporation "in a suitable and convenient manner to cover in the Fruit and Vegetable Market-place, and improve and better adapt the same for the purposes of such market," and we find together with the power which was given so to improve and better adapt that area for the purposes of a market by covering it in, power to make a higher charge than had down to that time been lawful for the use of that market-place, and power for the first time to make a charge on all persons entering it, even although they entered it for the purpose of purchase and not of sale. I cannot but think those circumstances throw light upon the construction to be put upon section 8; and when the language of section 8 is further considered, and it is found to contain a proviso "that the ground floor only of such market-place shall be used for such Fruit and Vegetable Market, and that all vacant portions of such market-place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market-place, may be let or used by the Corporation for such purposes and for such rents or rates as to them shall seem proper," I can put but this construction upon the section, that it was intended to point to a distinction between a portion of that covered-in area, that portion, namely, on the ground floor, which was required for the purposes of a market-place during market hours, and the rest of the area, and that area itself, in other than market hours; and that whilst with regard to the rest of the market area, and to all the vacant portions of that area—that is to say, portions not required for the purposes of the market—there is the amplest power given to let them at such rates and on such terms as the Corporation shall think fit, yet the intention and purpose of the enactment was to subordinate, as regards so much of the ground floor as was required for the Fruit and Vegetable Market, all other purposes to the purpose of the Fruit and Vegetable Market. According to the contention put before us on the part of the appellants, it was open to the Corporation, after this enactment passed, to allocate the sellers of fruit and vegetables to any part of the market area just as it was before. The argument of the Solicitor-General for Scotland went that length. I think that that view was perfectly logical, because I myself see great difficulty in any construction of the section which shall meet the views of the appellants and yet fall short of that contention, but I think that when the terms of the enactment and the circumstances of this additional tax are taken into consideration it is impossible to come to the conclusion that the Corporation were intended to have the power of allocating to any part of the market area those who sold fruit and vegetables, excluding them from this market-place in respect of which high charges were from time to time to be made upon them, and in respect of which a poll-tax was created, which all persons entering the market-place were liable to pay.

My Lords, no doubt, under this section, large powers of discretion are reposed in the Corporation. As regards all parts of this building which are not on the ground floor, and the vacant parts on the ground floor—by which I understand the parts not used or needed for the purpose of the Fruit and Vegetable Market—the discretion of the Corporation as to their use is absolute. So far

as regards even the market space except in market hours, and so far as the market is not interfered with, I think the discretion of the Corporation again is absolute. But when we come to consider that portion of the market area which is required for the market during market hours, I do not think that the Corporation have had a discretion subsequent to this statute to divert that part of the building during market hours to uses other than market uses, however beneficial they may consider those other uses to be in the interests of the public.

My Lords, it appears to me, therefore, that subsequently to the passing of that statute, the public had rights differing from the rights which existed before, just in the same way as they were subject in the use of the market to burdens to which they were not subject before. Their obligation to go to this market remained. No more after this statute than before could they have set up a market elsewhere, and, as I have said, that obligation rested, to some extent at all events, upon those who were beyond the limits of the city. Just as that additional obligation was imposed upon the public in respect of the use of the market, so I think there was an additional duty imposed upon the Corporation; and the market area so covered in could no longer, even if it were possible before, be used at the absolute discretion of the Corporation to the exclusion of those who desired to use the Fruit and Vegetable Market.

My Lords, it was contended that the construction of section 8 was to be in some respects limited by the provisions of section 26, which provides that "nothing in this Act contained shall be held to affect the right and power of the Corporation to fix, alter, and regulate markets and market-places, and establish additional markets, conferred or confirmed by the second recited Act, or by any other of the recited Acts, whether within or beyond the limits of the City." Now, my Lords, that section refers mainly to the second recited Act, that being the Act of 1840 to which I have already made reference. By the 21st section of that earlier Act it is provided "that it shall and may be lawful to the Corporation, and they are hereby authorised and empowered, to fix and ascertain the boundaries and limits of the existing market-places as they shall find the same to be necessary, to alter the days and hours of holding the different markets, to divide and allocate the stands in the same, to alter and enlarge the markets and market-places, and altogether to change the situation of any of the existing markets or market-places, and to substitute other markets or market-places in their stead, and to establish additional markets;" and then by the 22d section power is given to make rules, regulations, orders, and bye-laws for the better regulation and government of the different markets. This appears to me to be the power conferred; and the only power confirmed, so far as I can see, is that referred to in the 26th section, which provides "that it shall not be lawful for any other parties than the Corporation to establish any cattle market for the sale of cattle, horses, sheep, or other live stock, or any wholesale corn market for the sale of oats, meal, barley, pease, beans, or other grain, within the bounds of police of the city of Edinburgh for the time being; provided always that such rights of market as the said Corporation enjoy within or beyond these limits shall not be injured or limited by anything contained in this Act." That confirmation of their previous powers, no doubt, is kept alive by the terms of section 26; but, my Lords, giving full effect to section 26, and conceding that all the powers (although some question was raised as to some of them in the course of the argument) which are defined in section 21 or the following section of that Act are kept in full force by section 26, that does not appear to me in any way to affect or control the construction—as I think the plain construction—of section 8, to which I have already pointed your Lordships' attention.

Well, my Lords, putting the construction upon the statute which I have expressed to your Lordships, it follows that in my view the respondents in this case were entitled to maintain this action of declarator, and that they were entitled to the interdict which they prayed for. Some difficulty, my Lords, no doubt, is created by the language used in the interlocutor. In the Court below the learned Lords prefaced the final declaration of the interlocutor by certain considerations which perhaps are not strictly a part of the determination of the case, but are rather considerations or views which have led to that determination. Amongst those is the second, in these terms:—"That it is within the power and discretion of the defenders to allow the said covered-in market-place or house, including the ground flat thereof, to be used for purposes of public interest or utility at such times as the same is not required for the purposes of said market." So far, I do not think that any reasonable objection can be taken to the language used. But then it proceeds thus—"and even to allow of such use on market-days and during the ordinary market hour, on special occasions, for such length of time as shall not cause material and serious inconvenience to the pursuers and other persons frequenting the same, the defenders always providing on such occasions temporary accommodation, suitable to the circumstances, as a substitute for the said covered market-place or house." Now, my Lords, the appellants have contended that inasmuch as that allows in the Corporation a certain discretion to exclude from the use of this market-house during market hours, it follows that the matter is one entirely of discretion, and that there is no abuse of discretion in the exclusion for the period complained of in this case, namely, from the 7th to the 30th of April—a period including nine market-days, of which six were important market-days and three unimportant. Now, my Lords, no objection appears to have been taken on the part of the respondents, the pursuers in the action, to the limitation upon the rights of the public, or declaration of the rights of the Corporation contained in that finding, and there is no cross appeal in respect to it, nor does it become necessary for the purposes of the decision of this case, in the view which your Lordships have taken, to express an opinion upon the construction of the section which no doubt may be said to be somewhat at variance with the language of the finding which I have just read. But it does not appear, I believe, to any of your Lordships to be necessary (and it may be doubtful whether there is the power, inasmuch as there

is no cross appeal) to make any alteration in the terms of the interlocutor, inasmuch as the final declaratory part of the interlocutor is in these terms, with which, I think, all your Lordships agree—"That it is beyond the powers and discretion of the defenders to exclude the pursuers and other members of the public from the use of the said market-place or house for so long a period as three weeks continuously, assigning only unenclosed ground on part of the public streets in the neighbourhood of the said covered-in market-place or house, as the site or place for holding the ordinary public fruit and vegetable market for that time; to that extent and effect find and declare in terms of the conclusions of the summons." Therefore when we come to the actual finding and declaration, it appears to be in terms to which no exception can be taken; and certainly, having regard to the mode in which this case has come before your Lordships, with no appeal on the part of the pursuers against that portion of the interlocutor to which I have called attention, I do not think it would be possible to contend that the rights of the public could be in any way affected or bound, as by *res judicata*, by the determination of your Lordships, if you simply affirm the interlocutor of the Court below.

My Lords, upon the whole, I come to the conclusion that the judgment of the Court below is substantially correct, and I move your Lordships that the interlocutor be affirmed and the appeal dismissed with costs.

Lord Watson—My Lords, I see no reason to doubt that when a grant of market is not confined to any particular locality, the grantee may from time to time change the site upon which it is held in order to suit his own convenience. It is an implied condition of the exclusive privilege conferred upon him that he shall provide a market-place; but that condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market, either as buyers or sellers. The character and extent of the accommodation which must be afforded to the public who resort to the market will obviously vary with the circumstances of each case.

The obligation of the appellants as in a question with the respondents would probably have been no greater than I have already indicated if the appellants' privilege of market had rested solely upon their charters from the Kings of Scotland and relative statutes of the Scottish Parliament; but that does not appear to me to be the real condition of the argument in the present case. In point of fact, the appellants were not satisfied with the rights they enjoyed under these charters and statutes; and they have applied for and obtained from the Legislature certain statutory powers as against all persons resorting to their Fruit and Vegetable Market, which appear to me by plain implication to enlarge the rights which these persons previously had to accommodation within the market-place. After the statement of the facts of the case which has been made by the Lord Chancellor, I do not think it necessary to go further back than the most recent Act (37 and 38 Vict. cap. 85), which though a local and personal, is at the same time a public statute, or to enter into the history of the market-place, and its various changes of site, whether made by the appellants voluntarily or under statutory compulsion, before the passing of that Act in the year 1874. At that time the market-place for fruit and vegetables consisted of a rectangular area enclosed by stone walls, bounded by Princes Street on the north, and by the station of the North British Railway Company on the south; and I assume that the market-place, as then fixed and defined by the appellants, also included the public streets of the city within a radius of 100 yards, measuring from any part of the enclosed area.

An argument was addressed to your Lordships by the appellants' counsel with the view of showing that notwithstanding the provision of the Act of 1874 the appellants still possess the same powers which they had under their original charters, to fix, alter, or change altogether the site of the market-place. In my opinion, the decision of that point one way or another cannot affect the present case. There is no proposal before us for altering the market-place or transferring it to a new site. The only right asserted by the appellants is a discretionary power to regulate the use of an existing market-place during market hours, to the effect of occasionally excluding the marketing public from the area which has been covered in since the year 1874.

The Act of 1874, which embraces a great variety of matters, proceeds, *inter alia*, on the recital that the appellants possessed a fruit and vegetable market-place—that it was expedient that they should have power to cover in "the said market-place," and to improve and better adapt the same for public use, and for the accommodation of parties using the same, and also that the dues, &c., leviable in respect of the existing market should be amended. The 8th section accordingly gives the appellants power to cover in "the Fruit and Vegetable Market-place;" and the 17th section empowers them to levy, in connection with the market, the increased rates specified in Schedule A. Throughout the Act the expression "Fruit and Vegetable Market-place" is used to denote the area now covered in, which is admittedly the same with the area previously enclosed by walls, and does not include any part of the public streets. The increased rates specified in Schedule A, as the Lord Chancellor has already pointed out, have reference exclusively to the use of that area, or to the buildings erected upon or in connection with it.

It seems clear that the improvement of the market-place authorised by the Act was designed to effect two distinct objects, the one being the accommodation of the general public, and the other the accommodation of those members of the public who used the market. It is in my opinion equally clear that the purpose of the Legislature in sanctioning an increase of the rates payable by the latter class of persons was to make them contribute their *quota* towards the cost of providing such improved market and other accommodation. The appellants could not have raised the rates without the authority of the Legislature, and in these circumstances it appears to me to be matter of reasonable implication that the statutory power of rating now vested in the appellants involves a corresponding right on the part of the respondents to have and enjoy during market hours the benefit of the improvements made in terms of the Act upon the Fruit and Vegetable

Market-place. It might, no doubt, have appeared that such was not the intention of the Legislature, but I can find nothing in the provisions of the Act to warrant that inference. On the contrary, as I read the enactments of section 8, they in effect provide that the "ground floor," of what has been styled the "Market-house" in the course of the argument, is to be devoted to the uses of a fruit and vegetable market to such extent and so long as required for that purpose during regular market hours, and that during these hours no part of the ground floor which is required for market purposes is to be otherwise used. That being so, I do not think it within the power or discretion of the appellants to exclude the respondents and other frequenters of the market from the ground floor of the market-house, and in lieu thereof to assign to them part of the surrounding streets.

I therefore agree with the majority of the Judges of the First Division in thinking that the exclusion of the respondents from the covered area during market hours for three successive weeks constituted a substantial infringement of their right. I do not for a moment doubt that the appellants acted in honest belief that they had power to exclude the respondents, and were influenced by a laudable desire to stimulate and improve one of our great national industries. But the importance of the object they had in view is of no relevancy in the present question. The Act of 1874 has in my opinion provided that the primary use of the ground floor shall be for the purposes of a fruit and vegetable market, and no interference with that primary use can be justified on the ground of expediency.

These being the views which I entertain in regard to the merits of this appeal, I feel bound to express my dissent from the concluding part of the second finding in the interlocutor appealed from, which affirms the "power and discretion" of the appellants to allow the use of the area in question for purposes of public interest or utility on market days, and during the ordinary market hours, for such length of time as may not cause material and serious inconvenience. In my opinion, the appellants have no power which can justly be described as discretionary; they have no power to exclude the public from the use of the market during ordinary market hours; whatever amounts to such exclusion is an invasion of the public right, and the right of a member of the public to participate in that use does not in any degree depend upon his ability to prove that his exclusion would subject him to "material and serious inconvenience."

In disposing of the appeal before us it has been necessary for your Lordships to form a judicial opinion upon this part of the second finding, but there is no cross-appeal, and therefore the only course open to us is to affirm the interlocutor. But our affirmance of that part of it which has been withdrawn from our adjudication is merely formal, and cannot, I apprehend, be regarded as constituting *res judicata* in a question with any member of the public who is not a party to this action.

Lord Fitzgerald—My Lords, from the opening of the learned Lord Advocate, the moment I heard it I came to the conclusion that the whole question before us here depends upon the construction and effect to be given to the Act of 1874, and that we might quite easily draw our pen through all matters antecedent to 1840, when the series of statutes which ended with the Act of 1874 began.

My Lords, it appears to me that the market and the market-place in question are not what I would describe as a market or a market-place under the charter or any of the grants prior to 1840, but they are a statutory market in a statutory market-place, and the rights of the public are now regulated entirely by statute and by bye-laws which have been regularly made under that statute. My Lords, I say no more than that that being the case, I quite concur in the construction put upon the Act of 1874 by the noble and learned Lord on the woolsack, and by my noble and learned friend opposite. In both their judgments, and in the reasons which they have given for them, I entirely concur.

Lord Halsbury—My Lords, in this case I do not think that we are engaged in discussing what might be described as market rights at common law. I have no doubt myself that the grantee of a market has at common law a right, except where the market is described by metes and bounds, to select within the ambit of his franchise what place he will hold that market upon; but when he has selected it he may appropriate to each part of the market that class of goods which he thinks fittest for exposition there. I have no doubt, therefore, that in that sense the grantee of a market at common law has an absolute discretion—a discretion which I think is not reviewable by any tribunal whatsoever. But, as has been already pointed out, we are not dealing with market rights at common law—we are dealing in truth not with market rights at all. I cannot help thinking that some confusion still arises from not sufficiently distinguishing a right to the perception of the profits of a market from the rights created in a particular building which is to be devoted to particular purposes.

Now, assuming the utmost amount of right and discretion in the grantee of the market, the history of which we have had at considerable length, it seems to me that in 1874 the grantees of the market went to the Legislature for powers of increased taxation, and went to the Legislature further for powers of compulsory purchase—that they included in their bill the Lands Clauses Act 1845, and the Markets and Fairs Construction Act of Scotland; and I think it has been established at your Lordships' bar that by that statute it was contemplated that the promoters should have in their power the discretion of using part of the building which was to be constructed under the powers of that Act, and by additional taxation, for purposes of general utility and convenience. My Lords, it seems to me that under these circumstances it was not unnatural that the Legislature should, in granting the privileges which they granted under that Act, have stipulated that the public should not be inconvenienced by the use of the building so to be constructed in such a manner as to exclude the public who wished to buy and the public who wished to sell from the market-place which was to form part of the

building to be erected under the powers and by the additional taxation to be provided by the bill. The result of that is, that in considering what uses may be actually made of that building, one must look and see whether the Act of Parliament so obtained has not placed a restriction upon those uses where and so far as the building is intended to be applied to the purposes of a market.

It is unnecessary, I think, after what the Lord Chancellor has pointed out, to go further into the construction of the 8th section of the Act. It seems to me that, while leaving the amplest and fullest discretion to the Corporation in the use of the rest of the building, the Legislature indicated that a particular portion of the building to be erected should be subject to the public right, not controlled by the discretion of the Corporation. While saying that, I do not suppose that it could be contended that the Legislature intended to exclude the discretion properly applicable to the managers or owners of the market-place in so far as it has been used for market purposes. I cannot doubt that for purposes of repairs, for purposes of cleansing, and for all purposes applicable to its use as a market, the managers and owners of the market-place have the discretion which is incident to and forms a necessary part of the power of management given to them by the statute; and if the language which has been adverted to in the interlocutor simply means a discretion of that kind incident to and forming a necessary part of the management of the market, it may be that those words may be supported. If, however, they mean, what I am bound to admit they more naturally point to, a discretion as to whether that portion of the building shall be used as a part of the market or not, and that the Corporation have some kind of discretion to determine whether or not, with reference to objects of public utility, that market-place shall be used for a Fishery Exhibition or any other exhibition which they think would be useful to the public, then I am bound to say that I disagree with that portion of the interlocutor.

For these reasons I concur in the judgment which the Lord Chancellor has moved, namely, that the appeal should be dismissed.

Interlocutor of First Division appealed from affirmed with costs.

Counsel for Pursuers (Respondents) — Sol. Gen. Davey, Q.C.—J. P. B. Robertson, Q.C. —M'Clymont. Agent—Andrew Beveridge, for Nisbet & Matheson, S.S.C.

Counsel for Defenders (Appellants) — Lord-Advocate Balfour, Q.C.— Sol.-Gen. Asher, Q.C. Agent—John Graham, for W. White-Millar, S.S.C.

COURT OF SESSION.

Wednesday, February 24.

FIRST DIVISION.

STARK AND HOGG, PETITIONERS.

Bankruptcy—Sequestration—Abbreviate of Petition and Deliverance—Register of Inhibitions—Bankruptcy (Scotland) Act 1856 (19 *and* 20 *Vict. c.* 79), *sec.* 48.

A petitioner for sequestration of a debtor having omitted to record the abbreviate in the Register of Inhibitions within the statutory period, the Court *granted* warrant to the Keeper of the Register, on the creditor's petition, to record the abbreviate, reserving all objections to parties interested.

Sequestration of the estates of John Hendrie, coalmaster, Glasgow, was awarded by the Sheriff-Substitute of Lanarkshire at Glasgow on 20th January 1886, upon the petition of Stark & Hogg writers Glasgow, creditors to the extent required by law. Thereafter Messrs Stark & Hogg *per incuriam* omitted to transmit, within the period provided by sec. 48 of the Bankruptcy Act, to the Keeper of the Register of Inhibitions the abbreviate of the petition and deliverance to be recorded in the Register.

This petition was presented to the First Division by Stark & Hogg, craving and setting forth that no prejudice had been caused to the sequestrated estate in consequence of the omission, in respect that between the date of the first deliverance and that of the confirmation of the trustee no alienation of or diligence against the heritable estate of the bankrupt had taken place, and craving the Court to grant warrant to the Keeper of the Register of Inhibitions, before the expiry of the second lawful day from the deliverance of the Court, to record the abbreviate and to make the usual certificate thereon.

On the petition being moved in the Single Bills the Court pronounced this interlocutor, *observing* that intimation of the petition on the wall and in the minute-book was unnecessary, seeing that the rights of third parties were expressly reserved by the judgment of the Court:—

"The Lords having considered the petition and heard counsel for the petitioners, grant warrant to the Keeper of the Register of Inhibitions at Edinburgh to receive the abbreviate of the petition for sequestration and deliverance thereon, signed by the petitioners or their agents, and in the form mentioned in the petition, and to record the said abbreviate in the Register of Inhibitions, and write and subscribe a certificate thereof on the said abbreviate, all in conformity with and as prayed for in terms of the Bankruptcy (Scotland) Act 1856, sec. 48, and decern, reserving all objections to parties interested against the validity of the sequestration, and all answers to such objections as accords, and declaring that the expenses of the present application and procedure connected therewith are not to be allowed against the estate.

Counsel for Petitioner—Goudy. Agent—T. M'Naught, S.S.C.