

The evidence, then, ought not to be entertained either as proving the defender's relations with the pursuer at the time of conception, or as shaking his credit in consequence of his denial of proved facts.

At advising—

**LORD YOUNG**—I think there is not sufficient ground for interfering with the judgments of both Sheriffs here. The case is a peculiar one, but I think the evidence is reasonably sufficient to support the judgment, and when this is the case we never interfere. I say the case is a peculiar one, its most remarkable feature being that the child was born in the end of 1879, and the action was not raised till 1883, four years after the birth of the child. That is unprecedented so far as my memory serves. There is no prescription, however, and notwithstanding the delay the action is quite competent. The evidence consists, first, of the pursuer's own testimony, which is quite distinct, that the defender is the father of her child, but that is not sufficient unless it is corroborated. —[His Lordship here reviewed the facts adduced in the proof]. The Sheriff-Substitute, who heard her story and the corroborative evidence, was quite satisfied, and I should be loth in consequence to call in question his judgment. But then the case develops, and this is attributable to the peculiarity (which I have noticed) that the action was not brought till the child was three years old. The pursuer maintains the child, and goes into service again, and the defender again carries on his sweetheating with her, for we have two witnesses who swear that they saw him having connection with her in 1882. Now, I cannot say that this evidence is not admissible, although I concur with the Sheriff-Substitute in thinking that it would have been fairer and better if notice of it had been given. It is just evidence of facts going to confirm the ground of action which alone the record was meant to settle, and certainly affects my mind on the credibility of the pursuer's story. It is evidence in support of a renewal of the old intercourse which resulted in the birth of the child. In my opinion, then, the Sheriff-Substitute was right in proceeding on this evidence, and on the whole matter I agree with him that the paternity of the child has been established against the defender.

**LORD CRAIGHILL**—I concur with your Lordship in thinking that this evidence of intercourse in 1882 is quite admissible. No doubt there should have been, in strict pleading, averments with reference to it on record, but in my opinion it is nevertheless admissible as helping to establish the relations of the parties at the date of the conception of the child. But even without it, I am of opinion there is reasonable evidence to support the Sheriffs' judgment.

**LORD RUTHERFURD CLARK**—I go further than the Sheriff-Principal, and think that this is a very very narrow case, but I do not dissent.

The **LORD JUSTICE-CLERK** was absent.

The Court pronounced this interlocutor:—

“Find it proved that the defender is the father of the pursuer's child libelled: Therefore dismiss the appeal; affirm the judgment

of the Sheriff-Substitute and of the Sheriff appealed against; and of new decern against the defender in terms of the conclusions of the petition,” &c.

Counsel for Pursuer (Respondent)—Dickson.  
Agent—J. Young Guthrie, S.S.C.

Counsel for Defender (Appellant)—Rutherford Clark. Agent—Robert Broatch, L.A.

Tuesday, February 5.

## FIRST DIVISION.

[Lord Fraser, Ordinary.]

### BLACKIE AND OTHERS v. THE MAGISTRATES OF EDINBURGH.

*Burgh—Market Administration—Dedication of Market-House to Special Purpose—Power of Magistrates to Let for other Purposes and Exclude Frequenters—Statutes 23 and 24 Vict. c. cliv., 29 and 30 Vict. c. cclxvi., 37 and 38 Vict. c. lxxxv.—Process—Title to Sue.*

In 1823 a public fruit and vegetable market was constructed and enclosed on ground under the North Bridge of Edinburgh.

In 1860 an Act was passed authorising the North British Railway Company to acquire this site, provided they constructed and made over to the corporation another market-place. By this Act it was provided “that the new or substituted market to be constructed. . . shall not be formed or held upon any open street or area, but in some secure place, enclosed by substantial walls and gates, with equal accommodation to the present fruit and vegetable markets.”

In 1865 an agreement was entered into between the corporation and the railway company, sanctioned by Act of Parliament in the same year, which provided that the railway company “before appropriating, using, or interfering with the lands on which the fruit and vegetable market to be provided under article third hereof shall be held, or any of the accesses thereto. . . shall be bound to provide. . . a new and substituted market, which shall in every respect fulfil the conditions prescribed by the said North British Railway (Stations) Act of 1860 with reference to the new and substituted market therein specified.” Under this agreement the new Waverley Market was constructed, enclosed, and given over to the corporation in 1869. Subsequently another Act was passed in 1874, which provided that the corporation might cover in 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. It was further provided 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 or 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." The market-place was thereafter covered in by the corporation at considerable expense, and in respect of this greater convenience higher rates were paid by the market gardeners using the market. The markets were held in it on the mornings of three days per week. At various times the corporation allowed the use of the market-house for shows, &c., but not in such a manner as to cause serious inconvenience to its frequenters. On the occasion, however, of a Fisheries Exhibition in April 1882 the market gardeners and others were excluded from the market-house for a period of three weeks, and obliged to hold the market on the public streets adjoining thereto.

In an action at the instance of a number of the market gardeners against the corporation for declarator that the market was held primarily as a fruit and vegetable market, and for interdict against a similar exclusion from the market-house in future—*held* (1) (*diss.* Lord Deas) that the pursuers, as members of the public, had a title to sue; (2) that the covered fruit and vegetable market-place or house was vested in and held by the defenders primarily for the purposes of the public fruit and vegetable market of the city; (3) that the defenders had a discretionary power of allowing the covered-in market-place or house to be used for the purposes of public interest or utility even during market hours for such a length of time as might not cause material and serious inconvenience to its frequenters; but (3) (*diss.* Lord Deas, and *rev.* Lord Fraser) that it was beyond the discretionary powers of the defenders to exclude the pursuers and other members of the public from the use of the market-house for three weeks continuously, assigning only in its stead unenclosed ground on part of the public streets.

This was an action at the instance of John Blackie and others, market gardeners, against the Magistrates and Town Council of the City of Edinburgh, to have it found and declared that the fruit and vegetable market-place in Edinburgh was vested in and held by the defenders primarily for the purposes of a fruit and vegetable market, and that the pursuers had a right to the peaceable use and enjoyment of the said market-place for market purposes during market hours, and to have the defenders interdicted from excluding the pursuers from the use and enjoyment of the market-place for market purposes, or from otherwise appropriating, using, or disposing of the market-place to the prejudice of the pursuers' rights and privileges, and also from troubling or molesting the pursuers and other frequenters of the market in the peaceable use and enjoyment of the market-place during market hours in time to come, or at least until a new and suitable market-place should have been legally provided, set apart, and established for market purposes to supersede the said market-place.

The pursuers were a number of market gardeners and wholesale fruit and vegetable merchants who held stands allocated to them in the market-place, and were in use to attend the

market. The market contained 158 stances for carts, and there were upwards of a hundred pursuers. Some of the pursuers were resident in Edinburgh, and the rest in the neighbourhood or adjoining counties.

The Magistrates were grantees from the Crown of the right to hold fairs and markets within the burgh of Edinburgh. These royal grants extended back to the fourteenth century, and terminated with the Golden Charter granted by James VI. in the year 1603. Besides these royal grants, Parliamentary sanction was given to markets being held by the Magistrates within the burgh, commencing with a statute in the reign of James V. (1526, caps. 2 and 3), and terminating with the Act 37 and 38 Vict. cap. lxxxv.

Prior to the year 1823 the fruit and vegetable market was held on part of the central streets in the Old Town of Edinburgh, but in that year ground under the North Bridge was specially appropriated for the purpose by the magistrates after consultation with the market gardeners. In 1840 the Act 3 Vict. cap. xvii. was passed, sec. 21 of which provides—"And be it enacted that it shall and may be lawful to the said Lord Provost, Magistrates, and Council, 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." By this Act the Magistrates were further authorised to make rules, regulations, orders, and bye-laws for the better regulation and government of the different markets of the city, and to repeal, alter, add to, or amend such rules, &c.

In 1860 the Act 23 and 24 Vict. cap. clix. was passed after various negotiations, in consequence of the North British Railway Company requiring the ground on which the market was held. That Act authorised the railway company to acquire the old site, provided a proper site was substituted to the satisfaction of arbiters. Section 9 thereof provided—"Provided always that the new or substituted market to be constructed under arbitration shall not be formed or held upon any open street or area, but in some secure place, enclosed by substantial walls and gates, with equal accommodation to the present fruit and vegetable markets."

A dispute having arisen between the Magistrates and the railway company as to the new market to be provided, the matter was referred to arbitration, and a decree-arbitral was pronounced with reference to the provisions of this statute, which decree the Magistrates considered to be *ultra vires* of the arbiter, and the railway company having given notice of a bill to give effect to the decree, the Corporation took steps to oppose it. In this opposition the market gardeners took an active part, and the result of the proceedings before the Parliamentary Committee appears from a report made in October 1864 by the City Clerk to the Town Council in these terms:—"The Parliamentary Committee affirmed the views of the Council, decided that the markets should not be held in the public streets, and provided that

'another fruit and vegetable market' on an 'other site' should be constructed and made over, ready for use, at the expense of the company, before they should be allowed 'to appropriate, use, or interfere with' the lands on which the existing market is held." In the same report the City Clerk explained that the chairman of the Committee intimated, after certain witnesses, including market gardeners, had been examined, that "it would be unnecessary to lead further evidence as to the inexpediency of holding the markets on the public streets, or in an unenclosed space."

The result of this opposition was an agreement between the railway company and the corporation, sanctioned by the Act of 1865 (28 and 29 Vict. cap. cli.), which provided—"Before appropriating, using, or interfering with the lands on which the fruit and vegetable market, to be provided under article third hereof, shall be held, or of any of the accesses thereto . . . [the company] shall be bound to provide . . . a new and substituted market, which shall in every respect fulfil the conditions prescribed by the said North British Railway (Stations) Act of 1860, with reference to the new and substituted market therein specified."

In 1866 the Act 29 and 30 Vict. cap. cclxvi. was passed, which authorised the railway company to construct "a new fruit and vegetable market for the city of Edinburgh on ground adjoining Princes Street and Waverley Bridge, in the parish of Saint Andrew in the said city." The agreement of 1865 was contained in the schedule to the Act of 1865 and also to the Act of 1866.

The railway company did provide ground for the purpose, and under this agreement the new Waverley Market was constructed and given over to the corporation in 1869. In the conveyance to the corporation the ground was described as "All and Whole that piece of ground upon which the said North British Railway Company have formed a new fruit and vegetable market for the said city." It soon became apparent that the market would be much improved if covered over, and accordingly in 1874 another Act was obtained, entitled The Edinburgh Markets and Customs Act 1874 (37 and 38 Vict. cap. lxxxv). The preamble of this Act is as follows:—"Whereas 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 it is expedient that powers shall be acquired to cover in, in a suitable and convenient manner, the said market-place, and to improve and better adapt the same for public use, and for the accommodation of parties using the same."

Section 8 provides—"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."

Section 26 provides—"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."

This statute authorised a considerable increase in the customs to be exacted for the use of the market from the market gardeners who brought carts into it, and imposed a poll-tax upon each member of the public who entered the market-house.

Under the powers conferred by this Act the corporation had the market-house covered in at a cost of upwards of £30,000. It was proved by the City Chamberlain that the total income from all uses of the building was sufficient to meet the charges if it was taken into account that a large sum was annually appropriated to a sinking fund, and payment of a share of an annuity to the city's municipal funds.

Under their statutory powers above-mentioned the corporation made certain bye-laws, which were confirmed by the Sheriff of the county of Edinburgh, by the first of which it was provided that "the market-place shall comprehend the area of the market-house and the ground belonging thereto, situate at the east end of Princes Street and north end of Waverley Bridge Street, and the public roads, streets, courts, areas, and places situate within a radius of one hundred yards measured from any part of the said market-house." As first framed, these bye-laws contained this provision—"That the market-house shall be used for such purposes other than market purposes, for such times and on such conditions as to admission or otherwise, as shall from time to time be determined by the Magistrates and Council, or the Markets Committee of the Town Council." The proposal to obtain these powers was, however, opposed by the market gardeners, and the proposed provision was dropped.

The management and regulation of the market, so far as regarded the allocation of stands and other matters of detail, was left very much in the hands of the market gardeners. The corporation appointed out of their number a Market Committee, who gave a general superintendence, but who seldom interfered with the allocation of stances or such matters. In the exercise of their discretionary powers, the Magistrates granted from time to time to the proprietors of travelling menageries the use of the old market at the North Bridge. The Waverley Market was also granted for the same purpose at various times. It was also granted for several years for the purpose of flower shows, to a Christmas Club in several years for cattle shows, for a bicycle tournament in 1880, for a dog show in 1881, and for an art exhibition.

The days for the vegetable market were Tuesdays, Thursdays, and Saturdays, and the hours were from early morning until ten o'clock. On none of the occasions above specified was there any real interruption of the market, or anything but slight inconvenience to those who attended.

In April 1882, however, the corporation gave the exclusive use of the market-place or house

for a period of three weeks for the purpose of the Fisheries Exhibition, and during that time the pursuers and the public were excluded from the market house and market-place, and were obliged to hold the market on the neighbouring public streets, but within the area of the "market-place" defined by the bye-law above narrated. It was proved that during this period the weather was fine, so that no material injury or damage from the exposure of their goods to the weather was caused to the pursuers.

The pursuers, when the intention of the corporation to grant the exclusive use of the proper market-place or house for the Fisheries Exhibition became known, brought a process of suspension and interdict to prevent the proposal being carried out, but being anxious to avoid what might hinder or compromise the success of the Exhibition, they agreed not to press their demand for interdict, but to try in an action of declarator the right of the defenders to make such an appropriation of the market, to the exclusion of the public for so long a time, and hence the present action was raised.

The pursuers pleaded—" (1) The said market-place having been dedicated for market purposes consistently with the rights and privileges which the gardeners have enjoyed for time immemorial, the pursuers are entitled to declarator as concluded for. (3) In respect that the defenders' actings are an invasion of the pursuers' right at common law and under statute, decree of declarator and interdict ought to be given in terms of the conclusions of the summons."

The defenders pleaded—" (1) The pursuers have not set forth and do not possess any title to sue the present action. (4) The defenders, as proprietors of the said market-house in trust for the community, are entitled to regulate the use thereof in the manner they deem best calculated for the interests of the community, and are entitled to absolvitor from the conclusions of the summons. (5) The defenders are, in any event, entitled to use or let the use of the said market-house on special occasions for public purposes, provided they supply sufficient accommodation for the fruit and vegetable market within the area of the said market-place, or in some other equally convenient locality."

The Lord Ordinary (FRASER) allowed a proof before answer, and on 20th February 1883, after taking the proof, pronounced this interlocutor:—" Finds that the Lord Provost, Magistrates, and Town Council of the City of Edinburgh have, by royal charters confirmed by Acts of Parliament, a right to hold markets within the burgh of Edinburgh, and among others a fruit and vegetable market: Finds that the defenders have appropriated for the use of the said market a market-house situated on ground adjoining Princes Street and Waverley Bridge, Edinburgh, and which ground was obtained by them from the North British Railway Company in exchange for the site of the old fruit and vegetable market near the North Bridge of Edinburgh: Finds that the said market-house, except in so far as not laid out and fitted for a market by the said North British Railway Company, was erected by the defenders from funds contributed from the common good, and from money borrowed upon mortgages by them: Finds that the market-place of the said fruit and vegetable market comprehend the area of the said market-house, and the ground belonging thereto, and the public roads, streets,

courts areas, and places situate within a radius of one hundred yards measured from any point of the said market-house: Finds that the defenders, as grantees of the right of holding markets, in virtue of said royal charters and Acts of Parliament, have a right of control and administration of the said market-place and market-house, and are entitled to make rules, regulations, and bye-laws relative thereto, which are valid when confirmed by the Sheriff of the county of Edinburgh: Finds that the defenders and their predecessors have been in use from time to time to allow exhibitions of various kinds deemed by them to be of public interest or utility, to be held both in the existing market-house at Waverley Bridge and in the former market-places in Edinburgh where the fruit and vegetable market was held: Finds that the occasional use so granted by the defenders and their predecessors for such exhibitions was within their powers, and finds particularly that when the present market-house was built it was in contemplation of all the parties interested that such occasional use should be given of the market-house to such other exhibitions deemed by the defenders to be of interest to the community, and that the revenue derived from such exhibitions was relied upon as one of the sources from whence the interest and principal of the debt incurred by the corporation in building the market-house should be met: Finds that only occasionally have such exhibitions interfered with the holding of the fruit and vegetable market in the market-house during market hours, which are from early morning to ten o'clock forenoon: But finds that in April 1882 the pursuers and others frequenting the fruit and vegetable market were entirely excluded from the market-house for a period of about three weeks, and were obliged to hold the market upon the public streets adjacent to the market-house, but still within the market-place as above defined: Finds that this was not an undue exercise of the discretionary power vested in the defenders, and that it was not an illegal interruption of the peaceable use and enjoyment by the pursuers of the market-house: Finds, therefore, that there are no grounds for granting interdict against the defenders: As regards the declaratory conclusion, finds that the market-house is vested in the defenders for, among other purposes, a fruit and vegetable market, but not to such an extent as to bar the defenders from giving the occasional exclusive use thereof to some other purpose of public interest and utility: Therefore, with the above findings, assoilzies the defenders from the conclusions of the summons, reserving to the pursuers, and to any other persons interested and having a legal title so to do, to apply for interdict or such other remedy competent to them against the defenders in the event of the latter unduly restricting the frequenters of the market in the peaceable use and enjoyment thereof, or in the event of their devoting it for an unreasonable time to a purpose that deprives the frequenters thereto of the means of carrying on their business in the market-house: Finds no expenses due to either party, and decerns.

"*Opinion.*—The question in this case is, Whether the Magistrates and Town Council of Edinburgh, the grantees from the Crown and from Parliament of the right of holding a vegetable market within the burgh, can, in virtue of

their powers of administration and control, deprive the market gardeners of the use of the building wherein a part of the market is held, for a limited time, in order to enable them to give the use of the building during that time for some other purpose deemed by them to be of public utility?

“The law as to markets has very little occupied the attention of the Courts; and there is no decision explaining how far the grantee of the market can be restrained from interfering with the persons who frequent it.

“The privilege of holding a market is one only to be obtained by royal grant, or by prescriptive use, from which a royal grant is inferred. Bankton (i. 19, 13) so lays it down as follows:—‘For the encouragement of commerce, and the good of royal borows, there are weekly markets established in them; and likewise fairs, which are more solemn; yearly markets on stated days, with certain extraordinary privileges—these are granted by the Sovereign, and being once established, they cannot be encroached upon by a posterior grant to a neighbouring baron or town. Burghs of regalities, barons, and other heritors, in their respective borows, have likewise the privilege of markets and fairs indulged them.’ Lord Neaves, in the case of *Henderson v. Earl of Minto* (1st June 1860, 22 D. 1126), also states that the grant of a market only flows from the Crown; and Mr Cosmo Innes in his treatise on ‘Scotch Legal Antiquities’ (p. 38), shows that the Crown made such grants from a remote antiquity. It was not to burghs only that grants of markets were given. Private individuals received from the Crown at various times the right to hold a market upon their lands. But apparently during the sixteenth century the mode of establishing a public market was not by a direct grant from the Crown, but by means of an Act of Parliament. There are many Acts during that century conferring on burghs and upon private individuals the right to hold markets at specified places, or at any place that might be selected by the grantee within his territory. The days for holding the markets were appointed, and power was given to collect tolls and customs. Why resort should be had to an Act of Parliament to establish a market, to change the days for holding the market, and to alter the places which had been formerly appointed for it, has not been explained by any writer or by any decision. It was the prerogative of the Scottish kings to do all these things without the intervention of Parliament at all, and yet apparently the course adopted was to present a petition to Parliament praying for the necessary institution of the market, or the change that was desiderated in regard to time or place. The Acts of Parliament will be found referred to in the index to the Acts of the Scottish Parliament recently published (voce ‘Market’).

“The only points that seem to have occurred for decision of the Courts had reference to the establishment of a second market near to and conflicting with a market already in existence, and in regard to attempts made by the grantee of the market to increase the tolls and customs or duties beyond ancient usage. The decisions in regard to the latter point are numerous, and those in regard to the former point are quite direct and explicit as stated by Bankton. See Morison’s Dict., voce ‘Fairs and Markets,’ and Shaw’s Digest, voce ‘Burgh.’

“Perhaps it was because it was thought that without an Act of Parliament not merely customs or dues could not be increased, but that they could not authorise even the original dues to be taken, that made a resort so frequently to be had for Parliamentary authority. This does not seem to have been the view taken of the royal prerogative in England. It is laid down as the law in that country that the Sovereign may in the original grant authorise dues to be exacted. Chitty says (Treatise on the Laws of Commerce and Manufactures)—‘Toll is not a necessary incident to a fair or market; and if the King grant a fair or market without adding toll, such fair or market is free, and no toll can be taken. Tolls, therefore, can only be claimed by express words in a grant, or by prescription, which supposes such grant.’ The same author, in his treatise on the ‘Prerogatives of the Crown’ (p. 193), states the law thus—‘Marts and fairs were originally instituted for the benefit of the public and the better regulation of trade. As protector of commerce, the King alone possesses the power of creating markets and fairs; nor can anyone claim them but by grant from the Crown, or by prescription, which supposes such grant, though they may exist by way of royal ordinance without being granted to anyone in particular. It was observed by Lord Mansfield that the reason why a fair or market cannot be holden without a grant is not merely for the sake of promoting traffic and commerce, but also for the like reason as in the Roman law, for the preservation of order and prevention of irregular behaviour; *ubi est multitudo ibi debet esse Rector.*’

“The Magistrates of Edinburgh are grantees from the Crown of the right to hold fairs and markets within the burgh. These royal grants extend back to the fourteenth century, and terminate with the Golden Charter granted by King James the Sixth in the year 1603. But besides royal grants, Parliamentary sanction was given to markets being held by the Magistrates within the burgh of Edinburgh, commencing with a statute in the reign of King James the Fifth, and terminating with the 37 and 38 Vict., cap. 85, passed in the year 1874.

“By a charter of King James the Second, dated in 1447, the King granted to the Provost, Bailies, Councillors, and community of the burgh of Edinburgh right to hold fairs within the burgh and the territory thereof yearly. King James the Third, in 1477, by a letter under the privy seal, specifies the places within the burgh wherein the various markets were to be held. King James the Fourth, by a letter in 1507, confirms to the burgh and to the Magistrates thereof two yearly fairs, to be holden within a certain number of days within the burgh. In 1555 a doubt existed as to whether the Magistrates of their own authority could change the places that had been appointed by the prior charters for holding the market; and Queen Mary, on the narrative of this difficulty, granted authority to them to change the market-places to any other part or place of the burgh as often as they should think needful and expedient. Then came the Golden Charter granted by King James the Sixth in the year 1603, which ratified and confirmed all the prior grants of two yearly fairs, and gave power to hold weekly markets on every Monday, Wednesday, and Friday, or on any other three days of the

week as the Magistrates might appoint.

“As regards the Acts of Parliament, very much the same powers are conferred upon the Magistrates in the reign of King James the Fifth by the Act 1526, cap. 2 and 3. A corn and a flesh market were appointed to be held on three days every week. In 1540 the meal and victual was ordered to be removed from the High Street to some other convenient place. In 1640 the Monday market was ordered to be discontinued.

“But the important statutes are those of the present reign, which define the powers of the Magistrates in regard to the markets, and almost entirely supersede the necessity of considering what are the powers of administration and control which the grantee of a market possesses at common law. The first of these statutes to which reference need be made is that of 3 Vict., cap. 17, passed in the year 1840. The 21st section of this statute enacts ‘That it shall and may be lawful to the said Lord Provost, Magistrates, and Council, 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 for the sale of other articles of produce other than those contained in the schedules to this Act annexed.’

“The Magistrates were further authorised to make rules, regulations, orders, and bye-laws as they shall think fit and necessary for the better regulation and government of the different markets of the said city for the time being, and of the officers appointed by them to superintend the same, and from time to time to repeal, alter, add to, or amend such rules, regulations, orders, and bye-laws so to be made. The only limitations put upon this power of making rules and bye-laws was that they should not be repugnant to the laws of Scotland, and should not have the effect of increasing the dues or customs authorised to be levied, and that they should be confirmed by the Sheriff of the county of Edinburgh.

“This is the Act of Parliament in virtue of which the Magistrates did, after its date, frame rules and byelaws, and which rules have been confirmed by the Sheriff. It appears from the excerpts from the burgh records, beginning in 1508, that the Magistrates themselves had been in use, without any special authority given to them by the royal charters, or by the various Acts of Parliament which were passed relative to the Edinburgh markets, to make rules and bye-laws for regulating the mode of doing business at the markets, settling the hours during which each market was to be kept open, and the places at which each was to be held,—such powers being inherent in the grant of a market.

“Now, as to the particular market to which this case has reference, the history of it, so far as needful, is as follows:—It was held down to the year 1821 on the High Street of Edinburgh. The carts containing the vegetables which were sold were ranged on both sides of that street. This was neither convenient to the market gardeners

who brought their produce for sale, nor to the public who dealt with them, nor to the persons who had occasion to pass along that street. The Magistrates therefore, acting either under their common law powers as grantees of a market, or under the express authority given to them by Queen Mary to fix the market at any place within the burgh that they pleased, did in the year 1821 remove the market from the High Street to a place underneath the North Bridge. This was done after consultation with the market gardeners, whose opinion was taken, as set forth in a minute of 30th May 1821, and at that meeting the Magistrates and Council, acting under their powers as grantees of the market, passed a set of regulations for the government of it. These regulations appear to have been drawn up by a committee of the gardeners; but it was by the authority of the Magistrates and Council that they were enacted, and it was by their authority that all regulations for the proper management of the market were authorised in later times. Of recent date (1835) there are regulations signed by the Lord Provost for ‘the vegetable and fruit markets.’ After these came Acts of Council ‘declaring the boundaries of the different market-places of the city and the times when the markets are to be held, dated 11th ‘November 1840.’ This Act of the Magistrates and Council states explicitly where the vegetable market was to be held, viz., under the arches of the North Bridge, and to the west of the bridges, and so forth; and also prescribes the hours during which the market is to be held.

“That the Magistrates and Council could have changed the market from underneath the arches of the North Bridge, and put it elsewhere according to their discretion, is plain enough. They had express authority to alter any place that had been fixed upon for a market to any other place within the burgh under Queen Mary’s letter. They had this power within their right as grantees of a market independently of the Queen’s letter. Of course this discretionary power on their part could only be exercised, like all discretionary powers conferred upon persons for public purposes, in a reasonable manner. If the grantees of the market changed the place without any rational purpose, and nimously, and so as injuriously to affect the persons attending the market, these latter could complain. Still, unless some such objection could be stated, such change of the place for holding the market by the Magistrates was within their power prior to the Act of 1840, which gave express statutory authority to alter market-places.

“It is in reference to the more recent legislation that any difficulty exists in reference to the present dispute. If the matter had to be determined according to the law prior to these recent statutes, the Lord Ordinary thinks there could be no question that it was within the discretionary power of the Lord Provost, Magistrates, and Council of Edinburgh to have appointed that the vegetable market should be held—for a short period at a time—in some other place of the burgh than that in which it was usually held, if they had any reasonable purpose of public utility warranting them to put the market gardeners to the inconvenience of taking a new site. How far then has the discretion of the corporation been restrained by recent legislation?

“The North British Railway Company required

the ground on which the market was held at the Bridges, and after various negotiations an arrangement was come to between them and the corporation, under which the railway company were authorised to take the site of the market, and, on the other hand, they agreed to give other ground belonging to them for a new vegetable market. This arrangement was confirmed by Parliament by the Act 29 and 30 Vict., cap. 246, passed in the year 1866. The railway company was authorised to construct 'A new Fruit and Vegetable Market for the City of Edinburgh on ground adjoining Princes Street and Waverley Bridge, in the parish of St Andrew in the said city.' The railway company did provide ground for the purpose, and proceeded to lay it out in a manner suitable for the end in view. It was completed and handed over to the corporation in the year 1869, and is now the Waverley Market-House. This market-house was uncovered, and so remained from 1869 to 1874. It became apparent, however, that the convenience and comfort of the public, and of the gardeners resorting to the market, would be very greatly increased if the market were covered over, so as to free the persons frequenting it from the wind and rain. Another Act of Parliament therefore was obtained in the year 1874, entitled, 'The Edinburgh Markets and Customs Act 1874.' This Act proceeded upon a long preamble which recited the previous statute, one clause of which referring to the vegetable market being in the following terms:—'And whereas the corporation of Edinburgh, by whom the second, third, fourth, and fifth recited Acts have been and are being carried into effect, also possess a fruit and vegetable market-place, situated in the parish of St Andrews, and city and royal burgh of Edinburgh; and it is expedient that powers shall be acquired to cover in, in a suitable and convenient manner, 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 to acquire compulsorily any rights of property, privileges or servitudes which would interfere with the said objects.' The 8th section of this statute is in these words:—'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 stalls, stands, 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 and rates, as to them shall seem proper.' This statute authorised a considerable increase in the customs to be exacted for the use of the market from those market gardeners who brought carts into it, and it imposed a poll-tax upon each member of the public who entered the market-house. The allocation of the stands to the market gardeners is made once a year by lot, in terms of regulations framed by the Magistrates, and confirmed by the Sheriff, the 8th regulation being in the following terms:—

'The stands in the area of the market shall be allotted by the gardeners and other frequenters of the market amongst themselves, at such times, and according to such arrangements as shall from time to time be made by them, or a committee of their number, subject to the approval, or under the direction of the Markets Committee of the Town Council, provided (a) that in the allotment of stands the market area shall be occupied in the following order, beginning at the east end, viz.—(1) stands for the sale of fruit; (2) stands for the sale partly of fruit and partly of vegetables; (b) that failing the occupation of a stand or stands by the allottee or allottees thereof one-quarter of an hour before the opening of the market house for business on any day, the market officer shall allot such stand or stands for such day; and (c) that failing an allotment of the stands by the gardeners and frequenters as above authorised, the same shall be made from time to time by the market officer.'

'The management and regulation of the market so far as regards the allocation of stands and other matters of detail have thus been left very much in the hands of the gardeners themselves. The corporation appointed out of their number a market committee, who gave a general superintendence, but who seldom interfered with the allocation of stances or such matters.

'There being very few open spaces in the central part of Edinburgh for public exhibitions, the corporation were sometimes asked to accommodate such exhibitions on the site of the market, and believing that in granting such accommodation they were using their discretionary powers for the benefit of the public, they appear to have generally listened with a willing ear to these applications. They have granted the use of the old market at the Bridges to Wombwell's and Manders' Menageries, and the new Waverley Market has been for several years granted for the purpose of a flower show. The use of it has also been allowed to a Christmas club for several years, to menageries at various times, for a bicycle tournament in 1880, for a dog show in 1881, for an art exhibition, and in April 1882 for a fisheries exhibition, which last involved the exclusion of the gardeners from the market-house during market hours, from the 7th to the 30th April.

'The days for the vegetable market are Tuesdays, Thursdays, and Saturdays. The Thursday market is an unimportant one except for a few weeks in the year during the fruit season. The flower shows were held only during two days in a week in spring, and two days in a week in autumn—Wednesdays and Thursdays—and thus the use of the market by the gardeners, owing to the unimportance of the Thursday markets, was not much interfered with, and they willingly submitted to the inconvenience, seeing that the exhibition was a flower show in which they were all interested, and in which some of them were competitors. As regards the other uses now specified, to which the area of the market was put other than a market for vegetables, the gardeners were never actually extruded from the market-house, although some of them had to give up their stands and take a position elsewhere within the area. It was when the fisheries exhibition was allowed to be held within the

market-house for no less than three weeks that matters came to a crisis as between the corporation and the gardeners. The former maintained that it was within their discretionary powers to authorise the exclusion of the gardeners for the period during which such a national exhibition should be held, while, on the other hand, the gardeners insisted upon an absolute and uncontrollable right to the use of the market-house during the three weekly market days, during market hours, that is, from early morning to ten o'clock.

“In considering these opposing contentions it is necessary here to notice what is the area of the market-place. This is set forth in the rules and regulations confirmed by the Sheriff on the 16th of October 1877, as follows:—‘The market-place shall comprehend the area of the market-house and the ground belonging thereto, situate at the east end of Princes Street and north end of Waverley Bridge Street, and the public roads, streets, courts, areas, and places situate within a radius of 100 yards measured from any point of the said market-house.’ The corporation, on the occasion of the Fisheries Exhibition, when they excluded the gardeners from the market-house, allowed them to hold the market upon the Waverley Bridge and along Princes Street up to the Scott monument, and on the other side along the street leading behind the Bank of Scotland. All this was within the area of the market place as thus defined in these rules. Such a definition of the area of the market-place could be made by the corporation without confirmation by the Sheriff at all, for it is not of the character of a bye-law for the regulation of the markets. The power to fix the area, and to alter it according to their discretion was specially reserved by the Act of 1874, the 26th section of which is as follows:—‘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.’

“When therefore in April 1882 the corporation excluded the gardeners from the use of the market-house, and directed them to hold their markets upon the streets, they did not exclude them from the market-place, although they did so from the most comfortable part of it. Fortunately the weather was exceptionally fine at the time, and although some inconvenience was felt, the case was not so bad as it would have been had there been wind and rain.

“The important question, therefore, falls to be decided whether the corporation can be restrained at the instance of market gardeners who are not bound to attend the market, and who are only obliged to pay dues when they use it, from granting occasionally the exclusive use of the market-house for any exhibition that may interest the public. The corporation have a market-house perhaps the most commodious in the Kingdom, on which they have spent, according to the statement made up by the City Chamberlain, the sum of £30,834, 10s. 10d. Of this sum nearly £6000 was advanced by the corporation, and the rest was borrowed on mortgage by them. From the statement of estimated gross revenue derivable from the customs and market dues, on the basis on which the

Edinburgh Markets and Customs Act of 1874 was obtained, it appears that it was anticipated that a large revenue would be derived from the occasional use of the market-house for concerts and other exhibitions. It appears from the statement of revenue, from 1st August 1875 to 1st August 1882, that there was derived from this source a total sum of £5307, 0s. 6d., whereas the market gardeners only paid for their stands during the same seven years £4051, 3s. There are other sources of revenue which are all necessary in order to meet the interest upon the debt, the most prominent of which is the poll-tax of a penny, payable by each person who enters the market during market hours: Further, there are rents of shops in the north gallery, rent of a portion of the market given off for an aquarium, and so forth. The expenditure of £30,834 was, according to the City Chamberlain, all necessary in order to make a good covering. But 1882 was the only year in which the actual came up to the revenue that had been estimated, although even in that year the revenue was not sufficient to meet charges by £669, 19s. 4d. Of the total revenue in 1882 (£3455, 7s. 7½d.), the whole sum that came from the market gardeners was only £675, 1s. Mr Adam, the City Chamberlain, says—‘The revenue from the occasional use of the market for other than market purposes is a very important branch of revenue, and the account would be seriously injured if we were deprived of it. It has been strictly an occasional use, and at times when there was an exhibition of public interest—something that interested the whole community, or special sections of the community—it is within my knowledge that these have been frequented by very large numbers of persons. They have comprised cattle shows, dog shows, flower shows, concerts, bicycle tournaments, an assault-at-arms, and a fisheries exhibition. I do not think anything is charged for political meetings. When such occasional use has been taken, the Town Council have very generally done what they could do to consult the convenience of the market gardeners. (Q) And when in consequence of such use they have been put out, or some of them have been put out of the area of the market, has other accommodation been provided for them?—(A) So far as practicable. (Q) Within the area of the market-place as defined by the bye-laws?—(A) Yes. The original dues of 2d. per cart were voluntarily increased to 6d. after the market was built and before it was covered. I believe there were a few of the gardeners who declined to pay it. The rate of one shilling is now paid under Schedule A of the Markets and Customs Act of 1874.’

“It is in these circumstances that the Court is now asked to declare ‘that the fruit and vegetable market-place, situated in the parish of Saint Andrews, Edinburgh, is vested in and held by the defenders primarily for the purposes of a fruit and vegetable market, and that the pursuers have a right to the peaceable use and enjoyment of the said market-place, or stands therein for market purposes, during market hours.’ Keeping in mind that the market-place is defined to be ‘the market-house and the ground belonging thereto,’ and ‘the public roads, streets, courts, areas, and places situate within a radius of 100 yards measured from any point of the said



market-house,' it is plain that this conclusion cannot be affirmed as it stands. The pursuers no doubt intended by the use of the words 'market-place,' to indicate 'market-house,' but they have not so expressed themselves. But holding that they could restrict their conclusion to 'market house,' what is the case that they here make for the next conclusion, which asks that the corporation should be interdicted from 'excluding the pursuers from the use and enjoyment of the said market-place for market purposes,' and 'also from troubling or molesting the pursuers and other frequenters of the market in the peaceable use and enjoyment of the said market-place or stands therein during market hours in time to come.' This interdict is sought by reason of the fact that the corporation did give the use in April 1882 to the Fisheries Exhibition of the market house for three weeks, and this limited exclusion for that period is said to be an interference with the peaceable use and enjoyment of the building as a market house. Now this is a demand that cannot be acceded to. A building erected by the corporation at the expense of the community, intended for a variety of public purposes, cannot be demanded by one section of its frequenters for their use to the exclusion of all others. It is vested in the corporation for the public. The right of the gardeners to frequent it cannot be disputed. The 8th section of the Act of 1874 perhaps contains the best statutory recognition of such right when it provides that the ground floor of such market-place shall be used for the fruit and vegetable market, and that vacant stalls or shops may be used by the corporation for any purpose they think fit. This enactment is not inconsistent with occasional interruption of the use of the building, when the corporation think that higher and more general interests might be promoted by giving temporary possession of it to some other body. Of course any undue exercise of the discretionary power vested in the corporation, so as practically to interfere to a substantial extent, and contrary to precedent, with the business of a vegetable market, might be fitly made the subject of application for interdict. The exercise of all such discretionary power vested in public bodies may be controlled by the courts of law. But then a clamant case must be made out for such judicial interference, and this cannot be said to have been the case in the present instance.

"No part of the expenditure for the building was contributed by the 102 persons who are pursuers in this action. Only twelve of them carry on business within the burgh of Edinburgh, —the rest being scattered over the counties of Edinburgh, Linlithgow, Haddington, and Fife. No doubt they pay a shilling for the stance when they use it; but for this shilling they get ample recompense in the accommodation which they receive. It seems, therefore, somewhat unreasonable that the corporation, who have erected this commodious house at the expense of the community, should not be allowed to take the occasional use of it for some object which they deem of general interest to that community, though it might put the market gardeners for some weeks to inconvenience. Undoubtedly the expenditure of £30,000 was not made exclusively to facilitate the trade of the market gardeners; and it is not

asking too much from them that they should subordinate now and then their convenience to the convenience of the community at large.

"The peaceable use and enjoyment of the market-house which they claim is very little interfered with by the exercise of the discretionary power of the corporation in compelling the gardeners to hold their market within another part of the market-place than the market-house for some weeks in the year. The exercise of this power cannot, as already said, be made capriciously and without adequate cause. But the judges—in the first instance at least—of the expediency of using that discretionary power must be the corporation itself. No case has been made out by the pursuers for the interdict here sought. The right of the gardeners to peaceable use and enjoyment is not disputed. It is only maintained, and rightly maintained against them, that an occasional interruption of exclusive possession is not inconsistent in the circumstances with that right."

The pursuers reclaimed, and argued—The rights of the pursuers really begin in 1860, since prior to that the market was held in different places. On a sound construction of the Act of 1860 and subsequent statutes there was a dedication of this piece of ground to the purposes of a fruit and vegetable market. The Legislature by the Act of 1860, sec. 9, for the first time fixed the place for the market, and the railway company were taken bound to construct a new fruit and vegetable market. The Act of 1865, which proved abortive, repeated this section, but carried forward the obligation therein contained. The final agreement between the corporation and the railway company was embodied in and confirmed by the Act of 1866, in terms of which the market-place was constructed. Negotiations were thereafter commenced between the market gardeners and the corporation, which resulted in the passing of the Act of 1874, and the covering in of the market-house by the corporation. On the other hand, the market gardeners, in consideration of this advantage, agreed to pay higher rates for the use of the market. The Magistrates were not entitled, either on a construction of the statutes or at common law, to exclude the pursuers from the market-house for a period of three weeks, and force them to hold the market upon the streets.

The defenders and respondents argued—The burgh had had a right from time immemorial of holding a fruit and vegetable market, and the Magistrates had had the right of making regulations with regard to it. The burgh records showed that the Magistrates *de facto* made use of the powers conferred, and had shifted the place of holding the market from time to time. These powers were confirmed by the Act of 1840, and up till then it was clear there was no dedication. Therefore unless the pursuers could show a dedication from the terms of any statute they cannot succeed. But the reason why the statutes were passed was because the railway company wanted the land, and it was *prima facie* unlikely that as a result of this transaction there should be a dedication of the new ground when *ex hypothesi* there was no dedication of the old. True, there was in the agreement embodied in the Act of 1866 a stipulation that the railway company should construct a new market, but that was merely instead of

handing over a sum of money. Any doubt on this point was removed by sec. 26 of the Act of 1874. The market-house was covered in by the corporation at a great expense, and the income derived from sources other than the market, forming by far the largest part of the revenue, was in use to be applied in extinguishing the debt on the building. Further, the pursuers at common law had the power and discretion to appropriate the market-house to public purposes of utility. Every case in which the market gardeners were temporarily excluded from the market must be judged of on its merits, and in allowing the Fisheries Exhibition the Magistrates exercised properly and in good faith their discretionary powers.

Authorities—*Curwen v. Salkeld*, 3 East. 538; *Henderson v. Earl of Minto*, June 1, 1860, 22 D. 1126; *Clephane and Others v. Magistrates of Edinburgh*, February 15, 1864, 4 Maq. 603; *Reg. v. Hicks*, 4 E. and B. 633.

At advising—

**LORD SHAND**—This action has been raised at the instance of John Blackie and others, market gardeners and wholesale fruit and vegetable merchants, who have been in use to resort to the public fruit and vegetable market of the city of Edinburgh, known as the Waverley Market, for the sale of fruit and vegetables, against the Magistrates and Town Council of the city, in whom the right to the market and administration of it are vested for behoof of the public. The summons contains conclusions for declarator and interdiction, the first of these being, that it should be declared that the fruit and vegetable market-place is vested in and held by the defenders primarily for the purposes of a fruit and vegetable market, and that the pursuers have a right to the peaceable use and enjoyment of the market-place, or stands therein, for market purposes during market hours; and the second, that the defenders should be interdicted from excluding the pursuers from the use and enjoyment of the market-place for market purposes, or from otherwise appropriating, using, or disposing of the market-place, to the prejudice of the pursuers and other frequenters of the market, in the peaceable use and enjoyment of the market-place, or stands therein, during market hours in time to come, or at least until a new and suitable market-place shall have been legally provided, set apart, and established for market purposes, to supersede the present market-place.

The market is a large and commodious one, occupying a central situation on the south side of Princes Street. It was enclosed when it was erected in 1869 by substantial walls, and was, in or about 1874, covered in, so as to afford a complete protection from the weather, and ever since its erection it has been regularly resorted to by large numbers of the public for the purchase of fruit and vegetables, and by the pursuers and others, who sell the produce of their gardens, brought in loaded carts into the market-place or house, where the pursuers regularly occupy stances laid off for them. The market is held in the mornings from an early hour till ten o'clock, when it is closed, and the market days are Tuesday, Thursday, and Saturday, the markets on Thursday being usually much less frequented than on other market days. The market-place contains 158 stances for carts. On a Saturday morning there

are, according to the evidence of the market officer, perhaps 100 carts at the market, and he has seen as many as 188 carts there on one day—some of the carts on these occasions being obliged to stand out on the roadway. The proof does not, so far as I see, give a distinct account of the number of persons, purchasers, and others who frequent the market, but Mr Adam, the City Chamberlain, estimated that in 1874 the number of frequenters of the market was 15,000 weekly in summer and 2500 in winter.

The action, having regard to its nature and the terms of the conclusions of the summons, is one which might fitly be insisted in by any members of the public in use to resort to the market for business purposes; and though the pursuers claim to have a peculiar right and interest in the market because of their occupation of stances allocated to them from time to time, and for the use of which they pay dues at the rate of 1s. a stance on each day of occupation, and because the Magistrates and Council have allowed the market gardeners as a body to take a considerable part in the administration of the market, I am not prepared to say that I think they have any higher right or title to insist on an action like the present—to enforce alleged rights to the use and occupation of the market-place—than those members of the public who are in use to resort to the market to make their purchases. It is enough for the present case that members of the public, whether in use to buy or sell fruit and vegetables in the market-place, have a sufficient title and interest to try the questions raised by the conclusions of the action.

Prior to April 1882 the corporation, in whom the market is vested, had allowed of certain uses of the market-place from time to time, which caused a certain amount of inconvenience and interruption to the business, but, as I shall immediately notice, such inconvenience and interruption were of a really trifling nature, and either did not infer the entire exclusion of the gardeners or their customers from the market, or cause inconvenience of any consequence, or lasting beyond a day. But in April 1882 the corporation gave the exclusive use of the market-place or house, for a period of three weeks, for the purpose of the Fisheries Exhibition, and during that time the pursuers and the public excluded from the market-place were obliged to hold the market on the neighbouring public streets, which being in the centre of the city, and near to the Waverley Station of the North British Railway Company, are much used for public traffic. The defenders justify this proceeding on the ground of their general power to regulate and define the place for holding markets in the city, and because under the rules and regulations relating to the market, confirmed by the Sheriff on the 16th of October 1877, it was provided that the market-place should not only comprehend the market-house and the ground belonging thereto, but “the public roads, streets, courts, areas, and places situated within a radius of one hundred yards, measured from any point of the market-house,” and further, on the ground that they were entitled, as and when they thought fit, to appropriate and use the fruit and vegetable market-house for public purposes. The pursuers, when the intention of the corporation to grant the exclusive use of the proper market-place or house

for the Fisheries Exhibition became known, brought a process of suspension and interdict to prevent the proposal being carried out, but anxious to avoid what might hinder or compromise the success of the Exhibition, they agreed not to press their demand for interdict, but in an action for declarator to try the right of the defenders to make such an appropriation of the market, to the exclusion of the public, for so long a time, and hence the present action has been raised.

So far as regards the declaratory conclusion of the summons, it appears to me, upon the grounds to be immediately stated, that it is very difficult, if indeed possible, for the defenders successfully to dispute that the fruit and vegetable market—meaning thereby the covered-in market-house—is held by them primarily for the purpose of a fruit and vegetable market for the public. The real matter in controversy is not an abstract question of that kind, but whether, assuming that on the one hand the market-house is held primarily for public use as a fruit and vegetable market, while, on the other hand, when not so occupied, it may be appropriated by the defenders to other public uses, and further, that it may be in the power of the corporation to allow the use of the market for important public purposes, even on the market days, and during ordinary market hours, on special occasions, for such a length of time as may not cause material and serious inconvenience to the pursuers and other persons frequenting the market, on providing temporary suitable accommodation as a substitute for the market-house—it is within the power and discretion of the defenders to exclude the public from the use of the market for business purposes for so long a period as three weeks continuously, assigning only unenclosed ground, part of the public streets of the neighbourhood, as the site or place for holding the public fruit and vegetable market for that time. Accordingly, the Lord Ordinary has dealt with the case as really raising that question. Referring to the enactments of the Statute of 1874, under the provisions of which the market was covered in, he observes, that “the enactment of the 8th section is not inconsistent with the occasional interruption of the use of the building, when the incorporation think that higher and more general interests might be promoted by giving temporary possession of it to some other body;” and adds, “of course any undue exercise of the discretionary power vested in the corporation, so as practically to interfere to a substantial extent, and contrary to precedent, with the business of a vegetable market, may be fitly made the subject of an application for interdict.” The question in dispute between the parties is, whether such an exclusive occupation of the market-place or house as was given to the Fisheries Exhibition for a period of three weeks was an undue exercise of the discretionary power vested in the corporation, so as practically to interfere to a substantial extent, and contrary to precedent, with the business of the market? I have come to the conclusion, differing from the view of the Lord Ordinary, that having regard to the rights and obligations of the defenders, vested with the right of market for behoof of the public under the charters and statutes set forth on record, the exclusion of the public from the market-house, for the purpose of the business usually

carried on for that period, was an undue exercise of such discretionary power as is vested in the corporation, and that the pursuers are entitled to a decree which will prevent a similar interruption in the future.

The parties have laid before the Court voluminous prints of charters, Acts of Parliament, and minutes of meetings of different bodies, relating to the history of the market, and to the negotiations which took place from time to time between the corporation and the market gardeners, as well as the North British Railway Company, from whom the site of the present market was obtained. I think it quite unnecessary to refer to the charters and older Acts of Parliament contained in these prints. The Lord Ordinary has correctly explained the effect of these, and it appears to me that the result is to show that the corporation on the one hand has the power to hold a public fruit and vegetable market in the building appropriated for the purpose, and—it seems to follow—the right to exclude a rival market, but these rights are coupled with an obligation to make adequate and suitable provision for the convenience of the public in the use and enjoyment of the market.

Following this observation it is only further necessary to notice generally the history of the fruit and vegetable market for the last fifty or sixty years, and especially the circumstances in which the site of the present market was acquired, and the uses, other than that of a fruit and vegetable market, to which the ground has been put from time to time. Prior to 1823 it appears that the fruit and vegetable market, like certain other markets of the city at that time, was in use to be held on parts of certain central public streets in the old town of Edinburgh, but for upwards of sixty years the practice of holding markets in the public streets has been abandoned. Ground has been specially appropriated, laid out, and enclosed for the purpose, so that the business may be carried on conveniently, and not disturbed by traffic and other inconvenience which must arise if the market-place be not exclusively given up to the business for which it is intended. Between 1823 and 1860 the market-place consisted of enclosed ground under the North Bridge, and when a portion of this ground was acquired by the North British Railway Company for station purposes, additional substituted ground was provided and enclosed. In 1869 the Waverley Market, which had been the property of the railway company, was completed and enclosed by substantial walls, and handed over to the corporation, and since 1874 the enclosed market-place has been roofed and covered-in to the great convenience of the public, and so as to make the market both commodious and of a class now to be commonly found in all large cities and towns.

The importance of the market-place being situated upon ground enclosed from the public streets, and especially appropriated for the business of the market, has been recognised in the three statutes which were passed by the Legislature in relation to the removal of the market from its site under the North Bridge, and to the operation of covering it in in later years. The Act of 1860, which gave the North British Railway Company power to acquire the old site, provided that a proper site should be substituted to the satis-

faction of arbiters. It was provided "that the new or substituted market to be provided under arbitration shall not be formed or held upon any open street or area, but in some secure place, enclosed by substantial walls and gates, with equal accommodation to the present fruit and vegetable markets." A decree-arbitral having been pronounced with reference to the provisions of this statute, the railway company gave notice of a bill to give effect to the decree, which was opposed by the corporation on various grounds, and it appears from the report of the proceedings before the Committee in Parliament, made by the City-Clerk to the Town Council in relation to this bill, in the opposition to which the market gardeners took an active part, that the Parliamentary Committee decided that "the market should not be held in the public streets, and provided that another fruit and vegetable market on another site should be constructed and made over ready for use at the expense of the company before they should be allowed to appropriate, use, or interfere with the lands on which the existing market is held." In the same report the City-Clerk explained that the chairman intimated, after certain witnesses, including market gardeners, had been examined, that "it would be unnecessary to lead further evidence as to the inexpediency of holding the markets in the public streets or in unenclosed spaces." The views of the Town Council and the market gardeners as to the importance of having ground specially dedicated to the market, and enclosed for the purpose, cannot be better illustrated than by the passages from the Town-Clerk's report just referred to.

The result of the opposition to the railway company's bill was an agreement between the company and the corporation, which received legislative sanction by the Act of 1865, and which provided that the railway company "before appropriating, using, or interfering with the lands on which the fruit and vegetable market to be provided under article third hereof shall be held, or of any of the accesses thereto. . . shall be bound to provide. . . a new and substituted market, which shall in every respect fulfil the conditions prescribed by the said North British Railway Company (Stations) Act of 1860 with reference to the new and substituted market therein specified"—the provision thus made being designed to secure a special and exclusive appropriation of enclosed ground for the new fruit and vegetable market. Under this agreement the new Waverley Market was constructed, enclosed, and given over. Throughout the provisions of the Act of Parliament and agreement just referred to, the ground of the market is expressly described as being given for the purpose of a fruit and vegetable market. And in the conveyance in favour of the Magistrates of that ground it is described as "All and Whole that piece of ground upon which the said North British Railway Company have formed a new fruit and vegetable market for the said city." This being so, and having regard to the history of the acquisition of the ground, there can, I think, be no doubt that the ground is held by the corporation primarily for the purposes of such a market. It is also worthy of observation, although it may not materially affect the legal question between the parties, that in respect of the greater convenience which resulted to the

market gardeners from obtaining the new Waverley Market, they voluntarily agreed, without almost an exception, to pay increased dues for the stances allocated to them.

Matters so continued till 1873, when negotiations took place between the market gardeners and the corporation with a view to the improving and covering in of the market-place. The result was that in 1874 an Act of Parliament was obtained authorising this to be done, and since the market was completed and covered in, under the powers thus obtained, the market gardeners have paid still higher dues than formerly for their respective stances, while at the same time a poll-tax has been levied on all persons resorting to the market, and from these two sources a considerable revenue has been derived. I may here notice that it has been said the total income from all uses of the building are insufficient to meet the charges, but it must be kept in mind that a large sum is annually appropriated to a sinking fund, and payment of a share of an annuity to the city's municipal funds, and keeping this in view, and that £6812 has been set aside during the last seven years towards reducing the debt, Mr Adam proves that the market is a paying concern. The important section of the statute of 1874 in relation to the present question is the eighth, by which it is 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 or 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." Again, in this statute the area to be dealt with is described as "the fruit and vegetable market-place," and while the leading provision of the statute is, that the corporation may cover in the market-place, and improve and better adapt it for the purposes of the market, and for the accommodation of the parties using the same, and the public, and may make such arrangements in regard to stances, stalls, and shops as may seem suitable, it is further provided that the ground floor only of the 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 the 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. It has been maintained for the defenders that under these provisions they are entitled to appropriate and use the ground of the market-place or house when they think right for public purposes, other than that of the market, even on market days and at market hours, but I cannot so read the statute. On the contrary, it appears to me that the provisions of this section give the corporation power only to use vacant

portions of the market-place, and vacant and unlet stands, stalls, and shops, for other than market purposes. The explanation of this particular provision, which is given in the evidence, is that in the covering in of the market for the comfort and convenience of those resorting to it, the corporation took power to lay out a larger expenditure than was necessary for this simple purpose. The roof of the building has accordingly been made available for use as a promenade and garden, with entry from Princes Street. Internal galleries have been built above the floor of the market, with booths or shops entering from them, and it was indispensable in the view of the parties in incurring this increased expenditure, that the corporation should let these shops or booths, and should be able to use the market-house or building for purposes other than that of a fruit and vegetable market at those times when it was not required for the market, which practically means for almost the whole day and evening, for, as has already been explained, the fruit and vegetable markets are closed about ten o'clock in the morning, and are only held upon three days in the week. It seems to me to be a much wider and more serious proposal on the part of the defenders, than either the expenditure or the provisions of the statute would warrant or justify, that the defenders should be able to exclude the market gardeners and their customers even from the ground floor of the building, which was formed for the purposes of a fruit and vegetable market, for so long a period as three weeks, assigning only portions of the public streets as a market for that time, and I see nothing in the purposes or provisions of the statute which will give sanction to the idea that any such power was thereby conveyed.

It is further worthy of notice, that after the market had been erected and covered-in, the corporation, amongst other bye-laws which they proposed for the approval of the Sheriff, inserted one to this effect—"The market-house shall be used for such purposes, other than market purposes, for such time and on such conditions as to admission or otherwise as shall from time to time be determined by the Magistrates and Council, or the Market Committee of the Town Council." But the proposal to obtain this extreme power having been opposed by the market gardeners, the proposed bye-law was dropped.

It has been further maintained that at common law the corporation has the power and discretion to appropriate the fruit and vegetable market to such public purposes of utility as the Fisheries Exhibition, and for such a period as three weeks, and it is pleaded that as by the rules and bye-laws confirmed by the Sheriff it is provided that "the market-place shall comprehend the area of the market-house and the ground belonging thereto, situate within a radius of one hundred yards, measured from any one part of the said market-house," the corporation are entitled for such a period to appoint the market to be held on the public streets in the neighbourhood, which, as already explained, are in a central situation in which much traffic goes on. It appears to me, as indeed the Lord Ordinary seems also to hold, that a certain discretion is vested in the corporation. This discretion must, however, be exercised within reasonable limits. If to serve any purpose of great public utility they

were of opinion that for one or two days the fruit and vegetable market-house or place should be appropriated, and the market at some inconvenience, for that limited time, held on the surrounding public streets, it may be assumed that this may lawfully be ordered. But the matter assumes a different aspect when, instead of two or three days, the fruit and vegetable market is appropriated for no less than three weeks, for if that length of time be allowed, it is not easy to see why the time might not be extended to months. It is impossible to doubt that exclusion from the market-place or house for three weeks must cause great public inconvenience to those who are in use to buy and sell in the market. And as I cannot doubt that under the statutes the market-place is vested in the corporation primarily for the purpose of affording proper and suitable accommodation for the purchase and sale of fruit and vegetables, the corporation is bound *ante omnia* to give effect to that purpose. Such an appropriation and use of the market as the pursuers complain of seems to me to amount to a disregard of the primary purpose for which the market is held, and of the consequent obligations of the defenders, and cannot be defended on the ground that it is within the bounds of a due and ordinary exercise of discretion. It is explained in the evidence that while the operations for covering in the market were going on, all parties were obliged to rest content with the public streets for the purpose of their business. Very serious inconvenience and loss and injury occurred to the market gardeners and others, as explained by the witness John Blackie, and if it had not so happened that during the time of the Fisheries Exhibition exceptionally fine weather prevailed, the same thing would have happened then. This being so, it appears to me that in the use of a discretion which must be exercised under reasonable limits the corporation are not entitled to appropriate the market-place for other purposes for such a time as shall cause material and serious inconvenience to the public using the market for the purpose for which it was built, and to which it was primarily dedicated.

A good deal of evidence was led as to the uses which the corporation had allowed of the market-place for other purposes than the sale of fruit and vegetables. That evidence appears to me to be of no importance in the case; for such temporary use of the market-place as has hitherto been allowed did not amount to any real interruption of the markets, or to anything but slight inconvenience to those who attended. From time to time part of the old market, and latterly of the Waverley Market, was occupied for a short time in winter, when the markets are small, by a menagerie, and for some days in winter also by the Christmas Cattle Show, but the part of the ground so occupied was not required for the fruit and vegetable market, which accordingly was held as usual within the covered market-place. A dog show and a bicycle tournament were also allowed, but the former of these was held also in the east part of the market, and did not cause any material inconvenience, and the latter was permitted only after market hours, and caused no interference with the use of the market. As to the Horticultural Society's Shows, which take place two or three times a-year, it

appears that these interfered with the use of the market on a Thursday, when very little business is doing; and the market gardeners as a body appear to be anxious to promote the success of the flower shows, in which many of them were interested, and were therefore quite willing to consent to the slight inconvenience which was thus caused. Such an interruption as occurred during the Fisheries Exhibition, when the market-place was appropriated for three weeks, to the exclusion of any use of the building for the purposes of the market, was an act of a very different kind. It was an entire novelty, and necessarily caused such serious and material inconvenience as in my opinion to entitle the pursuers and other members of the public to such a decree from the Court as will prevent the recurrence of anything of the kind. I therefore propose to your Lordships that the interlocutor of the Lord Ordinary should be recalled, and that judgment should be pronounced in the following terms—[His Lordship here read the terms of the interlocutor, quoted infra].

**LORD MURE**—The circumstances under which the present proceedings have arisen were solely the exclusion of the pursuers from the market-house, built for them some years ago, and that for a considerable period of time, viz., for about three weeks in April 1882. Of the fact that the pursuers were so excluded there can be no doubt, and that some considerable inconvenience was sustained during the three weeks that they were excluded cannot, I think, be denied on the evidence. Although it was fortunately fine weather for that period of the year, there is some evidence from some of the officials of the defenders that if it had been otherwise it would have been a very unpleasant proceeding for those who were obliged to go there, either as market gardeners in the position of the pursuers, or as the marketing public, and particularly the retail dealers who had to go there to purchase goods from the wholesale market gardeners. But the question does not turn upon that. The question we have to decide is, whether such an exclusion of the pursuers and of the public from the market-house was within the power or discretion of the defenders, in virtue of the power vested in them as the Town Council of the city, either at common law or under the provisions of any of the statutes by which such matters are regulated? I agree with Lord Shand in the opinion which he has expressed, that such an exclusion of the pursuers for such a length of time was not within the ordinary powers or discretion vested in the defenders for the regulation of this market-house. In coming to this conclusion I also agree with Lord Shand that it is not necessary to enter upon the general question of the powers of the Magistrates at common law, which were discussed during the argument laid before us in support of the reclaiming-note. The present question turns, in my opinion, on the statute alone, and mainly on what took place between 1860 and 1874 in regard to the change of the site of the market, when the old market was acquired by the North British Railway Company for station purposes. It is impossible, I think, to read the evidence, oral and documentary, which has been laid before us without coming to the conclusion that before the year 1860 considerable inconvenience and disad-

vantage was found to attach to the markets in Edinburgh being held in open public streets, and that there was a growing desire on the part of those more immediately interested in these matters that some remedy for this inconvenience should if possible be provided. When, therefore, it became necessary, in order to enable the North British Railway Company to extend their station, and so get possession of the old markets, very decided steps appear to have been taken to have a new and improved market-house substituted for the old one. To ascertain what these were it is not necessary to go further than to the clause of the Act of Parliament obtained by the railway company in 1860, which has been referred to by Lord Shand, and which provided that "the new or substituted market to be constructed under arbitration shall not be formed or held upon any open street or area, but in some secure place, enclosed by substantial walls and gates, with equal accommodation to the present fruit and vegetable markets." Shortly after that, and after some proceedings in Parliament, there was a report by the City-Clerk in 1864, which bears that it was decided that the market should not be held in the public streets, and provided that another fruit and vegetable market on another site should be constructed and made over ready for use at the expense of the company before they should be allowed to appropriate, use, or interfere with the lands on which the existing market stands. The clause of the Act of Parliament of 1864, and the report in 1864, and some further Parliamentary proceedings which took place, appear to me to put that beyond all question. Now, such being the state of matters in 1864, and the agreement of 1865, the Act of Parliament of 1865-66 was passed with a view to make further provision relative to this change in the site of the market, and these do not appear to me to contain any provision at all as to the covering of the new market. But I think the covering of the new market was evidently a matter which was kept in view, and immediately on the new market being completed and transferred to the town in 1869, the subject of covering it, and the subject of the market gardeners paying a consequent increase of rates, seems to have been brought under the consideration of the Magistrates. That is referred to in the seventh article of the condensation in this action, where it is stated that "before the opening of the new market the corporation conferred with the committee of the market gardeners as to an increase in the rate of customs, and in respect of the improved site secured for the market, suggested a rise in the rate from 2d. to 6d. This was agreed to by the gardeners at a general meeting held on 4th March 1869, and the increased customs were voluntarily paid by all the gardeners and merchants exposing produce or goods in the market (with the exception of three or four) from the year 1869 to the year 1874, when the Edinburgh Markets and Customs Act was passed, enabling the corporation to levy certain increased rates." Now, that allegation is admitted by the defenders. They admit that between the years 1869 and 1874 the customs or dues were raised from 2d. to 6d. per stance, and they also admit that they got additional powers under the Act of Parliament. Then we have a minute of a committee meeting of the market gardeners with reference to that matter,

which shows that they went before the Town Council at that time, with the proposals about increased rates, immediately after the change of the site took place. Shortly after that a communication seems to have passed between the market gardeners as a body, represented by a committee who manage their affairs, and the Town Council; and these gentlemen were distinctly acknowledged by the representatives of the Town Council at that date as persons with whom they were authorised to treat on the subject. About 1872 communications passed with a view to covering over the market and the increase of rates. That is set forth in the condescendence, where it is stated that "at a meeting which they held on the 14th August 1873 with the sub-committee of the Lord Provost's Committee, the committee of the market gardeners concurred in the said statement, and while they expressed their desire that the market-place should be covered without delay, they promised cordial support in obtaining Parliamentary sanction for carrying out the works." It is admitted that there were certain meetings of the gardeners, and others then using the market, and the sub-committee of the Lord Provost's Committee in 1873, and the minutes of these meetings are referred to for what took place. Now, we have some of those minutes in the print, and they show what took place in 1872 and 1873, and I think that the substance of what is alleged in the condescendence, where there is a statement as to how the increase of rates was brought about, and that it was agreed that 1s. per stance should be paid for each day provided the market-house was covered in, is, in the view I take of these minutes, proved to be substantially correct. In 1873 there were meetings of the committee of market gardeners, with a view to consider the proposals of the Town Council applicable to the increase of rates from 6d. to 1s., and this was agreed to by a large majority of market gardeners. There is printed a copy of the memorial to the Lord Provost and Magistrates by the market gardeners relative to the proposal to cover the market, and they set forth the view which they hold as to the expense, and their readiness to pay the increased rates provided the market is covered. That is all set forth in the minutes, and there is a letter from Mr Harris, one of the officials of the Town Council, to Mr Millar at Bonnington, asking him to meet with Bailie Wilson, the Chamberlain, and himself on Wednesday at half-past two o'clock, to have some conversation in regard to the proposed covering in of the Waverley Market. Then we have a minute of the market gardeners on the subject, and there is a letter by Mr Reid, who represented the market gardeners, dated 30th December 1873, to Mr Harris, in which the matter of the tax and the increase of rates is referred to; and the market gardeners agreed to it, provided they got the market-house covered in. On 4th February Mr Harris writes Mr Reid—"I beg to inform you that, in conformity with an arrangement I made with Mr Millar, there will be a meeting of the sub-committee on the Markets, &c., Bill to-morrow (Thursday), at two o'clock P.M., and I am to request that you will be so good as arrange for a deputation of market gardeners being in attendance." Accordingly, it appears that the market gardeners did attend, and the result of the meeting which so took

place at the request of Mr Harris was that the following entry was made in the minutes of the Town Council of that day in relation to that business. It is printed, and is sent by Mr Skinner, in May 1875, to Mr Millar, as an excerpt of what he understood Mr Millar wanted at that time, and it is one of the minutes referred to—"On the understanding that the poll-tax should not be imposed, nor increased rates on entrance to the market made until the operations for the covering in of the market are actually commenced, the committee of the gardeners assent to the Bill." That was on the 5th of February 1874, and so the proceedings ended. The evidence of Mr Adam seems to imply that there were meetings to the effect I have just read. Now, it was in these circumstances that the Act of 1874, with its provisions as to the covering in of the market, was passed through Parliament, with the assent of the committee of market gardeners, who met with the Town Council of that day at the request of the City Clerk; and I think the committee of the gardeners who made that proposal, and that stipulation that was entered in the minutes, was entitled to expect that when they had agreed to an increased rate, the covering in of the market should take place. Accordingly, we find that the preamble of the Act of 1874 specially mentions the desirability of covering in the market as being one of the reasons for applying for the bill, and also the necessity for increasing the market dues in the manner that the market gardeners had agreed to. And so the bill was passed as the result of the arrangement to pay the increased dues, which, as I understand, the market gardeners have paid from that time down to the present day. There is a power given in the Act to make rules and regulations, although there was such a power in the older Act, and subsequent to the passing of the Act of 1874 rules and regulations were made. They are printed, and it appears to me that some of these rules are of material importance, because they are framed for the consideration of the market gardeners and of the public who were to use the market; and it appears that a discussion as to the terms of them took place before the Sheriff prior to their being passed. The 2nd of these rules is—"The market shall be open for business every lawful day during the five months from 1st May to 30th September, inclusive, at seven o'clock A.M., and during the seven months from 1st October to 30th April, inclusive, at eight o'clock A.M.;" and the 3d is—"The market-house shall be open for the admission of carts, lorries, or other vehicles conveying produce or goods to the market, in summer months one hour, and in winter months three-quarters of an hour respectively before the opening of the market for business." Now, these are provisions dealing with the market-house that is stated to be open for business every lawful day during the year; and the Town Council went with the market gardeners to the Sheriff, and got him to approve of regulations containing these provisions. Now, when we read that the market-house was to be open for the admission of carts and lorries at certain hours every lawful day, I cannot suppose that the gardeners were to be put in the position of being shut out from the market for three weeks, they having been before the Sheriff led to suppose that they were to have the use of the market every day when they re-

quired it. I cannot read the 2d and 3d of these regulations as implying that at the pleasure of the Town Council they might be excluded from this market, for which they had agreed to pay the doubled rate of 1s. instead of 6d. I do not think that admits of argument on the face of these regulations. There is one regulation which it is averred on record was proposed to the Sheriff, and the parties are at issue as to whether the Sheriff did or did not refuse to approve of it. It is in these terms—"That the market-house shall be used for such purposes, other than market purposes, for such times and on such conditions as to admission or otherwise as shall from time to time be determined by the Magistrates and Council, or the Markets Committee of the Town Council." It is stated by the pursuers that the Sheriff refused to confirm that. The defenders deny that, but it is admitted that though it was proposed as a rule, on its being objected to by the market gardeners it was withdrawn. Why it was proposed I do not know, except it was to get a power to do what the market gardeners here dispute that they have the power to do. But they did not get that power, and therefore we are driven to this—whether there is anything in the Act of Parliament which authorises the defenders, after they have built this market-house and covered it over, and have got increased rates in consequence, to maintain that for the national object, as I assume it was, of having a Fishery Exhibition there they were entitled to put these market gardeners out on to the public streets of the town, although within the precincts of the space that might be applied in some sense to a market—to put them out during market hours on to the public streets of the town at that early hour of the morning, they being the parties who had stipulated to obtain the market-house on their being assessed at a heavier rate than they had been in use to be assessed at. I am of opinion that in the circumstances of the case it was beyond the power of the defenders, as administrators under this Act of Parliament, in regulating the use of the market, to take such a decided step as to exclude the parties materially interested from the proper market-house for the space of well on to a month in April 1882. With these views I agree in what Lord Shand has proposed, that there should be certain findings as to the powers of the defenders in ordinary matters, but that with regard to the particular complaint in question they have gone beyond the discretion which is vested in them by the Act of Parliament.

**LOED DEAS**—This is an action at the instance of upwards of a hundred pursuers, who describe themselves no otherwise than as market gardeners, whose gardens and residences are, with a very few exceptions, from twenty to thirty, or more, miles from Edinburgh.

The Corporation of the City of Edinburgh, represented by the Lord Provost, Magistrates, and Town Council, has an extensive territory. We are familiar with many subordinate corporations under that of the city and its liberties, but the market gardeners are not, and do not pretend to be, among the number. They are admittedly a mere voluntary association, who for the more orderly carrying on of their business elect a chairman, who presides at their meetings, and a

treasurer and secretary to attend to their pecuniary matters and to their correspondence, but they are not bound together by any tie, not even that of a company or copartnership. The whole of them are not pursuers or parties to the action in any shape—supposing that would remedy the defect—and some of them totally disapprove of it. For instance, Messrs James Lindsay & Son, who are known to be amongst the most extensive market gardeners in the trade, not only do not concur in it, but they addressed a circular to the other market gardeners remonstrating against the action before it was raised.

The summons, it will be observed, is purely a summons of declarator and interdict—that is to say, declarator of the alleged rights of the pursuers, and interdict against interfering with these alleged rights. It concludes for declarator of the rights alleged, without any limitation of time, and therefore necessarily for all time coming.

I know no example of an action, and much less an action of declarator like this, having been sustained at the instance of a number of individuals like the pursuers. The Lord Ordinary has assumed the sufficiency of the instance and the competency of the action apparently for no better reason than that no objection thereto was pleaded to him. I cannot regard that as a sufficient reason in such a case. The decree of declarator concluded for is, and from its nature must be, applicable to all time. To warrant such an action and decree the pursuers would require to be a body having perpetual succession, whereas they are nothing of the kind. They are like a bundle of rods, or rather portions of a bundle of rods, bound together by no tie, not even a temporary one, still less by a tie of a permanent nature, and I am not prepared, simply because no objection has been pleaded, to sanction an action of so anomalous and unprecedented a nature.

Actions of a particular class have been sustained at the instance of a company and a certain number of its partners. But this is not an action at the instance of a company, and the same indulgence was not extended by the House of Lords to a voluntary association, even in an action which was not a declarator, in the well-known case of *M'Kenzie and Others v. Graham*, 21st June 1825, 1 W. & S. 538, where the Writers to the Signet being found not to be a corporation, the action at their instance was dismissed, although a considerable number of members of the body were concurring pursuers in it. If the action had been, as this is, a declarator of rights claimed by the body, I need not say that its dismissal must have been *a fortiori*.

If, however, this was an action in which, as the Lord Ordinary seems to have assumed, the merits of the question proposed to be raised in it could be competently decided, I should have agreed entirely with the views expressed in his Lordship's able and painstaking note, and with the result of his interlocutor, by which under a certain reservation he assolizies the defenders from the conclusions of the action.

As his Lordship observes in the note to his interlocutor, the right to hold fairs and markets can only flow either from the Crown or from Parliament. In this case it flowed directly from the Crown. It will not be doubted that in particular the Charter of James the Third, of 3d



October 1477, and the Charter of James the Sixth, of 1603, commonly called the Golden Charter, taken together, are amply sufficient to confer a grant of the right of holding all sorts of fairs and markets, together with all the various and extensive powers, privileges, and jurisdictions, over the same which are included in and under such a grant. No Parliamentary authority was or is necessary for that purpose in addition to these charters themselves. They are both in the print, and I need not read them.

The letter of King James the Third will be found in the same print. It sets out by enumerating all the principal markets then existing. It then "charges and strictly commands all and sundry our lieges and subjects foresaid, and specially the community and inhabitants of our said burgh whom it effairs that ye and ilk one of ye observe and keep the said statutes, and readily attend, answer, and obey to our said provost and baillies that are now and that shall happen to be for the time." If these powers, privileges, and jurisdictions over the markets and market-places, &c., so conferred, are alleged to have been in any respect subsequently altered, circumscribed, or in any way restricted, this must be instructed *habili modo*. No Act of Parliament that has been hitherto mentioned to me by any of your Lordships, or that I have been able to find, bears to have had any such limiting object or effect, but the reverse. The Act of 1840, for instance (section 21), enacts that it shall be lawful for the Lord Provost and Magistrates to fix and alter the existing markets and market-places—to alter, or altogether to change the situation of the same, and to substitute others in their place; and section 22 empowers them to make rules and bye-laws applicable to all markets and market-places, and alter the same at pleasure, subject to the approval of the Sheriff. When the defenders subsequently acquired, for full value, from the North British Railway Company, the present site of the fruit and vegetable market, that site necessarily fell under all the clauses and conditions applicable to fairs and markets in their charters, and the same observation remains applicable now that it has been roofed in at the defenders' expense.

By section 4 of the Act of 1874, the Lands Clauses Act 1860 and the Markets and Fairs Clauses Act of 1847 were incorporated with that Act, and by section 5 of the same Act powers were conferred on the defenders to enable them, besides property, to acquire compulsorily all privileges and rights of servitude connected with their different markets.

At the same time there was inserted in the said Act of 1874 a clause (section 26) in the following terms:—"Nothing in this Act contained shall be held to affect the rights 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."

A saving clause to a similar effect will be found in all the previous Acts promoted by the defenders.

The terms of this section 26, in an Act so recent as that of 1874, seems sufficiently to explain why the pursuers have not attempted to

show that there is anything in what the Lord Ordinary in his note calls recent legislation, either to increase the control of the pursuers or decrease that of the defenders over the market-place in question.

The fruit and vegetable market, when so covered in, is expressly spoken of in the Act as the fruit and vegetable market of the incorporation, and there can therefore be no doubt upon that point.

It will thus be seen that the Act (1874) which gave the defenders compulsory powers to enable them the better to cover in and complete the fruit and vegetable market, expressly described it as their property, and conferred no independent right of occupancy on the gardeners or any other parties, but rather restricted them from obtaining even through the defenders any occupancy whatever except on the ground floor. The 26th section of the same Act virtually amounts to a declaration that all rights and powers whatever which the defenders ever had as to markets and market-places remain and are continued to them.

Neither can there be any doubt of what is the relative position of the pursuers, although it may be difficult to describe it otherwise than negatively by saying what they are not. They are certainly not tenants, either in name or in substance. They pay no rent either for stalls or anything else (as explained by Mr Lauder, a leading member of their body, in the print). They pay certain petty customs, which are regulated by Act of Parliament, and are exigible from all who may choose to come as sellers to the market, and the maximum of which customs, so far as I can make out, is limited to 2s. per cart-load, which can bear no proportion to the interest of the money expended by the defenders on the fruit and vegetable market, besides the full value they gave, under contract of excambion, to the North British Railway for the site. The pursuers have no lease, not even for the shortest possible period. They cannot accurately be called even occupants of the market or market-place, for they at no time can claim to occupy, nor do occupy, more than a small portion of that market-place, and this only for a short time in very early morning, leaving it then always vacant, for all purposes the defenders choose, by 10 a.m., as is explained by their president Mr Blackie in the print. On the other hand, the position of the defenders is that of undoubted proprietors, as set forth in the face of the Act of 1874.

The grievance, and the only grievance, the pursuers complain of is embodied in the 15th article of their condescendence, in which they set forth that from the 7th to the 30th of April they were excluded from the market-place during market hours to make way for a Fisheries Exhibition. The Lord Ordinary was of opinion that this was quite within the power of the defenders, and I agree with him.

The site on which the fruit and vegetable market was erected was acquired from the North British Railway Company prior to the Act of 1874 by an onerous contract of excambion on which the defenders stand infert, and their infertment is duly recorded in the Register of Sasines. That site, however, was neither acquired at the period nor in the manner which might be supposed from what the Lord Ordinary

says in his note, which must, I presume, refer to some previous transaction altogether, although, except for accuracy of statement, the matter does not affect the case either way. The clause in regard to it in the Act of 1874 is as follows—"And whereas the Corporation of Edinburgh, by whom the second, third, fourth, and fifth recited Acts have been and are being carried into effect, also possess a fruit and vegetable market-place, situated in the parish of St Andrews, and city and royal burgh of Edinburgh, and it is expedient that powers shall be acquired to cover in, in a suitable and convenient manner, the said market-place, and to improve and better adapt the same for public use, for the accommodation of parties using the same, and to acquire compulsorily any right of property, privileges, or servitudes which would interfere with the said objects."

The Act of 1874, sect. 8, farther bore:—"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."

It is obvious that the above-quoted provision, in sect. 8 of the Act of 1874 is of the nature of a restriction, rather than otherwise, of the pursuers' claim for market accommodation, viz., that it shall be on the ground-floor only, and of a very limited nature even there.

For time immemorial those who acted for and represented the corporation had been in use to authorise such members of the public as they thought proper to occupy portions of the fruit and vegetable market for menageries, circus exhibitions of horsemanship, horticultural exhibitions, flower shows, club shows, dog shows, band and other musical performances, bicycle exercises, and various other purposes of utility, instruction, or amusement; and when in the spring of 1882 they were requested to allow the market-place (which, as Mr Adam explains in his perfectly reliable evidence, they had covered in at an expense of £30,384) to be occupied from the 7th to the 30th April following as a Fisheries Exhibition, I confess I should have been surprised if they had declined in place of agreeing to do so. They had made it a very different structure from what it had hitherto been, and capable of being used occasionally for much higher purposes; and for my part I think they would have fallen short of their duty to the Crown, the community, and the public if they had withdrawn the consent they had given to the occupation of the market for the proposed exhibition, and thereby tacitly admitted that what they had promised was beyond their power to perform.

I do not understand any of your Lordships to hold that to grant the use of the market-place for any laudable or innocent public purpose, even if

it interferes temporarily with the occupation of the gardeners, is absolutely beyond the power of the defenders; but it has been suggested that the period of exclusion was in this instance too long. Now, whether it was too long for the gardeners or not, I do not think that anyone who saw, as I did, that surprising and most useful exhibition would think it was too long in order at all to serve its purpose of informing and instructing such of the people of the three kingdoms as found it convenient to inspect it. The pursuers themselves seem to have been conscious of its importance; for they say that in agreeing to hold their market in the meantime on the Waverley Bridge they were simply anxious to avoid what might have interfered with the success of the Fisheries Exhibition. They were obviously impressed with the truth and importance of what Messrs James Lindsay & Sons had stated in their circular of 3d February 1882, that "the object of the Fisheries Exhibition is purely national, and a subject we should all take an interest in," and "that at this season of the year the market is not sufficiently occupied to warrant complaint being made on such a score; therefore we hope you will agree with us in what we believe to be common sense, viz., to let the Town Council alone."

I am disposed to think that this was sound advice, and that it is matter of regret that it was not taken. Those who acted for the corporation had obviously on all occasions, at least in modern times, been as solicitous as circumstances would permit for the accommodation and comfort of those frequenting the markets—sellers as well as buyers. When Maitland wrote his "History of Edinburgh" all the markets were held on the open streets, and continued to be so till a comparatively recent period. Mr Adam, who entered the Chamberlain's office in 1841, and became himself Chamberlain in 1847, says in his evidence—"The improvement of the markets generally, and putting them into these enclosed places (which he had previously alluded to) was done entirely by the Town Council at the expense of the community, either by actual cash payment or by raising money as authorised by Acts of Parliament. Previous to the framing of the bill which became the Act of 1874, I prepared, at the request of the Town Council, a short financial sketch showing the probable revenue and expenditure in connection with the fruit and vegetable market, on the supposition that it was covered in. Then when the bill was framed it was considered desirable not to limit the bill to the improvement of the fruit and vegetable market, but to extend it to the improvement of other markets, and therefore the Parliamentary estimate which I framed in the spring of 1874 embraces the whole revenue from the markets and customs of the city and the expenditure upon them." Mr Adam explains that the capital expended upon roofing in and completing the fruit and vegetable market was £34,584, of which there were charged to general improvements account £3750, leaving £30,384. "That," he says, "was all necessary to make a good covering." He further says—"The estimate of the cost by the architect was, I think, £23,000." Mr Blackie, the president of the market gardeners, corroborates the statement that the cost of roofing in the fruit and vegetable market-house exceeded the estimate. He says—"I am aware that the opinion given by our advisers

as to what the fruit and vegetable market-house would cost turned out to be erroneous, and that it cost upwards of £30,000."

When the corporation acquired the site of the fruit and vegetable market from the North British Railway Company, that market of course came under all the clauses and conditions of their charters applicable to fairs and markets, and, as I have said, the same observation remains applicable to it now that it is roofed in. The corporation, represented by the Lord Provost, Magistrates, and Council, had a long struggle to prevent their then market-places generally, and the ground which now forms the site of the fruit and vegetable market in particular, from falling into the envious hands of the North British Railway Company, and in that struggle the gardeners could not have prevailed had not the corporation come to their aid in Parliament as well as out of it. One of the most influential of the market gardeners themselves, Mr Lauder, whose age is eighty-seven years, speaks to this among other things. As a witness produced for the pursuers, he depones, on the cross-examination for the defenders—"I remember the North British Railway Company, in the end of 1859, giving notice that they wished to acquire the whole of the market ground. A notice was served upon the gardeners by the company at that time. I knew many who got it. A meeting of the gardeners was convened regarding the proposal of the railway company, and they came to a resolution on the subject, and got up a memorial to the Town Council. The scheme of the railway company was to put the gardeners out on the streets, and the Town Council opposed that, and we went with them. At the meeting I have referred to, the market gardeners resolved to oppose the bill, and at once put themselves in communication with the Town Council. There were statistics prepared by the gardeners at that time relative to the business of the market. These statistics referred to the number of acres in garden crop occupied by those who came to the market, with an estimate of the amount of money required to cultivate the ground. A memorial was laid before the Town Council setting forth the ground of the gardeners' opposition. At that time Mr Alexander Tod, Gorgie Mains, the president of the gardeners' committee, and I went to London at the request of the Town Council to give evidence against the railway bill. We gave evidence before the Select Committee of the House of Commons, the idea being suggested that the market should be held in the open street, to which the most strenuous opposition was given, and we gave evidence to that effect."

On the re-cross Mr Lauder says,—“I always found the Town Council ready to consult the convenience of the market gardeners so far as they could, and I always experienced the utmost civility from them. I was present at a meeting on 23d September 1873, and proposed a vote of thanks to the Town Council for the kindly, considerate, and earnest manner in which they had taken up and dealt with the subject of covering in the market. I never at any time had any difficulty with the Town Council.”

The bill which was brought in by the North British Railway Company for the acquisition of the market ground was thus thrown out, to the great satisfaction of the market gardeners, solely in consequence of the opposition and at the

expense of the defenders.

From that time downwards the attitude of the incorporation and the North British Railway Company has been in spirit and object the same as in 1859—the defenders jealously protecting the occupants of the markets, which were and are their own absolute property, from all attempts to disturb them, and the railway company watching an opportunity to advance their original object either by hostile measures or, as they latterly found necessary, by negotiation and agreements. All the capital raised and expended for improving the market and market-places of the city has been raised and expended at the expense and on the credit of the defenders. No part of it has been contributed by or at the expense of the market gardeners. On the other hand, the pursuers, during the short period they held their fruit and vegetable market on the Waverley Bridge did not thereby sustain, and do not allege that they sustained, thereby any pecuniary loss whatever. I concur in the result of the Lord Ordinary's opinion—the defenders ought to be assoziated from the conclusions of the action.

In conclusion, I think it right to repeat, that whatever may be the legal rights of parties, I cannot have the slightest doubt that in modern times at least the representatives of the Corporation of Edinburgh have been extremely solicitous to provide for and improve the accommodation of all who frequent the markets of the city, and particularly of that class of persons who have recently risen into more importance than formerly under the name of market gardeners.

The LORD PRESIDENT concurred with Lords Mure and Shand.

The Court pronounced the following interlocutor:—

“The Lords having considered the cause, and heard counsel for the parties on the reclaiming-note for John Blackie and others against the interlocutor of Lord Fraser of 20th February 1883, Recal the said interlocutor: Find (*primo*), that having regard (1) to the construction and enclosure, in or about the year 1822, of the public fruit and vegetable market of the city on the ground situated under and to the west of the North Bridge of Edinburgh, and to the occupation and use thereof for market purposes from that time till the year 1869 or thereby; (2) to the provisions of the North British Railway (New Works) Act 1866, and of the agreement of November 1865 between the defenders' predecessors and the North British Railway Company, thereby confirmed, and also to the provisions of the Edinburgh Markets and Customs Act 1874, and particularly section 8th thereof; and (3) to what has followed on these statutes, and particularly to the removal, in virtue of the said first-mentioned statute and agreement, in or about the year 1869, of the fruit and vegetable market from the enclosed ground before mentioned to the present site thereof, and to the enclosure of the same at the time, and to the subsequent covering-in of the market-place in or after the year 1874, in virtue of the provisions of the statute of that year, and to the payment of the increased

dues thereby authorised to be levied, and which have been in use to be levied since that time from the pursuers and other members of the public resorting to the said market as the public fruit and vegetable market of the city—the said present covered fruit and vegetable market-place or house situated on the south side of Princes Street, and in the parish of St Andrews, Edinburgh, is vested in and held by the defenders primarily for the purposes of the public fruit and vegetable market of the city, to which the pursuers and other members of the public have right to resort on the usual market days, and at the usual market hours, for the transaction of business, on payment of the proper and usual dues or charges, subject always to the provision of section 8th of said statute of 1874, to the effect that all vacant portions of said covered market-place, whether on the ground-floor or above the same, and all vacant and unlet stands, stalls, or shops in or on the market-place, may be let or used by the defenders for such purposes and for such rents or rates as to them shall seem proper: Find (*secundo*), that it is within the power and discretion of the defenders to allow the said covered-in market-place or house, including the ground-floor 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, and even to allow of such use on market days and during the ordinary market hours on special occasions, for such length of time as may 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: But find (*tertio*), 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, and *quoad ultra* dismiss the action, and decern: Find the pursuers' entitled to expenses, modified at two-thirds of the taxed amount," &c.

Counsel for Pursuers—J. P. B. Robertson  
Young—Dickson. Agents—Nisbet & Mathison,  
S.S.C.

Counsel for Defenders—Mackintosh—Mackay  
—Graham Murray. Agents—Millar, Robson  
& Innes, S.S.C.

Thursday, January 24.

OUTER HOUSE.

[Lord Kinneir.

BYRES, PETITIONER.

*Entail—Provisions to Younger Children of Heir in Possession—“Other” Children of Entailer.*

A disposition and deed of entail provided that the institute and heirs and substitutes mentioned in it should have power “to grant to their other children, if any they shall have besides the apparent heir, provisions,” which should affect the entailed estate. An heir in possession granted in favour of an only child, who was not called to the succession, a bond of provision bearing to be executed in exercise of this power. *Held* that the clause in the entail entitled him to make the provision.

The estate of Tonley, in the county of Aberdeen, was entailed under a deed of entail dated 15th October, 24th November, and 15th December 1827, and recorded in the Register of Tailzies 22d January 1828, granted by the testamentary trustees of the late Mr James Byres. The deed of entail conferred power upon the institute and heirs and substitutes therein mentioned “to grant to their other children, if any they shall have besides the apparent heir, provisions with which the said lands and estates shall be affectable in manner after-mentioned to the extent of two years’ free rent at one time, and no further.” James Gregory Moir Byres, heir in possession under the entail, on the narrative of the powers conferred by the said disposition and deed of entail upon him, executed a bond of provision dated 24th September 1863, and registered in the Books of Council and Session 4th December 1879, whereby, on the narrative of the powers conferred by the entail as above-mentioned, he bound and obliged himself, and the heirs of entail succeeding to him in the entailed lands and estates, to make payment out of the rents and proceeds thereof to his daughter Patricia Byres Moir Byres, and any other lawful children who might be born to him, and should not succeed to the entailed estate, equally among them if more than one, a sum equal to two years’ free rent of the entailed estate.

In the antenuptial contract of this daughter, who became Mrs Brooke, to which he was a party, she, with his advice and consent, and he for himself, and taking burden for her, assigned this sum in the bond of provision to the marriage-contract trustees.

Mr Byres died in 1881, leaving no other child than the daughter just mentioned. Under the destination of the entail, which was to the heirs-male of the body of a person therein mentioned, he was succeeded in the entailed estates by his brother George Moir Byres, who presented this petition to the Court under the Acts 11 and 12 Vict. cap. 36, 16 and 17 Vict. cap. 94, 31 and 32 Vict. cap. 84, and 38 and 39 Vict. cap. 61, for authority to execute over the entailed estate a bond and disposition in security for £4117, 13s. 2d., the amount of two years’ free rents, as the amount of the provision for Miss Byres, now Mrs Brooke.