whereby he was liable to the penalty provided by the Act above cited.

The accused stated the following objections to the relevancy of the complaint, viz. —"(1) That the complaint omitted to state, as provided by section 6 of the Locomotive Act 1861, that a conspicuous notice was placed by the authority of the surveyor, or persons liable for the repair of said bridge, on the bridge alleged to have been crossed by the accused, to the effect that it was insufficient to carry weights beyond the ordinary traffic of the district; (2) that the complaint omitted to found on or libel said Locomotive Act 1861, along with the Locomotives Amendment Act 1878, in so far as the same stands unrepealed, and particularly section 6 thereof, which is in force with regard to the regulation of locomotive traffic on bridges; (3) that the complaint should have averred that notice of the passing and confirmation of said bye-law had been brought to the knowledge of the accused by the Road Trustees."

The complainer pleaded that the offence charged was a breach of a bye-law made by the Road Authority in virtue of the Locomotives Amendment (Scotland) Act 1878, and was not a breach of the 6th section of the Locomotive Act 1861.

The Justices, in respect the complainer did not allege, and stated that he was not in a position to allege, that a conspicuous notice was placed on the bridge in question in terms of the 6th section of the Locomotive Act 1861, which section stands unrepealed, sustained the first two objections stated to the relevancy, and dismissed the complaint.

The complainer took a Case for appeal, and the question of law for the opinion of the High Court of Justiciary was—"Whether the judgment of the Court below in sustaining the objection to the relevancy and dismissing the complaint is right?"

Argued for the appellant—The complaint was relevant. It proceeded entirely on the Act of 1878. The Act of 1861 did not apply. It was not incorporated in the Act of 1878. There was notice in this case, but the Local Authority could stop a bridge without giving notice. The statutory prohibition applied to bridges incapable of carrying extra weight, but the Local Authority might close a bridge to locomotive traffic because it was too high or too narrow. The authority of such bye-laws appeared from *Crichton* v. *Forfar County Road Trustees*, July 20, 1886, 13 R. (J.C.) 99.

Argued for the respondent—There was nothing technical in the objections. There was no notice here, and it was essential that drivers of locomotives who might be strangers to the district should see the notice on the bridge. The bye-law alone was not enough to close the bridge. Such notice was the only means by which the driver could identify bridges included in the schedule of the trustees.

At advising—

LORD YOUNG—It is my opinion that the Justices were in error in sustaining the objections to the relevancy of this complaint, and, if the prosecutor thinks it fit to proceed with the case, the Justices must try it. As I took occasion to mention before, if this was an innocent transgression, it is a strong case for a modification or a nominal penalty, or for the prosecutor withdrawing the prosecution altogether. But as to the question whether a bridge can be stopped by a bye-law independently of a notice I have no doubt. This bridge having been stopped by a bye-law, and a transgression of the bye-law being averred in the complaint, I think that if the prosecutor insists in his case the Justices must try it.

The LORD JUSTICE-CLERK and LORD CRAIGHILL concurred.

The Court sustained the appeal and remitted the case to the Justices.

Counsel for the Appellant—D.-F. Mackintosh, — Cheyne. Agents — Mackenzie & Kermack, W.S.

Counsel for the Respondent—Comrie Thomson —Orr. Agents—Philip, Laing, & Trail, S.S.C.

COURT OF SESSION.

Friday, July 15.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

BAIN *v.* COUNTESS-DOWAGER OF SEAFIELD.

Church—Churchyard—Glebe—Excambion—Consent of Heritors—Reduction.

In a contract of excambion entered into between a presbytery, with the consent of the parish minister, and one of the heritors, the subjects conveyed to the heritor included part of the glebe lands, the site of the church, and the churchyard. *Held*, in an action of reduction of the contract at the instance of the minister and kirk-session, (1) that the contract, although invalid as regarded the site of the church and the church-yard, was valid as regarded the glebe lands, on the ground that it was advantageous to the benefice and the minister; and (2) that such a contract was validly executed although all the heritors of the parish were not parties thereto.

By deed of excambion dated in May 1882, entered into between the Earl of Seafield and the Presbytery of Abernethy, with consent and concurrence of the Reverend James Bain, minister of the parish of Duthil, on the narrative "that the said Earl of Seafield sometime ago signified to the said Reverend James Bain his desire to acquire part of the lands forming the glebe of Duthil, lying to the east and north of the churchyard, and extending to about one acre and one-half of an acre, with a view to plant and improve the said ground, which is in the immediate vicinity of the burying-ground of the family of Grant, and the said Reverend James Bain had expressed his readiness, subject to the sanction of the Presbytery of the bounds, and on receiving an equivalent therefor, to concede for the object in view the said parcels of ground, and also that the said Earl should at the same time acquire right to the ground occupied by

the church and church-yard of the said parish to the exclusion of the right of the said Reverend James Bain and his successors in the said cure to graze with cattle or sheep the said churchyard," the Presbytery, with consent of the Reverend James Bain, disponed to the Earl of of Seafield "All and Whole the following pieces of ground forming parts of the present glebe lands of Duthil; . . . as also the ground forming the churchyard of Duthil, and the site of the parish church thereof, extending to 3 roods and 1 pole or thereby; and the land occupied by the Grantown and Carr Bridge Road, so far as it traverses the said glebe of Duthil, extending to 2 roods 10 poles or thereby, making in all 3 acres and 4 poles imperial measure or thereby, all as delineated and coloured red on the foresaid plan hereto annexed, and signed as relative hereto; together with all right, title, and interest which the said Presbytery of Abernethy, or the said Reverend James Bain, or his successors in the said cure, had, have, or anywise might claim or pretend thereto in all time coming, and specially including the right of the minister of the said parish to graze with cattle or sheep the said churchyard, which right is hereby for ever renounced and discharged, the said Earl of Seafield and his foresaids being by acceptance hereof bound to cut the grass in the said churchyard, and to keep it in the order in which it has hitherto been kept by the minister."

After the death of the Earl of Seafield, his mother, the Countess-Dowager of Seafield, who succeeded him in the estates of Seafield, proceeded to erect a mausoleum on a portion of the glebe lands conveyed, and when this building was in course of construction the Revd. Mr Bain raised an action to have the Countess interdicted from going on with the erection. The case is reported as *Bain* v. *Lady Seafield*, November 6, 1884, 22 S.L.R. 41, 12 R. 62. Interdict was refused. Thereafter the Revd. Mr Bain and the kirk-session of Duthil parish raised an action against the Countess of Seafield, the Presbytery of Abernethy, and Sir John Peter Grant of Rothiemurchus, the only other heritors in the parish, in which they sought to have the contract of excambion reduced.

The Countess-Dowager averred that "after the contract was executed the Reverend Mr Bain got possession of the portions of ground to be added to the glebe, and there was further paid to him a sum of £25 as compensation for timber on the portion of the glebe acquired by the Earl, and for fencing." "In accepting a conveyance of the site of the church and churchyard Lord Seafield distinctly understood that it conveyed no right of property therein, but merely imposed upon him the responsibility of keeping the churchyard in order; and he never made, nor does the defender make, any claim under the conveyance. In estimating the land to be given in exchange to the minister, the extent of the church and churchyard, and also of the site of the public road, was included in the amount conveyed to Lord Seafield, and land of an equal amount was conveyed to the minister, Lord Seafield's desire being that the minister should get full value for the ground taken from the glebe. The minister thus profited by the extent of the churchyard and site of the church being included. Neither the site of the church nor the churchyard has ever in any way been interfered with by the defender, except that she has assumed the burden of keeping the churchyard in order; but she has never claimed or exercised any right of property over either the one or the other. She is quite willing and hereby offers to renounce any right purporting to be conveyed by the contract in or to the site of the church and churchyard, and to execute any deed which may be necessary to give effect thereto."

The pursuers pleaded, *inter alia*—"(1) The said agreement and contract of excambion fall to be reduced, in respect it was *ultra vires* of the parties thereto to have entered into the same. (2) In respect the said contract of excambion conveyed to the said Earl of Seafield the site of the church and churchyard of the parish of Duthil, the same falls to be reduced."

The Countess-Dowager pleaded—"(1) The statements of the pursuers are irrelevant. (2) The pursuer Mr Bain is barred *personali exceptione* from challenging the deed sought to be reduced. (3) The pursuers have not stated, and there do not exist, any grounds for reducing the deed in question."

The Presbytery pleaded—"The present defenders assuming, but not admitting, the relevancy of the averments of the pursuers and their title and interest to sue, and that the pursuer the Reverend James Bain is not barred *personali exceptione* from challenging the deeds sought to be reduced, plead that, as the arrangement contained in the said deeds has been and will be beneficial to the minister and his successors in office, and to the benefice generally, the decree of reduction concluded for should not be pronounced."

On 29th March 1887 the Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Finds that the contract and deed of excambion libelled, in so far as it purports to convey to the late Earl of Seafield the ground forming the churchyard of Duthil, and the site of the parish church thereof, or any right, title, or interest which the Presbytery of Abernethy or the minister of the parish of Duthil have in the said church or churchyard, was *ultra vires* of the said minister and Presbytery, and was and is invalid and ineffectual; and to this extent and effect finds, declares, and reduces, in terms of the conclusions of the summons: Finds that, in other respects, the said excambion is valid and effectual to the parties, and except to the extent and effect aforesaid assoilzies the defenders, and decerns: Finds the defenders entitled to expenses, &c.

"*Opinion.*—There can be no doubt that the excambion in question is invalid and ineffectual in so far as it purports to convey the churchyard and the site of the church to the late Earl of Seafield. But the defender avers that it never was intended to give the Earl a right of property in these subjects, but merely to subject him to the burden of keeping the churchyard in order; that she has neither exercised nor asserted any right of property in either the church or churchyard, and that she is ready to renounce any right in either which may be conveyed to her by the deed of excambion, and to execute any deed which may be necessary for that purpose.

"The only question therefore is, whether the conveyance of the church and churchyard is to be considered as a mere error in conveyancing,

which may be set right without affecting the subsistence or validity of the excambion in any essential respect, or whether the contract must be reduced *in toto* as being altogether illegal and ineffectual.

"The pursuer maintains that the excambion must be reduced *in toto* on two grounds—first, because independently of the attempted conveyance of the churchyard, the sanction of the body of heritors as well as of the Presbytery is essential to the validity of an excambion of a glebe in whole or in part; and secondly, because if the conveyance of the churchyard is illegal, the entire conveyance and the contract upon which it proceeds must be set aside.

"There is no authority, so far as I know, in support of the first of these propositions. The heritors are the proper administrators of the churchyard, and there can be no effectual excambion of any part of it to which they are not parties. But they have no similar title or interest in the glebe. They are not the guardians of the benefice, and if the interests of the benefice are adequately represented by the minister in the cure and the Presbytery of the bounds, there appears to me to be no ground in law for setting aside an excambion of the glebe, otherwise unobjectionable, merely because the heritors as a body have not been parties to the transaction. Such excambions have not been uncommon, and it does not appear either from the decisions or the text-books that the consent of the heritors has ever been thought essential to their validity. It may be that the heritors other than the heritor with whom the excambion is made may have an interest to challenge a transaction which they conceive to be prejudicial to themselves or to the benefice. But a challenge on that ground must be based upon the fact of prejudice. In the present case the heritors make no complaints, and it is not suggested that they have any reason to complain. It does not appear to me that the pursuer can have any title to plead their absence as a ground for reducing an excambion to which he himself was party, with the sanction of the Presbytery of the bounds.

"The second proposition appears to me to be equally untenable. If Lord Seafield had bargained for a right of property in the churchyard, he and his representatives would have been entitled to plead that the contract must either be reduced altogether or affirmed in all its terms. But the defender does not claim to have any proprietary right in the churchyard, and is ready to renounce all such right as may appear to have been given to her by the terms of the conveyance, without demanding in return the restoration of any part of the land given by the late Earl in exchange for the glebe land which she desires to retain. The pursuer and his successors in the benefice are in no way prejudiced by the partial reduction of the excambion or by the failure of the transaction with regard to the churchyard. If he were to lose by the reduction any part of the consideration given to him or the benefice in exchange for his glebe land he might be justified in demanding that the whole transaction should be set aside. But he loses nothing. The Presbytery is satisfied that the excambion is for the advantage of the benefice, and the only consequence of the churchyard having been taken into account would appear to be that it is more advantageous than it would have been otherwise. The case of *Hart* v. *Stewart's Trustees*, 3 R. 192, upon which the pursuer relies, appears to me to be inapplicable. It was held to be incompetent to make a new contract for the parties by substituting terms which might appear to the Court to be reasonable for the terms which were actually stipulated but under essential error. But in the present case it is not proposed to make a new contract. The defender is in possession of land under a conveyance which is in part ineffectual because the minister and Presbytery have no power to convey the churchyard, but in other respects valid, because they have power to excamb glebe land. She is ready to renounce the right which she admits to be ineffectual. But it does not follow that she must also abandon the valid right which the minister and Presbytery had full power to grant, and for which she has given an adequate consideration."

The pursuers reclaimed, and argued—(1) That this contract was bad, because the heritors were not parties to it. That this was essential, and was to be inferred from the provisions of the Glebe Lands (Scotland) Act 1866 (29 and 30 Vict. cap. 71), sec. 3, in conferring on the minister a limited power to grant leases, and of the Ecclesiastical Buildings and Glebes (Scotland) Act 1868 (31 and 32 Vict. cap. 96), sec. 3. (2) That partial reduction was incompetent—Duncan on Parochial Law, 531, note.

Argued for the respondents—(1) That there was no authority for the proposition that the heritors' consent was essential—Connell's Parochial Law, 428, and Appdx. 97; *M'Callum* v. *Grant*, March 4, 1826, 4 S. 535; *Bremner* v. *Officers of State*, June 29, 1831, 9 S. 838; *Stewart* v. *Lord Glenlyon*, May 20, 1835, 13 S. 787; *Leckerby* v. *Stirling*, June 25, 1835, 13 S. 978. The position of the heritors with respect to the site of the church and the churchyard and with respect to the glebe was quite different. It was with regard to the former only that they were proprietors in trust. (2) There was no reason why the deed should not be partially reduced in the present case. By a partial reduction the pursuers gained, for they got back part of the consideration they had given. The minister gave up nothing, for he was not entitled to pasture the churchyard, and that was all that he was deprived of. Besides, all that he was deprived of had been taken into account in arranging the terms of the contract.

At advising—

Lord President—I am of opinion that the Lord Ordinary has rightly disposed of this case. I had previously (*Bain* v. *Lady Seafield*, 12 R. 62) occasion to express my opinion that the contract and deed of excambion libelled on was to some extent illegal and invalid, and that has been given effect to by the Lord Ordinary, "in so far as it purports to convey to the late Earl of Seafield the ground forming the churchyard of Duthil, and the site of the parish church thereof, or any right, title, or interest which the Presbytery of Abernethy or the minister of the parish of Duthill have in the said church or churchyard," as being *ultra vires* of the parties who convey. But it is now contended by the pursuers, in the first place, that the Lord Ordinary's judgment does not go far enough, and

that the contract should be held invalid in all respects in respect of the invalidity of part of it. Now, I can quite well understand that if the party in whose favour a stipulation is made finds that he cannot maintain it, and that consequently the consideration fails on account of which he undertook the obligation, it is reasonable for him to hold that the deed must go, on the ground that the consideration being removed the obligation no longer remains effectual. Accordingly that would have been a plausible position for the Countess of Seafield to have taken up, the position, namely, that as she could not get the ground of the churchyard and the site of the church she was no longer bound by the contract. But that is not the state of matters, for the Rev. James Bain's position is the reverse of all that. He loses nothing whatever by the judgment of the Lord Ordinary. As the Lord Ordinary has pointed out, he gains by the transaction. The churchyard and the site of the church are restored to the proper possessors, as being the property of the heritors of the parish in trust for the parishioners. It was part of his duty to defend these grounds from any encroachment, and to see that they were used for the proper purposes. Now, he has succeeded in restoring these matters to their proper legal position, so far at least as the site of the church and the churchyard are concerned. It is clear that he has given less consideration, as matters now stand, than under the original stipulation, and yet he retains everything that he stipulated for. And accordingly he cannot maintain that because part is illegal he shall be entitled to cut down that part of the contract which is perfectly legal.

The second objection maintained is, that the contract is invalid because the heritors were not consenting parties to it. That objection is not directed to that part of the contract which deals with the site of the church and the churchyard; it applies only to that part of the contract which deals with the glebe. The pursuer maintained that there can be no excambion without the consent of the heritors. He was asked for authority for that proposition, and he could produce none. On the other hand, Mr Maconochie showed us that on many occasions a contract of excambion entered into with consent of the Presbytery, and without the consent of the heritors, has been given effect to. It is quite true that the objection was not stated, but the facts of the cases show that had it been tenable the objection would have been stated. And yet the contract was unchallenged, although it appeared *ex facie* of the contract that no such consent had been given.

Lords Mure, Shand, and Adam concurred.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Comrie Thomson — A. J. Young. Agents — Gordon, Pringle, Dallas, & Company, W.S.

Counsel for the Defenders (Respondents)—D.-F. Mackintosh — Maconochie — A. S. D. Thomson. Agents—Mackenzie, Innes, & Logan, W.S.

Friday, July 15.

FIRST DIVISION.

DOW *v.* IMRIE (IMRIE'S EXECUTOR).

Contract—Stipend—Assistant and Successor—Ann—Personal Obligation.

The minister of a parish entered into an agreement with his assistant and successor, with consent of the presbytery, by which, in consideration of being relieved of the duties of pastor of the parish, he agreed to "surrender" to the latter a certain sum "of the annual income derivable from the benefice of said parish, payable half-yearly at the terms of Martinmas and Whitsunday" . . . . The minister died on 29th April 1887, and his assistant and successor claimed from his executor a sum in respect of services between Martinmas 1886 and the date of his predecessor's death. *Held* that the stipend payable at Whitsunday 1887 having passed to the next-of-kin of the deceased as ann, there was no stipend to surrender for the period in question; that the agreement contained no personal obligation upon the deceased; and that therefore no sum was due by the executor.

The Rev. William Malcolm Imrie, minister of the parish of Penicuik, applied in 1886 to the Presbytery of Dalkeith to sanction the appointment of an assistant and successor to him in consequence of his being unable on account of infirmity to discharge the duties of minister of the parish. The Presbytery agreed to Mr Imrie's request, and the Rev. Peter Dow was upon 3d August 1886 appointed assistant and successor to him. In connection with this arrangement an agreement was entered into between Mr Imrie as the first party, and Mr Dow as the second party, dated 30th July and 3d August 1886, which provided as follows—"The parties hereto considering that on or about the 26th of December 1885 the said party of the first part, in consequence of ill health, found it necessary to retire from the active duties of minister of the parish of Penicuik, and that he had agreed to surrender to an assistant and successor a certain sum of money *per annum*, as after specified, which said agreement was thereafter sanctioned and approved of by the Presbytery of Dalkeith,—therefore the parties have agreed, and hereby agree as follows, *videlicet:—First*, The said first party agrees (1) to surrender to the said second party the sum of £8, 6s. 8d. sterling, being the allowance for communion elements, and the sum of £165 sterling of the annual income derivable from the benefice of said parish, payable half-yearly at the terms of Martinmas and Whitsunday from and after the 3d day of August 1886, being the date at which the said second party is to enter upon the duties of assistant and successor, beginning the first term's payment thereof at Martinmas next for the proportion to fall due from the said 3d day of August 1886 to that term, and the next term's payment thereof at Whitsunday thereafter for the half-year immediately preceding, and so forth half-yearly, termly, and continually thereafter during the lifetime of the said Peter Dow, so long as he shall be the said first party's assistant;