a bond of annuity in terms of this obligation.

It will be observed that this annuity is not in any way secured over the property specified in the agreement, and if the question had been open it might very well have been doubted whether the settlor had thereby reserved an interest in such property for life, seeing that the property had passed out of his hands and might have been dissipated next day. But I think that the question was in terms decided in the Queen's Bench in England in the case of *Crossman* v. *The Queen*, and that we ought to follow that case.

I therefore think we should adhere to the interlocutor reclaimed against.

LORD M'LAREN and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuer and Respondent —Asher, Q.C.—Young. Agent—Solicitor of Inland Revenue.

Counsel for the Defenders and Reclaimers —Dickson — Glegg. Agents — Dalgleish, Gray, & Dobbie, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.

TINNEVELLY SUGAR REFINING COMPANY, LIMITED *v.* THE MIRRLEES, WATSON, & YARYAN COMPANY, LIMITED.

Contract—Privity of Contract—Agent for Company about to be Formed—Relevancy —Title to Sue.

A firm acting in the interests of a company about to be formed, contracted with an engineering company for the supply of certain machinery, to be used by the new company when formed. Delivery was to be f.o.b. in Glasgow harbour. The company was incorporated while the machinery was being made, and thereafter tried to use the machinery which was fitted up for them in India by a person sent out by the engineering firm, and worked by a manager selected by said firm, but it was not alleged that they had done anything to constitute a direct contractual relationship between themselves and the engineering firm. Subsequently, with the concurrence of those who had acted on their behalf, they brought an action of damages against the said firm, on the ground that the machinery supplied was not conform to contract.

Held that they had no title to sue, seeing that the firm who had contracted with the engineers could not act as agents for a non-existent principal, and that the company had set forth no relevant statement instructing privity of contract between themselves and the defenders.

By offer dated 26th November 1889 and acceptance dated 11th July 1890 the Mirrlees, Watson, & Yaryan Company, Limited, Glasgow, contracted with Messrs Darley & Butler, London, to supply the machinery and ironwork for a building at Tuticorin, Madras Presidency, India, for a non-char sugar refinery capable of turning out 10 tons per day of twelve hours. Delivery was to be given f.o.b. in Glasgow harbour.

The Tinnevelly Sugar Refining Company, Limited, was incorporated on 29th July 1890 for the purpose of refining sugar at Tuticorin, where the said machinery was fitted up. The machinery having failed to give satisfaction, the Tinnevelly Company in January 1894, with consent and concurrence of Messrs Darley & Butler, brought an action of damages for £23,000 against the Mirrlees, Watson, & Yaryan Company.

They averred, *inter alia*, that "Messrs Darley & Butler, who have all through the negotiations transacted for the Tinnevelly Sugar Refining Company with the defenders, are large shareholders in the pursuers' company. The contracts for the machinery were made by them for behoof and on behalf of the pursuers the Tinnevelly Sugar Refining Company. The defenders knew before the contract was given to them for the machinery that it was for the pursuers' company's use, and that Messrs Darley & Butler were acting, in making the said contract, for behoof of or as agents for the pursuers' company. Messrs Darley & Butler have from the beginning of negotiations with the defenders acted for behoof of the Tinnevelly Sugar Refining Company, and the defenders have treated and transacted with Messrs Darley & Butler on that footing. The machinery was paid for out of the capital of the Tinnevelly Sugar Refining Company. . . . The said machinery and ironwork was manufactured by the defenders, and early in 1891 was erected at works at Tuticorin, which had been specially constructed for its reception on plans approved by the defenders. The work of erection was effected under the superintendence of an engineer sent out by the defenders. . . . The manager was a well qualified sugar refiner, selected and approved by the defenders on behalf of the pursuers. . . . After the refinery was started the defenders were always fully informed of how it was working, and continually assured the pursuers that the machinery was quite adequate, and would, when everything was in full working order, produce what was stipulated for."

The pursuers pleaded, *inter alia*—"(3) The defenders having negotiated and contracted on the footing that Messrs Darley & Butler were acting for behoof of or as agents for the Tinnevelly Sugar Refining Company, are barred from questioning the pursuers' title. (4) The defenders having admitted by their actions as condescended on their obligation to make the machinery perform the work required of it by the

pursuers, are barred from pleading want of title in the pursuers, or failure of the pursuers to make timeous rejection."

The defenders pleaded, *inter alia*—"(1) No title to sue. (2) The pursuers' statements are irrelevant, and insufficient to support the conclusions of the summons."

Upon 7th June 1894 the Lord Ordinary (Low) allowed a proof.

"*Opinion.*—The defenders maintain that their first plea-in-law of no title to sue should be sustained, and the action thrown out without any inquiry. They argued that the contract, for breach of which damages are sought, being made by Messrs Darley & Butler before the Tinnevelly Sugar Refining Company was incorporated, that company cannot sue upon the contract, even although it was made for behoof of the company when it should come into existence, and that the concurrence of Darley & Butler cannot aid the company, because that firm not having sustained the loss for which reparation is sought have no interest and could not themselves have sued the action.

"It seems to be clear that a company incorporated under the Companies Acts is not bound by a contract made for it or on its behalf before incorporation, unless after incorporation it has so acted as to make the contract its own. Further, it appears to be settled in England that a company after incorporation cannot ratify a contract entered into on its behalf before incorporation, because ratification (in the strict sense) refers to an act previously done for the person ratifying, and cannot apply to an act done before that person came into existence.

"The case chiefly relied upon by the defenders was the *Northumberland Avenue Hotel Company*, 33 Ch. Div. 16. In that case the plaintiff sued the liquidator of the hotel company for damages for breach of a contract entered into between him and one acting as trustee for the intended company before its incorporation. The plaintiff had a lease from the Board of Works of certain lands upon condition that he should erect certain buildings within a specified time. The contract with the trustee for the intended company was for a sub-lease of the lands at a higher rent than that which the plaintiff was under obligation to pay to the Board of Works, the company being bound to erect the buildings stipulated for in the plaintiff's lease. The articles of association of the company provided that the contract should be adopted and carried into effect. After being registered, the company entered into possession of the lands, spent large sums of money upon them, made payments to the plaintiff to account of rent, and passed certain resolutions, with the assent of the plaintiff, modifying the contract which had been made with him. The company went into liquidation, and the Board of Works cancelled the lease to the plaintiff, and resumed possession of the lands, apparently because the company had not erected the buildings stipulated for within the specified time.

"The Court of Appeal held that the plaintiff had no claim for damages (1) because the contract being made before the company was in existence was not binding upon it, and was incapable of ratification by the company after incorporation; and (2) because the acts of the company were not evidence of a fresh agreement having been entered into between it and the plaintiff, having been done under the erroneous belief that the contract was binding on the company.

"That judgment goes very far, because it was clear that the company had, as far as it possibly could, recognised and taken advantage of the contract. The ground of judgment was that to give the plaintiff a claim against the company it was necessary that the latter should have made a new contract with him upon the same terms as the original contract, and that the facts showed that they had not done so, but had proceeded upon the erroneous belief that the original contract was binding upon the company. The footing, therefore, on which the company took possession of the lands, and otherwise recognised the contract, was essential to the judgment. If it had been proved that the directors knew that the original agreement was not binding on the company, it may well be that the judgment would have been different, and that the Court would in that case have held that the actings of the company were evidence of an agreement between them and the plaintiff.

"The decision, therefore, apart from the peculiar circumstances of the case, does not appear to me to go further than to affirm that an action will not lie against a company if it is only rested upon a contract with the company itself. But I know of no authority for saying that such a contract must be a formal contract. I apprehend that it is sufficient if the actings of parties necessarily lead to the inference that they intended to be, and held themselves out as being binding on each other. If a company by its acts adopts a contract made before its incorporation, takes benefit by the contract, and allows the other contracting party to act upon the footing that the company is bound to him, in terms of the original agreement, I can see no principle upon which the company should not be bound, just as an individual is bound who homologates an informal or defective contract. And there are many authorities in the English law pointing in that direction, among which I refer to *Touch* v. *The Metropolitan Railway Warehouse Company*, 1871, L.R., 6 Ch. 671; *Spiller* v. *Paris Skating Rink Company*, 1878, 7 Ch. D. 368; and *Howard* v. *Patent Ivory Manufacturing Company*, 1888, 38 Ch. D. 156.

"In this case the averments are that the defenders were from the first told that the machinery which was ordered from them was for the company; that before the machinery was made the company was incorporated; that the machinery when finished was sent by the defenders to Tuticorin, where the company had constructed buildings for it on plans approved

by the defenders; that the machinery was fitted up by an engineer sent out by the defenders; that the manager who was to work the machinery for the company was selected by the defenders, and that the price was paid out of the capital of the company. According to these averments the defenders were brought directly into contact with the company as the principals in the transaction. If this had been an action by the defender for payment of the price upon such averments of adoption of the contract by the company, I think that there would have been a relevant case to go to proof; and in like manner when the action is by the company for damages on the ground that the machinery is not fit for the purpose for which it was supplied, I am of opinion that there must be inquiry, so that the precise facts may be ascertained.

"I shall therefore allow a proof before answer."

The defenders reclaimed, and argued—(1) If all the averments summarised by the Lord Ordinary at the end of his note were proved they would fail to give the pursuers a title to sue. (2) The pursuers' own statements were fatal to their case. That was, as again and again stated, that Darley & Butler were agents for them. But Darley & Butler could not act as agents for an admittedly non-existent principal. (3) The pursuers had failed to set forth anything instructing privity of contract between them and the defenders. The case resembled *The Edinburgh United Breweries, Limited* v. *Molleson* (*Nicolson's Trustee*), March 17, 1893, 20 R. 581, *aff.* March 9, 1894, L.R., 1894, App. Cas. 96. Here, as there, the concurrence of the original contracting party, not alleged to have suffered in any way, could not improve their position—*cf.* also *Blumer & Company* v. *Scott & Sons*, January 16, 1874, 1 R. 379; and *Tully* v. *Ingram*, November 10, 1891, 19 R. 65. (4) Relying on their mistaken position of being Darley & Butler's principal, they had taken no steps to enter into direct contractual relation with the defenders by adopting the contract which would have been necessary—*Kelner* v. *Baxter*, 1866, L.R., 2 C.P. 174; *in re Express Engineering Company*, 1880, L.R., 16 C.D. 125; *in re Northumberland Avenue Hotel Company*, 1886, L.R., 33, C.D. 16.

Argued for respondents—(1) The cases relied on by the defenders were not in point. The actings of the parties throughout showed that the pursuers had adopted the contract, and that the defenders had negotiated with them throughout as the real parties, on behalf of whom Darley & Butler had originally contracted. (2) Darley & Butler were to be regarded not as agents for a non-existent principal, but as trustees for the company before incorporation—*cf.* *Davenport* v. *Bishopp*, 1843, 2 Yonge & Collyer, 451; *Gregory* v. *Williams*, 1817, 3 Merivale, 582. (3) Darley & Butler could, without the defenders' consent, have assigned their contract, there being no *delectus personæ—British Waggon Co.* v. *Lea & Co.*, 1880, L.R., 5 Q.B.D. 149. Here Darley & Butler were concurrent pursuers.

At advising—

LORD PRESIDENT — The contract for breach of which this action was brought was constituted by a tender and relative acceptance dated respectively 26th November 1889 and 11th July 1890. The contract was for the supply of certain machinery and ironwork for a refinery. On the face of the documents the parties to the contract were the defenders on the one hand, and Messrs Darley & Butler of Billiter Square Buildings, London, on the other hand.

The pursuers of this action are the Tinnevelly Sugar Refining Company, Limited, with consent and concurrence of Messrs Darley & Butler, and the said Messrs Darley & Butler for all right and interest they may have in the premises. The fact that Messrs Darley & Butler thus appear, not merely as consenting to the instance of the company but as themselves pursuers, has no practical importance; for in this action of damages no averment is made that that firm has suffered damage. The action is therefore the action of the Tinnevelly Company, Limited.

Now, against this action the defenders' first plea is "No title to sue." As argued to us, this plea means not merely that the pursuers do not possess, but that they have not set forth, any title to sue. The Lord Ordinary has before answer allowed a proof; but the defenders have asked our judgment on the question whether anything is averred or offered to be proved which would make out the pursuer's title.

The company was registered on 29th July 1890, and accordingly was not in existence at the date of the contract. It is therefore legally impossible that the contract can bind the company, unless the company since its registration has in some way acquired the rights or submitted itself to the obligations of the contract. Accordingly, the defenders are in the right when they say that the question is, do the pursuers set forth on this record anything done by the company itself which has this result? I have carefully examined the condescendence and must answer this question in the negative.

The contract, be it observed, was for certain machinery and ironwork which was to be delivered free alongside vessel in Glasgow Harbour. Now, the pursuers endeavour to bring the company and the defenders into direct relations by saying that the machinery was erected at Tuticorin, which is in India, under the superintendence of an engineer sent out by the defenders. But it was admitted in argument (and is indeed manifest) that the erection of the machinery in India was outside the contract which is now sued on. It is unnecessary to criticise in detail the other averments compendiously stated by the Lord Ordinary, for not one of them nor all taken together tend to show that after the registration of the company any contract relation was constituted between it and the defenders.

The absence of such averments is, in truth, accounted for by the fact that the theory of the pursuers' case is entirely different. They begin by saying that when Darley & Butler contracted with the defenders they were acting, and were known by the defenders to be acting, as agents for the Tinnevelly Company. This is the basis of the pursuers' case. It is in law an untenable position, for Darley & Butler could not be the agents of a non-existent company. I should infer from the record that the persons acting for the company had not realised this. Accordingly it is quite consistent with the record to suppose that the persons acting for the company were unaware that if the company was to take the place of Darley & Butler, it required—that is to say the shareholders or their executive required—consciously to do so. In place of any such overt action on the part of the company things were allowed to rest on the original contract between Darley & Butler and the defenders, which was erroneously believed to bind the company. I do not pronounce this to bave been the true state of the facts, having no occasion to do so; all I say is that the pursuers' record says nothing to the contrary and much to this effect.

Well, now, the law applicable to such a case seems to be tolerably clear. First of all, where there is no principal, there can be no agent; there having been no Tinnevelly Company at the date of this contract, Darley & Butler were not agents of that company in entering into the contract. The next point is, that in order to bind the company to a contract not incumbent on it, it is necessary that the company should voluntarily so contract; and it is not equivalent to this if the company merely acts as if, contrary to the fact, the contract had from the beginning been obligatory on it.

I have considered, up to this point, solely the position of the company, and have not taken into account the question how far the consent of the defenders would have been necessary to the substitution of the company for Darley & Butler as parties to the contract, I do not find it necessary to enter upon this question, inasmuch as, in my opinion the case of the pursuers is irrelevant, even if regard be had to the consent of the company alone.

I am for finding that the pursuers have not set forth on record any title in the Tinnevelly Sugar Refining Company, Limited, to sue, that there are no relevant averments to support the conclusions in so far as insisted in by Darley & Butler, and dismissing the action.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuers and Respondents—Jameson—Cooper. Agents—Millar, Robson, & M'Lean, W.S.

Counsel for Defenders and Reclaimers—Ure—Younger. Agents—J. & J. Ross, W.S.

Tuesday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.

LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY AND ANOTHER *v.* MAIN.

Railway—Accommodation Works—Conflicting Interests of Owner and Occupier of Lands Taken—All Parties not Heard—Reduction of Sheriff's Award—Railway Clauses Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 60, 61—*Relevancy.*

The Railway Clauses Act 1845, by sec. 60, provides that the company shall make works for the accommodation of the owners and occupiers of lands adjoining the railway; and sec. 61 provides that if any difference arise respecting the kind of accommodation works the same shall be determined by the sheriff.

Held that the difference contemplated might be a difference between owner and occupier, and that averments by an owner to the effect that the Sheriff had considered the claims of the occupier, had along with a civil engineer inspected the ground, where he had heard parties' explanations, without ordering intimation to him and outwith his presence, and had thereafter, although sisting him as a party to the process, refused to allow him to lodge answers or even to give him time to consider his position, were relevant to support an action of reduction of the Sheriff's award.

The Railway Clauses Act 1845 (8 and 9 Vict. cap. 33), by sec. 60, provides—"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway," . . . and by sec. 61 it provides that "If any difference arise respecting the kind or number of any such accommodation works, or the dimensions or sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by the sheriff or two justices."

In April 1893 Mr George James Fergusson Buchanan of Auchentorlie, Dumbartonshire, arranged with the Lanarkshire and Dumbartonshire Railway Company for payment of compensation for the construction of certain accommodation works rendered necessary by the railway company having taken a portion of his lands under their compulsory powers. Thereafter, Thomas Main, a market gardener at Milton, near Bowling, who held a nineteen years' lease from Whitsunday 1888 of a piece of ground belonging to Mr Buchanan through which the railway passed, claimed certain accommodation works, including an overhead bridge connecting the portions of the garden which were separated by the railway. The company in reply stated objections to supplying the works de-