MARCH 29, 1859.

The SCOTTISH NORTH EASTERN RAILWAY COMPANY, *Appellants*, *v.* SIR WILLIAM DRUMMOND STEWART, *Respondent*.

Railway—Agreement with landowner—Compulsory making of line—*A railway company, before applying for an Act of Parliament to construct a branch line, entered into an agreement with a proprietor on the proposed line, in which he consented to the branch railway passing through his estate, and agreed to petition parliament in favour of the act, the company binding themselves, if the act should pass, and before breaking ground, to pay him a sum of money for personal inconvenience, and to take at least* 80 *acres of land at a price to be fixed by an arbiter. The act having passed, the company granted a debenture bond for the sum due for personal inconvenience payable on the entry of his land to make the railway, but did not construct the branch railway.*

HELD (reversing judgment), *That the company were not bound to pay the sum in the bond, and to enter into an arbitration with regard to the land which they had agreed to purchase.*

Primâ facie, *all the contracts of a corporation are valid, and those who impugn them must shew that the statutes creating and regulating such contracts, expressly or impliedly, prohibit them.* (*Per* LORD WENSLEYDALE.)[1]

The Scottish Midland Junction Railway Company (the original defenders in this case) having been united into one company with the Aberdeen Railway Company, under the name of the Scottish North Eastern Railway Company, they appealed against the judgment of the Court of Session in the action at the instance of the respondent, maintaining, in their *printed case*, that it ought to be reversed—1. Because the obligations undertaken on behalf of the company, in the minute of agreement, and relative writings, were conditional upon the formation of the branch railway; and imposed no obligation upon the appellants, in the event which happened, of the execution of the railway being abandoned. 2. Because the minute of agreement, &c., if capable of the construction put on them by the Court, that the appellants should, on the passing of the act of 1848, be bound to pay the respondent £14,500, and to take his land and to pay for it, and for damages, although the execution of the railway should be abandoned, were illegal, and incapable of being enforced. 3. Because, at all events, it was illegal, on the part of the directors, to stipulate to pay to the respondent, out of the company's funds, £14,500, or any other sum, for his consent to the passing of the act of 1848, or on any other alleged ground, in addition to the price of his land which might be taken, and full compensation for the damage done to his property, by the formation of the line. 4. Because the debenture bond, and writings connected with it, were illegal, and could not be made the foundation of any claim. 5. Because, even if some other form of remedy were competent, the minute of agreement and relative writings were not such as ought, in the circumstances, to be enforced against the appellants by a decree for specific performance. *Gage* v. *Newmarket Company*, 7 Rail. Cas. 168; *Preston* v. *Liverpool Railway Company*, 5 H. L. C. 622; *The Edinburgh, Perth, and Dundee Railway Company* v. *Philip*, 16 D. 1065, 2 Macq. Ap. 514: 29 Sc. Jur. 242, *ante*, p. 681; 11 and 12 Vict. c. 72; 17 and 18 Vict. c. 148; *The Caledonian Railway Company* v. *Helensburgh Harbour Trustees*, 2 Macq. Ap. 381: 28 Sc. Jur. 493, *ante*, p. 642; *Webb* v. *The Direct London Company*, 7 Rail. Cas. 9.

In support of the judgment the *respondent* maintained (1) that the agreement was obligatory on the act passing; and (2) that it was a binding agreement.

Sir R. Bethell Q.C., and *Anderson* Q.C., for the appellants.—The true construction of all the written documents here constituting the agreement between the parties is, that the sum of £14,500 was to be paid only in the event of the railway being made. It was a conditional contract.—*Gage* v. *Newmarket R. Co.*, 7 Rail. Cases, 168; *Edinburgh and Perth R. Co.* v. *Philip*, 2 Macq. Ap. 514: 29 Sc. Jur. 242; *ante*, p. 681; *Preston and Liverpool and Manchester R. Co.*, 5 H. L. Cas. 605.

If the contract was not conditional on the formation of the line, then it was *ultra vires* of the directors, and is not binding upon the appellants. The company is not bound by the contracts made by anticipation in its name by persons calling themselves promoters; at least the company is not bound unless such contracts could have been made by the directors after the act was obtained. The statute was the charter of the company, and defines the powers of the company

[1] See previous reports, 18 D. 570: 28 Sc. Jur. 214. S. C. 3 Macq. Ap. 382: 31 Sc. Jur. 445.

as to raising money and applying funds—*Caledonian R. Co.* v. *Helensburgh Harbour Trustees*, 2 Macq. 391 ; 28 Sc. Jur. 57 ; *ante*, p. 642. If the directors go beyond the act by a hairsbreadth, the contract is illegal, and can be met by the defence of *ultra vires*.

[LORD WENSLEYDALE.—Suppose a company borrowed a thousand pounds more than they ought to do under their act, would *ultra vires* be a defence to an action for that £1000?]

Yes, it would.

[LORD WENSLEYDALE.—If the act were to say that only £100,000 might be borrowed, and that all contracts to repay money borrowed beyond that amount should be void, then that would be a clear case ; but suppose it were not declared by the act, that if money exceeding that amount should be borrowed, the contract would be void, then am I to lose my money—I who know nothing of the circumstances under which my money was borrowed?]

It might be doubtful.

[LORD CRANWORTH.—If the company is not restrained by the statute from borrowing, *primâ facie* they may borrow to any amount.]

[LORD WENSLEYDALE.—If it were made a positive condition that no more money than a specified sum should be borrowed, then no doubt any contract beyond that amount would be void ; but if the statute is merely directory, then I have great doubts whether an action would not lie.]

The doctrine of *ultra vires* cannot be said as yet to be quite settled—*Salomons* v. *Laing*, 6 Rail. Cas. 301 ; *Shrewsbury and Birmingham R. Co.* v. *London and N. W. R. Co.*, 6 H. L. Cas. 113 ; *Caledonian R. Co.* v. *Helensburgh Harbour Trustees*, 2 Macq. 391 ; *ante*, p. 642. We contend that there is no real difference between a company seeking incorporation and an old company seeking expansion, as regards the contracts made in its name. Here the £14,500 was not a sum paid for value received ; it was not for land bought ; it was a large sum given as pocket money, and the contract was beyond the company's powers. At all events, the company here were not bound to make their railway, though they had obtained their act—*R.* v. *York, and North Midland R. Co.*, 1 E. & B. 858. And the rule is settled in the same way in Scotland —*Anstruther* v. *East of Fife R. Co.*, 1 Macq. 100 ; *ante*, p. 63 ; *Edinburgh and Perth R. Co.* v. *Philip*, 2. Macq. 514 ; *ante*, p. 681 ; *Lord Blantyre* v. *Caledonian R. Co.*, 16 D. 90 ; *Stewart* v. *Scottish Midland R. Co.*, 18 D. 570. The Court, therefore, ought not to have ordered specific performance, especially as the contract was so unequal in its terms—*Webb* v. *Direct Portsmouth R. Co.*, 7 Rail. Cas. 9 ; *Lord James Stuart* v. *London and N. W. R. Co.*, 7 Rail. Cas. 25 ; *Shrewsbury and Birmingham R. Co.* v. *North W. R. Co.*, 6 H. L. Cas. 113. The proper remedy of the respondent is an action of damages against the directors individually for the damage he has sustained.

Rolt Q.C., and *R. Palmer* Q.C., for the respondents, contended that the present could not be distinguished from the case of *Hawkes* v. *The Eastern Counties R. Co.*, 5 H. L. Cas. 331, and that the decision of the Court below was right.

Sir R. Bethell replied.

[LORD WENSLEYDALE.—There is no doubt, we all went wrong at first as to the law applicable to provisional committee men ; but that law is now well settled. There are, however, still some points as to the doctrine of *ultra vires* which may well bear reconsideration. LORD CRANWORTH and I are disposed to think, that a company may enter into any contract under their common seal, (and in Scotland not under their common seal,) unless the act of parliament expressly or impliedly prohibits such contract.]

Cur. adv. vult.

LORD CHANCELLOR CHELMSFORD.—My Lords, this is an appeal from part of an interlocutor of the Lord Ordinary, and also from an interlocutor of the Second Division of the Court of Session, pronounced in an action by the respondent against the Scottish Midland Junction Railway Company, the appellants having been since sisted as defenders, in room and place of that company, under the provision of the act of parliament in which they were incorporated. The Scottish Midland Junction Railway Company was incorporated under an act of parliament, passed on 31st July 1845, for making a railway from Perth to Forfar. In the year 1846 they obtained an act for the formation of certain branch railways, one of them being a branch from their main line to the town of Dunkeld. In the year 1847 it was thought that it would be advantageous to abandon a portion of the branch line to Dunkeld, and to make branch railways to Birnam and to the Dunkeld branch of the Scottish Midland Junction Railway Company. An act of parliament was necessary to effect this change, and the consent of the Duke of Atholl and of the respondent, Sir W. D. Stewart, through whose lands it was proposed that the altered line should run, was considered essential towards obtaining it. Negotiations were accordingly opened with them, which resulted in an agreement upon which the action is founded. The agreement is between the Duke of Atholl and Sir W. D. Stewart, of the one part ; and George Buchanan and John Murray as authorized by, and taking burthen on them for, the Scottish Midland Junction Railway Company, of the other part. It will be better at once to drop all

consideration of the Duke of Atholl's rights under the agreement, and to follow it only so far as it affects Sir W. D. Stewart. The agreement, after describing the line of the railway and its entering upon the property of Sir W. D. Stewart, through which it runs the whole way to Birnam, proceeds, "It is therefore hereby conditioned and agreed to by the parties as follows."—The clauses necessary to be considered are the 1st, 2d, 3d, and 5th. The first clause is, "His Grace the Duke of Atholl and Sir W. D. Stewart shall give entry to the ground required through their respective estates as delineated in the plan before referred to, so that, in so far as they are concerned, the company may proceed with the execution of their works without waiting till an act of parliament shall have been obtained for the formation of the line; and they hereby undertake to obtain the consent of the tenants of the ground, through which the said line will pass, and out of the sums to be paid, as hereinafter provided, to settle with the tenants, the agricultural and other damages, to which they may be entitled in consequence of the railway operations. 2d, The railway company shall be bound to apply for an act of parliament for the formation of the line during the next or following session of parliament, and the said Duke of Atholl and Sir W. D. Stewart shall give their consent and assistance to the passing of the said act, by joining in a petition to parliament or otherwise, the company relieving them of all expenses. 3d, The said parties shall, in the mean while, if required, grant leases in favour of the railway company, of the ground necessary for the formation of the railway for nineteen years, or for any shorter term the company may desire, declaring hereby that, in case the company shall fail to obtain their act of parliament, they shall be bound to restore the ground taken possession of by them, in as far as possible, to the same state in which it was at the time of their entry, and to pay such damages for the injury done thereto, as shall be determined by R. Walker Rannie, Esquire; and, by the 5th clause, the railway company shall be bound, before breaking ground, to pay to the said Sir W. D. Stewart, for personal inconvenience and annoyance which must of necessity arise to him during the formation of the line through the ground and preserves, such a sum as shall be declared by the said George Buchanan. And the company and Sir William, and those authorized by him, shall enter into a deed of submission to the said R. W. Rannie, as sole arbiter for ascertaining and determining the amount which shall be paid by the said railway company to the said Sir W. D. Stewart, the proprietor of the entailed estate of Murthly, for the land to be taken, and for injury done to the grounds and place of Murthly in a residential point of view, and for amenity and intersectional damage, and for injury sustained by tenants."

The agreement was signed by the respondent on the 3d February 1848. On the 1st March 1848, Buchanan found that the sum which was to be paid before breaking ground should be £14,500, but on the express understanding, that, if under the submission entered into to R. W. Rannie, the sum to be awarded by him for the 80 acres of ground and damages shall exceed in the whole the rate of £128 15*s.* per imperial acre, such excess should be deducted from, and taken out of, the above sum of £14,500.

On the 5th May 1848, the company gave a debenture to Mr. James Condie, who was the agent of the respondent, and also one of the directors of the company, expressed to be in consideration of £14,500, paid by Condie to the company, but no money was ever paid to the respondent; and there is a writing of discharge signed by Sir W. Drummond Stewart, on the 27th April 1848, reciting the 5th article of the agreement, and the letter of finding and declaration of Buchanan, and also reciting, that, "Whereas the said Scottish Midland Junction Railway Company have instantly advanced and paid, or at least subsequently accounted to me for the said sum of £14,500 sterling, of which I hereby acknowledge the receipt, renouncing all exception to the contrary; therefore, I have exonered and discharged, as I do hereby not only exoner, acquit, and *simpliciter* discharge the said Scottish Midland Junction Railway Company of the said sum of £14,500 sterling, as in full of all and every claim for the personal inconvenience and annoyance which shall or may in any way arise or be occasioned to me during the formation of the said deviated Dunkeld branch line through my grounds and premises."

And then there was a condition, that "if under the submission to be entered into to Rannie for ascertaining the compensation and permanent damage to be paid by the company for, or in respect of, the lands taken by the railway or works as aforesaid, the sum to be awarded by him for the 80 acres of land and damages (other than those applicable to the house and premises of Birnam) shall exceed in whole the rate of £128 15*s.* sterling per imperial acre, we (that is Sir W. D. Stewart and James Condie) shall content and pay to the said Scottish Midland Junction Railway Company the amount of such excess, as the same shall be fixed by the said Rannie, the same having been appointed to be deducted from, and taken out of, the said sum of £14,500 sterling, paid to me, the said Sir W. D. Stewart, in terms of the finding of the said George Buchanan as aforesaid, together with the legal interest of the amount of such excess, from the date hereof to the date of the same being paid or accounted for to the said company."

Sir W. Drummond Stewart and James Condie also gave a bond to the company, which was signed by Sir W. Drummond Stewart on the 3d February 1848, and by Condie 5th May 1848, reciting that, "Considering that in anticipation of the said intended bill being passed into a law, and the said intended line of railway through Murthly being thereby allowed to be executed, the

said directors have at the request of me, the said Sir W. Drummond Stewart, Baronet, and in order to the said directors being enabled to enter to the possession and use of the said lands as soon as they may desire to do so, made immediate payment to me out of the proper funds of the said Scottish Midland Junction Railway Company of the sum of £14,500 sterling, toward payment of the sum to which I will be entitled under the said agreement for personal loss and inconvenience, if the said intended bill shall be passed into a law, and the said railway be thereby authorized to be formed in the said intended line through Murthly," Sir W. D. Stewart and Condie bind and oblige themselves, conjunctly and severally, that unless the said bill intended to be brought into parliament by the Scottish Midland Junction Railway Company for enabling them to carry their intended branch railway to Dunkeld through the estate of Murthly as aforesaid, shall be passed into a law, and so the said company be authorized to acquire the land and make the said line, then, and in such case, "we shall content and repay to the said Scottish Midland Junction Railway Company, or the said directors of the said company for its behoof, the said sum of £14,500 sterling."

The foregoing deeds and writings are all brought together in an explanatory memorandum, signed by Sir W. D. Stewart on the 27th April 1848, and on behalf of the directors on the 5th May 1848. In this memorandum, with reference to the bond given to the company by Sir W. D. Stewart and Condie, it is declared "by the said Scottish Midland Junction Railway Company on the one part, and the said Sir W. D. Stewart and the said James Condie on the other part, in explanation of the deeds and writings before specified, granted by and interchanged between them, that the said Scottish Midland Junction Railway Company, on the one hand, shall, in implement of the obligation undertaken by them, and without reference to the term of payment mentioned in the said debenture bond, make actual payment to the said James Condie of the principal sum of £14,500 sterling, subject as to amount to the said condition in the said letter of finding and declaration, No. 2, and that so soon as the said Scottish Midland Junction Railway Company shall break ground on the estate of Murthly, belonging to the said Sir W. D. Stewart, for the formation of their proposed branch railway to Dunkeld, the said James Condie being bound, on such payment being made, to deliver up the said debenture bond duly cancelled."

After this agreement the company obtained an act of parliament for making the proposed branch lines, which received the Royal assent on 22d July 1848. By the 7th section of this act the compulsory powers of purchasing and taking lands were limited to three years from the passing of the act, and they consequently expired on 22d July 1851. And by the 8th section the powers of executing the railway were to cease to be exercised from the expiration of five years from the passing of the act, and the company, therefore, were incapable of making the railway after the 22d July 1853. None of the powers of purchasing lands have been exercised by the company, and no part of the branch railway has been made.

The summons in the action is dated 6th June 1850. It alleges that the Scottish Midland Junction Railway Company, the defenders, "ought and should be decerned and ordained by decree of our Lords of Council and Session to pay to the pursuer the said sum of £14,500, with interest from the date of their breaking ground as aforesaid, at least from and after the date of citation in the present action; and it ought and should be found and declared, by decree aforesaid, that the said defenders are bound to enter into a submission to the said Robert Walker Rannie as sole arbiter for ascertaining and determining the amount which shall be paid to the pursuer for lands, &c., in terms of § 5th of the said minute of agreement first before recited, and the amount being ascertained, the said defenders ought and should be decerned and ordained to pay the same to the pursuer to an extent not exceeding the aforesaid sum of £128 15*s.* per acre; or otherwise, and in the event of the defenders failing to enter into said submission, they ought and should be decerned and ordained by decree aforesaid to pay to the pursuer the sum of £10,300, being the price of 80 acres of ground, in terms of said agreement, at the foresaid rate of £128 15*s.* per acre.

The defenders, by their pleas in law, state, (I will only call your Lordships' attention to four of them, the 1st, 6th, 3d, and 4th,) by the first, "the debenture bond libelled on is an invalid document, which it was *ultra vires* of the directors to grant, and which is not binding on the statutory company; and the claim sought to be enforced by the present summons, in so far as laid on the debenture bond, is therefore untenable;" and by the 6th, "supposing the minute of agreement to be capable of being construed into an obligation to pay the sums in question irrespective of the company forming the line, and taking the ground, the agreement is, in that view, invalid as an agreement on behalf of the company, and is one which it was *ultra vires* of those subscribing it to grant on the company's behalf, and which is not enforceable against the company." In the 3d, they say, "Considered as a claim under the original minute of agreement, the claim for the sum of £14,500 is untenable, inasmuch as such claim did not, in any event, arise until the company broke ground for the formation of the line, or caused, or were in the course of causing, thereby, the inconvenience and annoyance, for which it was intended to be a compensation, and this has not yet been done so." And by the fourth, they say—"In like manner, the demand made in the summons that the defenders should enter into a submission for fixing the value of a

certain assumed portion of the pursuer's lands, and failing their doing so should pay to the pursuer the sum of £10,300, is untenable and unwarranted, in respect of no ground having been taken by the company, or notice given by them of such being required, and to be taken, till which event occurs, the claim is inadmissible."

The Lord Ordinary pronounced his interlocutor on the 1st November 1854, finding that, "Under the deeds executed by the parties, the sum of £14,500 sterling was payable to the pursuer, so soon as the defenders should break ground on the estate of Murthly for the formation of their proposed branch railway to Dunkeld, and that interest became thereafter exigible on that sum; finds that the pursuer has averred facts relevant, if proved, to establish that the defenders broke ground on the estate of Murthly for the formation of the said railway; but finds that the parties are at issue whether the defenders broke ground as aforesaid; allows the parties respectively to lodge draft issues in order to the trial of this fact."

Upon this interlocutor, both parties reclaimed to the Second Division of the Court—the respondents praying that "it might be altered in so far as it directs issues to be lodged, in order to the trial of the fact as to the breaking of ground on the estate of Murthly;" and the appellants praying "the Lords to recall the aforesaid interlocutor; to sustain the defences, in so far as not already done; assoilzie the defenders from the whole conclusions of the summons, and find them entitled to expenses." The Second Division of the Court pronounced an interlocutor upon the 26th of February 1856:—"The Lords having advised the reclaiming note for Sir W. Drummond Stewart, and heard counsel, Find that the defenders are bound to pay to the pursuer the sum of £14,500, with interest from the date of citation, and decern accordingly for payment of the foresaid sum; and farther find and declare, that the defenders are bound to enter into a submission to Robert W. Rannie as sole arbiter, for ascertaining and determining the amount which shall be paid to the pursuer for land to be taken, and for injury done to the grounds and place of Murthly in a residential point of view; and for amenity, agricultural, and intersectional damage, and for injury sustained by tenants in terms of § 5th of the minute of agreement, of date 5th October 1847; and 3d February, 1st March, and 14th March 1848."

The appeal to your Lordships' House is from the interlocutor of the Lord Ordinary, except so far as it assoilzies the Scottish Midland Junction Railway Company, and from the whole of the interlocutor of the Second Division of the Court of Session. The questions which are raised by the appellants in this case may be reduced to two;—1st, whether the agreement entered into by the parties was conditional on the formation of the railway, or whether the obligations undertaken on behalf of the company were binding upon them, as soon as they obtained the act of parliament enabling them to make the branch railway; 2d, whether, if the construction put upon the agreement by the Court of Session is correct, it is not *ultra vires*, and, therefore, incapable of being enforced against the appellants.

In considering these questions, it seems to me that the claim for the £14,500 ought not to be regarded as founded upon the debenture bond. If it were, it would be necessary to examine the validity of that instrument; but I think that all the documents must be taken together as amounting to an agreement, that the company should pay to Sir W. D. Stewart the sum of £14,500 upon certain terms, the debenture bond being only the mode adopted of carrying out the transaction, and not of the substance of the agreement.

For the purpose of aiding your Lordships in construing this agreement, various authorities were cited at the bar. Those which were of the closest application, were *Gage* v. *The Newmarket Railway Company*, 18 Q. B. 457; *The Edinburgh, Perth, and Dundee Railway Company* v. *Philip*, 2 Macq. 514; *ante*, p. 681; and *Preston* v. *The Liverpool, Manchester, and Newcastle-upon-Tyne Railway*, 5 H. L. Cas. 605. But unless former decisions lay down some general principles of construction, if the instrument to be construed is not precisely similar to those which have previously received a judicial construction, very little assistance is to be derived from them towards determining the meaning of the particular contract. Every agreement must be interpreted by its own terms, aided by the considerations under which it was made.

After a careful examination of the different writings constituting the agreement, I have arrived at the conclusion, that the £14,500 was not to be paid upon the passing of the act empowering the branch line to be made, but upon the commencement of the railway. There can be little doubt that, at the time of the agreement, all parties supposed that, when the act of parliament was obtained, the company would be bound to make the branch line. It was not until the year 1853, that it was decided by the Exchequer Chamber in the case of the *York and North Midland Junction Railway Company* v. *The Queen*, 1 Ellis & Blackburn, 858, that acts of parliament empowering companies to make railways were enabling merely, and not obligatory. Bearing in mind that the opposite opinion prevailed at the time of the agreement, it appears to me that the interpretation of it will be materially assisted. The company were desirous of forming a branch line in a direction which would carry it over a considerable extent of Sir W. Drummond Stewart's land. Although there is nothing upon the face of the agreement to shew that the company meant to buy off his opposition, yet there can be no doubt that this must have been an important object with them, and that they would be willing to offer him very favourable terms for the lands to be

taken for the railway, and for the necessary interference with his comfort and the enjoyments of his residence. Accordingly, by the 5th clause of the agreement, the company agree to be bound, before breaking ground, to pay such a sum as should be declared by George Buchanan. This clause evidently contemplates a payment to be made for something, which it is considered must necessarily follow from the formation of the line; and it, therefore, stipulates that the company shall not begin to occasion the consequential inconvenience and annoyance by breaking ground, before they shall have paid the ascertained sum; but it was thought that the company might require to enter upon the lands, before the act of parliament could be obtained; and the parties, therefore, provide by the 1st and 3d clauses of the agreement for such state of things.

By the first clause the Duke of Atholl and Sir W. Drummond Stewart are to give entry to the ground *required*, through their respective estates (that is, *required* for the formation of the railway); so that, in so far as they are concerned, the company may proceed with the execution of their works without waiting till an act of parliament should have been obtained for the formation of the line; and, by the third cause, "in case the company shall fail to obtain their act of parliament, they shall be bound to restore the ground taken possession of by them, in as far as possible, to the same state in which it was at the time of their entry, and to pay such damages for the injury done thereto as shall be determined by Robert Walker Rannie."

So far everything seems to be clear. The breaking ground before the passing of the act of parliament was not to render the company liable to pay the £14,500, but would of course have entitled Sir W. Drummond Stewart to that sum immediately the act passed. If the company failed to obtain the act, the ground was to be restored and damages to be paid.

The whole difficulty of the case appears to me to have arisen from a desire on the part of Sir W. D. Stewart to anticipate the period when the £14,500 would have regularly become payable under the agreement, and from the company having favoured his views on the subject. A debenture bond for £14,500 was given; and for the purpose of satisfying Mr. James Condie, who was a creditor of Sir William Drummond Stewart, it was allowed to be made out in his name. From this the whole complication arose. The company having, by the debenture, acknowledged a liability which, on the face of it, was absolute, although it was intended to meet an obligation which might never arise, found it necessary for their protection to provide in some way for the event of their not obtaining their act of parliament, by which alone that inconvenience and annoyance to Sir W. Drummond Stewart could be produced, for which the £14,500 was intended as a compensation; any injury occasioned to him by the execution of the works prior to the act being the subject of damages. The company, therefore, took a bond from Sir W. Drummond Stewart and James Condie, in which the debenture bond is treated as an actual payment of the £14,500; and Sir W. Drummond Stewart and James Condie bound themselves that, unless the bill intended to be brought into parliament should be passed into a law, and *so* the company be authorized to acquire the land and make the line, they would repay to the company the £14,500; and further provision to this effect is made by what is called the memorandum explanatory of the deeds or writings, by which, after reciting the last mentioned bond, it is declared, that the said Scottish Midland Junction Railway Company shall, in implement of the obligation undertaken by them, and without reference to the term of payment mentioned in said debenture bond, make actual payment to the said James Condie of the principal sum of £14,500, subject as to amount to the condition in the said letter of finding or declaration No. 2, (words which have an important bearing upon the construction,) and that so soon as the company shall break ground on the estate of Murthly for the formation of their proposed branch railway; James Condie being bound, on such payment being made, to deliver up the said debenture bond duly cancelled.

The form of this transaction seems to me to render the intention of the parties perfectly clear. A debenture bond is given as the representative of the £14,500, which was to be paid to Sir W. Drummond Stewart on a particular event. But the debenture bond was not payable till the 5th of May 1849, and the event upon which the £14,500 was to be paid might occur before that time. The company therefore undertook, without reference to the term of payment of the debenture bond, to make payment of the £14,500, on the happening of the event which they describe as the breaking ground on the estate for the formation of their proposed branch railway.

I have stated, that the reference in the explanatory memorandum to the letter of finding and declaration had, in my opinion, an important bearing on the construction of the agreement, and for this reason, that, by that document, the £14,500 was to be subject to deduction in case the sum to be awarded for the 80 acres of land belonging to Sir W. Drummond Stewart, assumed to be required for the railway, should exceed £128 15*s.* per acre. Now, as the £14,500 was to be paid so soon as the company should break ground for the formation of the railway, but might not be payable in full, as it was to be subject to a possible deduction, it appears to me, that the parties contemplated, that, after the act of parliament passed, but before breaking ground, the arbitrator would ascertain the value of the assumed quantity of 80 acres, so that the company might be informed of his valuation with a view of enabling them to deduct any excess before payment of the £14,500. Until the particular land required, and the quantity of it was

ascertained, no valuation could be made, and therefore the payment of £14,500 must necessarily have waited under this valuation, upon which it was to a certain extent dependent.

The stipulation also, as to the payment of interest, in the explanatory memorandum, materially assists this construction. The debenture bond I have called the representative of the £14,500, which, it now appears very clearly, was to be paid only on breaking ground for the formation of the railway. But the debenture bond bore interest, which it was not the intention of the transaction should be paid according to the terms of it, and therefore the explanatory memorandum provides, "That no interest shall be exigible under the debenture bond, notwithstanding the obligation to the effect therein contained, until the date of the company so breaking ground as aforesaid, from which date only the sum therein contained shall commence bearing interest;"—in other words, interest shall only begin to run from the time when the principal becomes payable, which is explained to be from the date of the company's breaking ground "as aforesaid,"—meaning, by these last words, "for the formation of the railway."

When all the writings come to be carefully considered, whatever perplexity may at first arise from the various dates of the different parts of the transaction, yet, taking them altogether as constituting one entire agreement, I think the meaning and proper construction of them can be at last clearly ascertained; and, with every respect for the judgment of the Judges of the Second Division of the Court of Session, I cannot agree with that part of their interlocutor in which they find the defenders are bound to pay to the pursuer the sum of £14,500, and decern accordingly for payment of the aforesaid sum.

With respect to the other part of their interlocutor, which finds and declares that the defenders are bound to enter into a submission to R. Walker Rannie, for ascertaining and determining the amount to be paid to the pursuer for lands to be taken and for injury done, it will be unnecessary for me to say much, for I think it will be quite clear to your Lordships, that this also cannot be supported.

By the part of the agreement to which this portion of the interlocutor refers, the company and Sir W. D. Stewart agree to "enter into a deed of submission to the said R. W. Rannie, as sole arbiter, for ascertaining and determining the amount which shall be paid by the Railway Company to the said Sir W. D. Stewart, as proprietor of the entail estate of Murthly, for the land to be taken, and for injury done to the grounds and place of Murthly, in a residental point of view for amenity, for agricultural and intersectional damage, and for injury sustained by tenants, it being declared that the binding of the said arbiter shall proceed on the assumption that 80 acres imperial are to be required for the railway, and for which his award shall proceed, and the company shall pay whether that extent of ground shall be used by them or not.

But the company on obtaining their act of parliament were under no obligation to make the line. They failed to exercise the powers conferred upon them by the legislature, and the period limited for making the railway has expired. It is therefore beyond their power to execute any part of the line; and to decree the company specifically to perform their agreement, is to make that which is merely enabling and permissive obligatory upon them, and to compel them to purchase and pay for land which would be utterly useless to them, and which they could not hold. If Sir W. D. Stewart has suffered by the breach of the agreement, he may proceed by action, and may recover damages to the extent of the injury sustained, but he cannot compel the performance of an agreement which is merely accessory to one which cannot be enforced.

Your Lordships will observe that the Lord Ordinary by his interlocutor finds that, "under the deed executed by the parties, the sum of £14,500 was payable to the pursuer, so soon as the defenders should break ground on the estate of Murthly, for the formation of their proposed branch railway to Dunkeld, and that interest became therefore exigible on that sum: Finds, that the pursuer has averred facts relevant, if proved, to establish that the defenders broke ground on the estate of Murthly for the formation of the said railway, but finds that the parties are at issue whether the defenders broke ground as aforesaid; allows the parties respectively to lodge draft issues in order to the trial of this fact."

If, in the present proceeding, the claims made by the pursuer could be separated, and the defenders can be decreed to pay the £14,500, although they might be assoilzied as to entering into the submission, there would remain the question of fact, whether the defenders have broken ground on the estate of Murthly for the formation of the railway, upon which the Lord Ordinary allowed the parties to lodge issues in order to the trial. But before your Lordships remitted the cause to the Court of Session for the purpose of trying these issues, it would be necessary to determine whether the agreement for the payment of the £14,500 was a valid agreement, or whether, as strongly contended for at the bar, it was *ultra vires* and void. The question is one undoubtedly of the highest importance. But your Lordships are not called upon to consider it upon the present occasion. The two parts of the agreement on which the summons is founded, cannot, in my opinion, be separated from each other. They both proceed upon the footing of the railway being made. The proceeding is for the specific performance of the agreement between the parties. The agreement is entire; the terms of it are such as the parties would probably not have entered into except as a whole, and it would be contrary to principle and not

consonant with justice, if specific performance were decreed of a part of it, when the other part is not capable of performance. It therefore becomes unnecessary to regard the separate parts of the pursuer's claim any further. He is clearly not entitled to the remedy which he demands. I therefore submit to your Lordships that the interlocutors ought to be reversed.

LORD CRANWORTH.—My Lords, the first point made by the appellants, who were defenders below, against the demand of the respondent is, that as to the £14,500, there was never any contract binding upon them; that their obligation was conditional only; and that the circumstances on which alone they were to be liable never occurred. I think that if we look only to the original agreement, there was no contract to pay anything, if the company should not break ground. The terms of the original agreement in the 5th article upon that point are as follows: "The Railway Company shall be bound, before breaking ground, to pay to the said Sir W. D. Stewart, for personal inconvenience and annoyance, which must of necessity arise to him during the formation of the line through his grounds and preserves, such a sum as shall be declared by George Buchanan."

If I contract to pay £1000 before the 1st of January 1860, or before the next meeting of parliament, or during the life of A. B., no action can be maintained against me on that contract without an averment that the 1st of January 1860 had arrived, or that parliament had met, or that A. B. had died. And this is the precise nature of the contract contained in the 5th clause. The company agreed to pay to the respondent before they should break ground, a sum of money, the amount to be fixed by Mr. Buchanan. He afterwards fixed the sum at £14,500, subject to reduction if the money to be awarded as the price of the entailed lands should exceed £128 15*s.* per acre. Until they break ground they have not been guilty of any breach of their agreement by not paying the money.

The question, however, is, what is the effect of the subsequent transaction? The respondent contends that the £14,500 was in substance paid by the company by means of a debenture to that amount given by them to Condie as his agent. That debenture was afterwards duly assigned to the respondent, and he contends that whatever might have been his right to sue on the original contract, yet that it was in the power of the company to pay the £14,500 at any time, and that they did so by means of the debenture on which they became absolute debtors for a sum of £14,500 without reference to the question of their breaking ground. And in confirmation of this view of the case, the respondent relies on the discharge given by him and Condie to the company, at the same time at which the company gave their debenture. By that instrument the company obtained a release from all demand on them in respect to the sum originally agreed to be paid; and if the matter had rested there, the respondent might well have contended that there was, by means of the debenture, an absolute contract to pay the £14,500.

But in order to come to a just conclusion as to the real meaning of the parties, it is necessary to look attentively to all the documents and their bearing on one another. The original agreement was signed by the respondent on the 3d of February 1848, at Perth, and at the same time and place he signed a bond to the company, reciting that they had paid to him the sum of £14,500 towards payment of what he should be entitled to for personal inconvenience, in the event of the intended Bill being passed, and the railway being thereby authorized to be made. And then he binds himself as cautioner, that, if the bill should not pass, they shall repay the £14,500 to the company. The expression, it will be observed, is *towards* payment, from which it is plain, without reference to the contemporaneous correspondence, that the precise sum had then been ascertained. The statement that the company had paid the £14,500 was untrue; but no doubt they had agreed to secure by a debenture whatever sum should be settled by Buchanan, and the respondent, therefore, was willing to act on the footing of £14,500 having been paid, leaving it open to him to receive more, if more should be awarded by Buchanan. Buchanan's award was made on the 1st of March 1848, fixing the amount a £14,500, subject to a deduction, if the sum to be afterwards awarded as the price of the entailed land taken should exceed £128 15*s.* per acre. On the 5th of May following, the company gave to Condie a debenture for £14,500 expressed to be for money advanced to him by them, and at the same time they received from Condie a deed signed by the respondent on the 27th of April preceding, and by Condie himself on the 5th of May, whereby the respondent referring to the original agreement and the award of Buchanan, and stating that the company had paid or satisfactorily secured to him, the sum of £14,500, released them from all claim on account of the personal inconvenience which should be occasioned to him during the formation of the line of railway. By the same deed the respondent, as principal, and Condie, as surety, bound themselves, in case the sum to be awarded as the price of the entailed lands should exceed £128 15*s.* per acre, to pay the company the excess.

The circumstance that the last mentioned deed was signed by the respondent on the 27th April, though it was not delivered to the company till the 5th May, is explained by the fact that he was then at a distance from the office of the company, it appearing that he signed it at Portsmouth.

The conclusion at which I arrive on looking at these documents is this, that on or before the

3d of February 1848, it had been ascertained, though Buchanan had not made his award, that the sum which the company would have to pay before breaking ground would not be less than £14,500, subject to possible reduction in respect to the price of the lands, and that as the company could not lawfully pay the sum before they had obtained their new act, they should do what they supposed they had a right to do, namely, give a debenture for the amount as for money borrowed by them, and that the money secured by that debenture should be applied in satisfying the respondent's claim for personal inconvenience for making the new line, and that they should take a counter security for the repayment to them of the £14,500 if the bill should not pass. They did not, in fact, give the debenture till three months afterwards, that is, till the 5th of May. But this is explained by the circumstance that the precise amount to be secured by it had not been ascertained on the 3d February. On the 5th of May the company gave the debenture to Condie as the agent or nominee of the respondent, taking in return the discharge or release from their liability under their original agreement, to which I have already referred.

If the matter had rested there, a question might have arisen whether the debenture was to be taken as a substitute for the original liability, or only as a security for its due performance. But there was a further document, called an explanatory memorandum, signed by the respondent, concurrently with the deed of discharge, on the 27th of April, and by or on behalf of the company at the time they gave the debenture of the 5th May, the object of which was to explain the real meaning of the parties. And for this memorandum signed by the directors as binding the company, by the respondent and by Condie, it appears to me plain that all which had been done was merely intended as machinery for carrying into effect, in what the parties considered a legal mode, the contract for compensating the respondent for personal annoyance. By that memorandum it is declared, in explanation of the several deeds and writings, which the parties had executed, that the company should, in implement of their obligation, and without reference to the term of payment mentioned in the debenture, pay to Condie £14,500 before they should break ground, and that thereupon the debenture should be given up to be cancelled; and further, that although the debenture purported to carry interest from its date, no interest should be payable until the company should break ground.

It is to be observed, that what the company was to pay, was to be in *implement of their obligation*, that is, their original obligation, which shews that the discharge was not intended really to exonerate them; that it was only part of a series of instruments, the object of which was effectually to secure to the respondent the payment of what Buchanan had found to be the sum he sought to receive for personal inconvenience. If the original obligation was at an end, it was impossible that it should be implemented.

On these grounds, I am of opinion that, independently of other objections, and whether they are or are not valid, the interlocutor of the Inner House, so far as relates to the £14,500, cannot be supported. With respect to the other branch of the interlocutor, that which relates to the purchase of the land, I think that the Lord Ordinary was right, and that the interlocutor of the Inner House was wrong. The obvious meaning of the contract was, that the payment, by way of price for the land, was to be made, if the land should be taken for the railway, but not otherwise. This was the construction put upon the contract in *Gage* v. *The Newmarket Railway*, 7 Rail. Cas. 268, and in *Preston* v. *The Liverpool and Manchester Railway Company*, 5 H. L. C. 605; the terms of which contracts are very similar to that now under consideration. There is nothing in the language used here necessarily importing that the company meant to enter into a contract so unreasonable as that they should be bound to take land for a railway which was not to be constructed at all; and as in this case the intention to make the railway has been abandoned, I think there is nothing to bind the company to pay for the land, which, if it had been constructed, they had agreed to take.

I am therefore of opinion that, as to the £14,500, there was no agreement to pay anything if ground was not broken; and, as to the sum to be paid as the price of the land, that the contract was contingent on the railway being formed.

The only remaining question is, whether there ought, according to the interlocutor of the Lord Ordinary, to be an issue to try in reference to the £14,500, whether ground was broken. I think not. Such an issue could not be directed, unless it was found for the pursuer, the money would be payable; and this I think would not be the result. If that sum was agreed to be given as a bribe to buy off opposition to the new bill, I think it could not be sustained; it would have been an unwarrantable application of the funds of the company. It is not, however, clear, that this was the case. But even if the agreement to pay that sum was a lawful agreement, still it was an independent agreement. It was an accessory to the agreement for purchase of the land. Till the price of the land was fixed, the sum to be paid for personal annoyance could not be ascertained; for it was not an absolute sum of £14,500, but that sum, with a possible deduction, with reference to the price to be paid for the land. And when it became impossible to fix that price, it became equally impossible to say what sum was to be paid for personal annoyance, the one depending on the other. I think, therefore, that both interlocutors were wrong, and that the

appellants ought to have been assoilzied; but reserving to the respondent the same right or rights of action as were reserved by the interlocutor of the Lord Ordinary.

LORD WENSLEYDALE.—My Lords, there are two questions for the decision of your Lordships in this case,—1st, Whether, on the true construction of the agreement between the respondent and Messrs. Buchanan and Murray on the part of the appellants, on the bonds and other instruments which have passed between the parties, and on the fact already in proof, there is an obligation on the part of the appellants to pay any certain sum of money to the respondent? 2d, Whether, if there is, the agreement and bonds are void in law? It has not yet been proved in the case, that the appellants have broken ground for the formation of the proposed branch of their railway to Dunkeld.

The construction of the agreement is first to be considered. The agreement, after reciting that the appellants had some time ago obtained an act of parliament for the formation of a branch from the main line to Dunkeld, and that it was desirable to adopt another which would pass through the estate of the respondent, Sir W. D. Stewart, the adoption of which line would save considerable expense, and would be advantageous to the company, stipulates that the appellants should be bound to apply for an act of parliament during the next or following session, and the respondent was to give his consent to the passing of that act. And, in the fifth article, upon which the question mainly turns, it is provided, that the railway company shall be bound, *before breaking ground*, to pay the respondent, for the personal inconvenience and annoyance which must of necessity arise to him during the formation of the line through his grounds and preserves, such a sum as Mr. Buchanan should declare. It then proceeds to provide that the company and the respondent shall enter into a deed of submission to a sole arbiter, Mr. Rannie, to ascertain and determine the amount to be paid by the company to the respondent, the proprietor of the entailed estate of Murthly, for the land *to be taken*, and for injury done to the grounds and place in a residential point of view, and for amenity, and for agricultural and intersectional damages, and for injury sustained by tenants, it being declared that the finding of the arbiter shall proceed on the assumption that 80 acres are to be required for the railway, for which his award shall be made, and the company shall pay, whether that extent of ground shall be used by them or not, and any excess of ground beyond that quantity was to be found by the arbiter, and to be paid for according to that valuation. Then follow several other stipulations as to the mode of making the railway. By the 10th article, the company are bound to make a station on the estate of the respondent, and another on a convenient spot at or near the crossing of a particular turnpike road. By the 11th, the company are to be bound to make a dyke along the south side of the railway, and to make a road in a particular direction, for which the respondent is to pay £628 and upwards.

On the 1st of March 1848, by an instrument of that date, Mr. Buchanan found that the sum to be paid by the company to the respondent, *before breaking ground*, was to be £14,500, but with this qualification, that if, on the submission to be entered into by Mr. Rannie, the sum to be awarded by him for the 80 acres should exceed £128 15*s.* per imperial acre, the excess was to be deducted from, and taken out of, the £14,500. By this agreement two different payments are to be provided for, to be made to Sir W. D. Stewart, one of a fixed sum for himself personally, the other an uncertain sum to be the subject of valuation for land, and payable to him as owner of the estate entailed, and, of course, to be settled with the estate.

These two payments require to be considered separately; and first, the sum to be paid personally to Sir W. Stewart. There was to be paid, in the first instance, a sum to the respondent for his own use, but no time is fixed for that payment, nor is there a contract to pay generally without mentioning a time; in which case, in point of law, it would be payable immediately, and an immediate debt would be due. The only stipulation is, that it shall be paid *before* breaking ground; it is not to be paid *after* the breaking, when the breaking would be considered a condition precedent, or *on* the breaking, when it would be a contemporaneous condition, but it is to be paid *before* the breaking. That means no more than that the company shall not break ground until after they have made the payment. It being assumed that no breaking ground has taken place, the sum stipulated to be paid to the respondent personally is not now due. It cannot be recovered as a liquidated sum due on that agreement. Whether it may not be recovered as damages for the breach of an implied agreement to break ground in a reasonable time, as a part of the general agreement to make the railroad in a specified direction, is a different consideration now not necessary to be adverted to.

But the claim to this sum is rested not on the agreement only, but also the bonds or debentures which have been given with a view to create a present obligation on the company. It is quite unnecessary to decide whether these bonds were valid or not. Assuming that they were, no action can now be brought on them, for there is a memorandum amongst them explanatory of those deeds signed by the parties; and by that it is declared, by and between the appellants and the respondent, that without reference to the term of payment mentioned in the debenture bond, the respondent should make actual payment of the principal sum of £14,500 (subject as to the amount to the condition in a letter of finding and declaration, to which I will afterwards

advert) as soon as the company should break ground on the estate of the respondent for the formation of the proposed branch of the railway being made, the bond is to be delivered up to the company cancelled, and that no interest shall be exigible from the company under the bond, notwithstanding the obligation to that effect therein contained, until the date of the company's breaking ground aforesaid, from which date only the same shall bear interest; and in the event of the contemplated act not being obtained, the bonds respectively are to be given up cancelled.

Assuming that there is no objection to the validity of the bonds given by the company, (on which I will hereafter make an observation,) the result is, that they cannot by the agreement of the parties be enforced for principal and interest until the company have broken ground for the formation of their proposed branch to Dunkeld. This suit, therefore, for the £14,500 certainly cannot at present be enforced.

The next part of the 5th clause relates to the amount to be paid to the respondent as owner of the entailed estate, for the land to be taken, and damage done, and injury sustained by the tenants, to be fixed by the arbiter, Mr. Rannie.

Before the quantity of land required is fixed and identified, the precise sum to be paid for it cannot be ascertained. The price even of 80 acres cannot be fixed until their nature and quality can be ascertained, nor, of course, the price of the excess above 80, until it appears whether there is an excess, unless there be a stipulation to that effect. Nothing can be clearer than that the price is not to be paid until after the land required is ascertained and conveyed. If a purchaser refuses to pay, the vendor can only recover unliquidated damages, in an action against the purchaser for not performing his contract, and the stipulated price he cannot recover until after the conveyance.

The company, therefore, who have not, as is assumed, broken ground, nor taken steps to form the railway, and are unable now to do so, because their powers have expired, cannot be called upon to enter into a deed of submission to Mr. Rannie, as arbiter under the 5th clause, as to the value of the land and damages, and specific performance of this contract cannot therefore be compelled. If, then, the company have broken ground, neither the agreement nor the bond can be enforced, and it is unnecessary to inquire into their validity. If they are valid in point of law, the only course on that supposition would be for the respondent to sue the company for damages for the breach of their undertaking to break ground and make the new branch of their railroad, which undertaking is certainly to be found in very distinct terms in the written agreement between the parties of October 5, 1847, and other documents. If that agreement had not been made, the company could not have been obliged to make the new branch. They were merely empowered to do so.

It was at one time supposed in England, as it seems to have been thought in Scotland, that permissive powers given by an act of parliament were obligatory upon them. The case of *Philip* v. *The Edinburgh, Perth, and Dundee Railway Company*, in Scotland, and that of *The Queen* v. *The York and North Midland Company*, 1 E. & B. 178, so decided. This latter case, however, has been reversed in 1853 in the Exchequer Chamber, 1 E. & B. 878, and the former in this House in 1857. But though the company were not bound to exercise the powers because the legislature has given them, it is competent for them to bind themselves to do so, and that I think they have done by their agreement.

But suppose it should turn out, on an issue being tried, as at first directed by the Lord Ordinary, to ascertain that fact, that the company have broken ground with the intent mentioned, and that, therefore, the condition which was annexed to the company's bond and agreement was purified, and that they were valid in point of law, a further difficulty would arise which seems to me insuperable. If Mr. Buchanan had fixed a *precise sum* to be paid to Sir W. D. Stewart personally before breaking ground, that sum would be payable. But, in truth, Mr. Buchanan did not fix any precise sum, but a sum, the exact amount of which could not be ascertained until the quantity and value of the land to be taken was also ascertained, which has never been done. How much of the £14,500 declared by Mr. Buchanan to be payable really had become payable when the land wanted was specified and valued, it is impossible now to tell, and therefore no certain sum can be recovered on the agreement. It would have been probably otherwise had Mr. Buchanan declared that £14,500 should be paid down, and *afterwards*, when the valuation was made, the excess returned. This difficulty is not removed by giving the debenture for £14,500, for there is in the explanatory instrument a provision that the payment of that sum shall be subject as to the amount to Mr. Buchanan's letter of finding and declaration.

It seems to me, therefore, that Sir W. Stewart's remedy is confined to an action against the company for unliquidated damages on the agreement; whether this agreement is invalid on the ground of not being authorized by the acts regulating the company it is not necessary to decide. It may be proper, however, with a view to future litigation, to make some observations as to the illegality of the contract. I think there is little to be said against the part of it which relates to the purchase of the lands. There can be no doubt that a corporation is fully capable of binding itself by any contract under its common seal in England, and without it in Scotland, except when the statutes by which it is regulated or created, expressly or by *necessary* implication, *prohibit*

such contract between the parties. *Primâ facie*, all its contracts are valid, and it lies on those who impeach any contract to make out that it is invalid. This is the doctrine of *ultra vires;* and it is no doubt sound law, though the application of it to the facts of each particular case has not always been satisfactory to my mind.

But no objection can, I think, be made on the *ultra vires* doctrine to a contract by a company which wishes to alter one of the branches of its railroad, and is about to apply to parliament for authority to do so, engaging to purchase land from a neighbouring proprietor if they should obtain their act. The contract to purchase land in this case will therefore probably, I think, prove valid.

The contract, however, to pay a sum for personal compensation to the pursuer for his own use is open to another objection, arising from the Scotch Lands Clauses Consolidation Act, 1845, 7th and 8th Vict. cap. 33. The 71st section provides that, when there is a contract with a person who is not entitled to dispose of lands, or the interest contracted to be sold by him absolutely for his own benefit—and this is Sir W. D. Stewart's condition—the money is to be paid into the bank, and it shall not be lawful for the contracting party so not entitled to retain to his own use any portion of the sum contracted in respect of taking such lands, or for consenting to, and not opposing the passing of the bill authorizing the taking of such land, or in trust for bridges, &c., but all such moneys shall be deemed to have been contracted to be paid for and on account of the several parties interested in such lands, as well in possession as in succession or in expectancy, provided always that it shall be in the discretion of the Court of Session (or trustees, when the money is to be paid to them) to allot to the liferenter, or any person holding under any particular qualified right or interest for his own use, a portion of the sum for a compensation for any injury, inconvenience, or annoyance which he may be considered to sustain, independently of the actual value of the land to be taken, and of the damage occasioned to the lands held therewith by reason of the taking of such lands, and the making of the works.

This shows the intention of the legislature, that a person who has an entailed estate shall only take such a part of the agreed price for his own personal use as the Court of Session, or an independent third person, shall think reasonable. He is not admitted to make his own bargain for the remuneration to himself, which he would be naturally desirous of making as large as possible, to the prejudice of the compensation for the land itself. The act, therefore, provides for an independent control. It appears to me, therefore, highly probable that an agreement for a gross sum, payable to the respondent personally, cannot be supported.

LORD KINGSDOWN.—My Lords, in this case I have had an opportunity beforehand of reading the judgment proposed by the Lord Chancellor, and as I quite concur in that judgment, it would only be wasting time for me to say anything more upon the case.

Sir Richard Bethell.—Will your Lordships permit me to suggest that the order should run thus—Reverse the interlocutors; assoilzie the defenders from the conclusions of the summons with expenses; direct the expenses paid by them in the Court below to be returned; and with that declarator remit the case.

Mr. Rolt.—It was the unanimous judgment of the Inner House.

LORD CHANCELLOR.—We say nothing about the expenses, but merely reverse the interlocutor.

LORD CRANWORTH.—The expenses that have been paid should have been returned.

LORD CHANCELLOR.—The expenses that have been paid to be returned of course.

The following was the *order* drawn up:—"Ordered and adjudged, that the said interlocutors of the 1st Nov. 1854 and 26th Feb. 1856, so far as complained of in the said appeal, be, and the same are hereby, reversed, and that the defenders be assoilzied from the conclusions of the summons, and that the expenses of the Court below, if paid by the defenders to the pursuer, be returned to the said defenders; and it is further ordered, that the cause be remitted back to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment."

Morton, Whitehead, and Greig, W.S. *Appellants' Agents.*—Dundas and Wilson, C.S. *Respondent's Agents.*