1859.
February 28th, March 1st, 3rd, and 28th.

SCOTTISH NORTH-EASTERN RAILWAY COMPANY, ... APPELLANTS.
SIR WILLIAM DRUMMOND STEWART, . RESPONDENT.

Statutes enabling, but not compulsory.—Acts of Parliament authorizing companies to make railways are now regarded as but *enabling* statutes, which give powers, but do not render compulsory or obligatory the exercise of those powers.

Per Lord Wensleydale: 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 to a company were obligatory upon them. The cases, however, so deciding, have been reversed; p. 414.

Where a company, after getting their Act, had determined to abstain from executing the line which it sanctioned, the House held (reversing the judgment below) that they could not be compelled specifically to perform an agreement for the purchase of land which they had contracted to purchase for the purposes of the line, but which, as they had relinquished the undertaking, they no longer required.

Effect of Cesser of Power.—Where the time limited for making the line had expired, and where consequently the powers of the company under their Act had expired: Held by the House (reversing the decision below), that the company could not be called upon to enter into an arbitration under a contract which had assumed them to be in full possession of their authority.

In such a case, however, an action might lie for damages, though a bill could not be sustained for specific performance (*a*).

Bribe to stifle Opposition to a Railway Bill.—Per Lord Cranworth: An agreement to give a sum of money as

(*a*) See the contrary reasoning on which the Court below had proceeded, *infrà*, pp. 389, 390, 391, 392, 393.

a bribe to buy off opposition to a railway bill in Parliament cannot be enforced; p. 408.

Principal and accessory Agreement.—Where the principal agreement cannot be enforced, the specific performance of the accessory agreement will not be decreed.

Ultra Vires Doctrine.—Per Lord Wensleydale: There can be no doubt that a corporation is fully capable of binding itself by any contract, except when the statutes by which it is created or regulated 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 bad; p. 415.

Per Lord Wensleydale: No objection can, I think, be made on the *ultra vires* doctrine to a contract by a company who wish to alter one of the branches of its railroad, and are about to apply to Parliament for authority to do so, engaging to purchase land from a neighbouring proprietor if they should obtain their Act; p. 416.

Scotch Lands Clauses Consolidation Act.—Lord Wensleydale's remarks as to contracts with life renters and persons having only partial and qualified interests; p. 416.

SIR WILLIAM DRUMMOND STEWART of Murthly, Baronet, the Pursuer of the action in the Court of Session, by his summons dated 6th June 1850, alleged as follows:—

That by the "Scottish Midland Junction Railway Branches Act, 1846," (*a*) the Company were authorized to increase their capital and to form a branch to Dunkeld. That they became desirous of abandoning the said branch, and adopting another branch proceeding by a different route to Birnam. That such different route to Birnam passed through the estates of the Pursuer; and to facilitate the formation thereof, George Buchanan and John Murray, Esquires, as authorized by the Company,

(*a*) On the 13th February 1857 the Court below sisted (substituted) the Scottish North-Eastern Railway Company in place of the Scottish Midland Junction Railway Company, in pursuance of a minute.

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entered into an agreement with the Pursuer in March 1848, by which it was conditioned,—*First*, that the Pursuer should give the Company entry through his estate, as the same was delineated on a plan referred to; and that, so far as the Pursuer was concerned, the Company might proceed with the execution of their works without waiting till an Act of Parliament should be obtained for the formation of the line, and that the Pursuer should obtain the consent of his tenants and occupants, and out of the sum therein-after provided settle with the tenants the agricultural and other damage to which they might be entitled in consequence of the railway operations. *Secondly*, that the Company should apply for an Act of Parliament for the formation of the line during the then-next or following session of Parliament, and that the Pursuer should give his consent and assistance to the passing thereof, he being kept free of all expenses. *Thirdly*, that the Pursuer should meanwhile, if required, grant leases in favour of the Company of the ground necessary for the formation of the railway, for nineteen years, or for any shorter term the Company might desire,—it being declared, that in case the Company should fail to obtain their Act of Parliament, they should be bound to restore the ground taken possession of by them to its former state, and pay such damages as might be found due in the manner therein mentioned. *Fifthly*, that the Company should be bound, before breaking ground, to pay to the Pursuer, for personal inconvenience and annoyance, which would of necessity arise to him during the formation of the line through his grounds and preserves, such a sum as should be declared by the said George Buchanan; and that the Company and the Pursuer, or those authorized by him, should enter into a deed of submission to Robert Walker Rannie, Esq., as sole arbiter for ascertaining and determining the amount which should be paid by the Company to the Pursuer for the land to be taken and injury done to the grounds and place of Murthly in a residential point of view, and for amenity, agricultural and intersectional damages, and for injury sustained by tenants; it being declared that the finding of the said arbiter should proceed on the assumption that eighty acres imperial were to be required for the railway, and for which his award should proceed; and that the Defenders should pay, whether that extent of ground should be used by them or not, and that any excess of ground beyond this quantity should be fixed by the said Robert Walker Rannie, and be paid for by the Company according to his valuation. *Seventhly*, that the whole wood along the line, so far as in the Pursuer's grounds, should belong and pertain to him. *Twelfthly*, that all future expenses, deeds, and references necessary for carrying the agreement into effect, and the expenses of the whole procedure therewith connected, should be paid by the Company; that the said George Buchanan, then chairman of the said Scottish Midland Junction

Railway Company, as referee, by letter of finding and declaration, fixed the sum payable to the Pursuer under the agreement at 14,500*l.*; but on the express understanding that if, under the submission to be entered into to the said Robert Walker Rannie, the sum to be awarded by him for the eighty acres of ground and damages should exceed in whole the rate of 128*l.* 15*s.* per imperial acre, such excess should be deducted from and taken out of the said sum of 14,500*l.*; that in implement of said award, the Company delivered to the Pursuer a debenture bond, dated the 5th day of May 1848, for the said sum of 14,500*l.*, payable to Mr. James Condie, the Pursuer's agent there, on the 15th day of May 1849, with interest at the rate of five per cent. That the Pursuer and the said James Condie, by discharge dated the 27th day of April and 5th day of May 1848, discharged the Company of the said sum of 14,500*l.*, and of all and every claim for inconvenience and annoyance which should or might in any way arise or be occasioned to the Pursuer during the formation of the said line of railway through his grounds and premises, and bound themselves to repay to the Company whatever excess of value of land or damages beyond the stipulated rate of 128*l.* 15*s.* per acre might be awarded by the said Robert Walker Rannie, under the submission to be entered into as before mentioned; that by bond dated the 3rd day of February and 5th of May 1848, the Pursuer and the said James Condie bound and obliged themselves, conjunctly and severally, and their respective heirs and successors, the Pursuer as principal and the said James Condie as cautioner, surety, and full debtor, that unless the said Bill, should be passed into a law, they should repay (*a*) to the said Company the said sum of 14,500*l.* when demanded, on receiving six months' previous notice in writing and the legal interest; that by memorandum entered into between the Pursuer and the said James Condie on the one part, and the Company on the other, as explanatory of the writings before mentioned, it was declared that the Company on the one hand should make actual payment to the said James Condie of the 14,500*l.*, subject, as to amount, to the condition in the finding by the said George Buchanan, so soon as the Defenders should break ground on the Pursuer's estate, the said James Condie being bound, on such payment being made, to deliver up the said debenture bond cancelled; and, on the other hand, that no interest should be exigible by the said James Condie from the Company under the said debenture bond, until the date of the said Defenders breaking ground as aforesaid, from which date only the sum therein contained should commence bearing interest: And it was also declared, that in the event of the Company not obtaining the contemplated Act of Parliament, then the said debenture bond,

(*a*) *i. e.* pay back.

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and the bond by the said James Condie and the Pursuer, should be delivered up cancelled by the said parties respectively, the one to the other, without payment being given or received by either party under these instruments; that in July 1848 the Company obtained an Act of Parliament authorizing the execution of the proposed branch railway; that in September 1848 the Company, proceeded to break ground on the Pursuer's lands, and dug pits, and cut down trees, forming several unsightly lanes through his plantations of nearly two miles in length and from ten to twenty feet in width. The summons then averred that the Company were bound to pay the 14,500*l.* on the 15th May 1849, or pay that sum on obtaining their Act of Parliament as aforesaid, or at least whenever they broke ground as aforesaid; that they were also bound, before or on breaking ground as aforesaid, to enter into a submission to the said Robert Walker Rannie, to have the value of the Pursuer's ground required by the Defenders ascertained, the extent of ground to be so valued being not less than eighty acres, and to pay the amount of such valuation to the Pursuer to the extent of not more than 128*l.* 15*s.* an acre, as provided in said agreement; and the summons further decreed, that the Company, although required to pay the said sum of 14,500*l.*, and to enter into a submission as aforesaid, and pay to the Pursuer the value of the ground as the same might be ascertained therein, refused or at least delayed so to do, and refused or at least delayed to acknowledge the Pursuer's right in the premises; whereupon the summons concluded by a prayer that the Company should be decreed to pay to the Pursuer the said sum of 14,500*l.*, with interest from the date of their breaking ground as aforesaid, or at least from and after the date of citation in the present action. And the summons also prayed a declaration that the Company were bound to enter into a submission to the said Robert Walker Rannie, for ascertaining the amount which should be paid to the Pursuer for land, &c., in terms of the agreement; and the amount being so ascertained, that the Company ought and should be decerned and ordained to pay the same to the Pursuer to an extent not exceeding the foresaid sum of 128*l.* 15*s.* per acre, or otherwise, and in the event of the Defenders failing to enter into said submission, they ought to be decreed to pay to the Pursuer the sum of 10,300*l.*, being the price of eighty acres of ground in terms of said agreement, at the foresaid rate of 128*l.* 15*s.* per acre, together with the Pursuer's expenses in the premises.

The above is the agreement abbreviated from the recital of the summons.

The summons was followed by a condescendence substantially repeating, though in a more expanded form, the preceding allegations.

The following were the Pursuer's pleas in the Court of Session :—

1. The debenture bond forms a valid and liquid ground of debt against the Company.

2. The compensation payable to the Pursuer was to depend on the Company obtaining the Act of Parliament, which enabled them, when they thought fit, to make the line through the Pursuer's estates.

3. The Railway Company having broken ground on the Pursuer's estates, the compensation agreed to be paid is exigible.

The pleas in defence on behalf of the Company in the Court of Session were these :—

1. 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.

2. At all events, as it is proved that the debenture bond is nothing else than an altered form into which to put the obligation constituted by the original minute of agreement, or as at least it cannot be legally regarded as anything else, the claim in the present summons cannot be further enforced than in so far as it is sustained by the original minute of agreement, or would be capable of enforcement under that minute of agreement itself.

3. Considered as a claim under the original minute of agreement, the claim for the sum of 14,500*l.* is untenable, inasmuch as such claim did not in any event arise until the Company broke ground for the formation of the line, and 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.

4. 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*l.*, 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.

5. In any view, the Pursuer, as an entailed proprietor, would not be entitled to enforce payment of the price of the land to himself individually.

6. Supposing the minute of agreement to constitute an absolute obligation whether the land was taken and the line formed or not, it was an agreement *ultra vires*, and incapable of being enforced against the Company.

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The *Lord Ordinary* (Handyside), having heard Counsel on both sides, pronounced the following Interlocutor:—

1*st November* 1854.—Having made avizandum as regards the *petitory* conclusion of the summons—Finds that under the deeds executed by the parties, the sum of 14,500*l.* 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, i 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: Meantime supersedes consideration of the farther and separate plea of the Pursuer that payment of said sum became prestable by the Defenders having obtained the Act of Parliament 1848, which enabled them to make their line of railway through the estate of the Pursuer, and that the Pursuer is entitled now to enforce payment thereof from the Defenders: And as regards the *declaratory* conclusion of the summons, in respect that the Defenders have abandoned the making of said branch railway, and that their statutory powers to make it have now expired, assoilzies the Defenders from said conclusion, and decerns, reserving to the Pursuer action for any special damage he can instruct to have suffered by having, on the faith of the agreements between him and the Defenders being fulfilled, executed, as alleged, extensive improvements upon his estates, altered his plans to suit the line of railway, and also entered into arrangements with his tenants, as well as his claims for damage sustained by the alleged breaking of ground for the formation of said railway, and to the Defenders their answers thereto.

Against this Interlocutor both parties reclaimed to the Second Division of the Inner House; the Pursuer praying their Lordships to alter the said Interlocutor, in so far as it directed issues, and in so far as it superseded consideration of the plea of the Pursuer that payment had become prestable by reason of the Defenders having obtained the Act of Parliament; and in so far as it assoilzied the Company from the declaratory conclusions of the summons.

The reclaiming note for the Company, on the other hand, prayed their Lordships to recall the said In-

terlocutor, to sustain the Company's defence, and to assoilzie them *in toto.*

After hearing Counsel on both these reclaiming notes, the following judgment was pronounced by the Second Division of the Court of Session :—

26th February 1856.—The Lords find, that the Company are bound to pay to the Pursuer the sum of 14,500*l.*, with interest from the date of citation, and decern accordingly for payment of the foresaid sum ; and farther find and declare, that the Company are bound to enter into a submission to Robert Walker 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 section fifth of the minute of agreement of date 5th October 1847 and 3rd February, 1st March and 14th March 1848, and decern against them accordingly, and allow this last decerniture to be extracted *ad interim*: Find the Pursuer entitled to expenses.

The following written opinion, delivered by one of the Judges (Lord *Wood*), had been previously perused by his learned colleagues, and adopted by them. It fully discloses the reasoning on which the Court below proceeded.

Lord *Wood:* This action was raised more than a year before the Company's compulsory powers had expired, and more than three years before the termination of the period for executing the branch line.

The question is, whether the agreement was dependent on the branch line being formed, or, at least, upon the Company breaking ground on the estate of Murthly?

The party entering into the agreement with the Pursuer was an incorporated company. They were aware that it was indispensable that they should buy off the opposition of the Pursuer ; that they should carry him along with them, and induce him to agree to his land being taken, and to submit to all the inconvenience and annoyance which would necessarily attend the formation of the railway ; and that he should, become not only a consenter to, but a promoter of, the proposed Bill. To secure what was thus known to be essential to success was the moving cause of the agreement, and it is beyond dispute that it and the relative writings were prepared, in the full confidence that the agreement being entered into, a Bill for making the altered branch line would be

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passed into a law, and on the understanding that, if passed, the line would be made.

Now it appears to me, that if there were any room for dispute as to the true meaning of the transaction, it is attributable to the circumstance of its being a part of the arrangement that power should be conferred upon the Company to enter upon and use the Pursuer's lands *prior* to the Bill passing into law, and to the words and provisions which consequently came to be introduced, an arrangement arising out of the belief that the Bill would be passed, and the determination of the Company to make the intended line. But still, to whatever observations the terms of the minute of agreement and other writings may be open, I think it will be found, on due consideration, that they do not support the plea of the Company.

First, then, as regards the minute of agreement.

Looking, 1*st*, to the provision in the *first* head of that minute, for immediate "entry to the ground required;" 2*nd*, to the express obligation put upon the Company by the *second* head to apply for an Act of Parliament "for the formation of the line during next or following session of Parliament," which is totally with the idea that the obligation should be wholly dependent on the pleasure of the Company; 3*rd*, to the provision in the *third* head as to the restoration (in the case of the Defenders failing to obtain an Act of Parliament) of ground that might have been taken possession of by them; and *fourth* and *fifth* heads, containing the provision that the Company "shall be bound, before breaking ground, to pay to the said Sir William Drummond Stewart, for personal inconvenience and annoyance which must of necessity arise to him during the formation of the line through his ground and preserves, such a sum as shall be declared by the said George Buchanan;" and the further provision, binding the Pursuer and the Defenders to enter into a submission for ascertaining the amount which shall be paid by the Company for the land to be taken and injury done to the grounds and place of Murthly, on the assumption that eighty acres imperial were to be required for the railway, both which, it is to be observed, form parts of one head of the agreement, and are united together as considerations stipulated for by the Pursuer, and agreed to by the Defenders, for the consent said to be given by the Pursuer to the procuring the proposed Act of Parliament; and keeping in view the fact, that before the last date of the minute of agreement the sum to be paid for personal inconvenience, &c. had been fixed by Mr. Buchanan at 14,500*l.*, I would hold that, construing the agreement without any light to be derived from relative writings, the Defenders became by its terms positively bound, in the event of the passing of the Act, to make immediate payment to the Pursuer of the sum declared by Mr. Buchanan; and that a debt was con-

tracted which in that event was to be absolute. It appears to me to be impossible to read the first, second, third, and fifth heads of the agreement without being satisfied that these words had reference to the power previously given to the Company to enter to the Pursuer's lands *prior* to the passing of the Act.

I conceive it to be free from doubt that the contraction of a debt to the Pursuer was not dependent on ground being broken by them. The debt to the Pursuer was absolute, without regard even to the contemplated Act being obtained.

Accordingly the bond of 3rd and 5th May 1848 by the Pursuer, and Mr. Condie as cautioner, provides for the event of the Act not passing.

Nor does the explanatory memorandum in the remotest degree countenance an opposite view. It contains a clause, the first part of which has manifest reference to the possible entering by the Defenders to the Pursuer's estate before the passing of the Act, and thereby taking benefit of that part of the minute of agreement, when it was considered to be only just that instant payment in cash should be made of the 14,500*l.* And it is accordingly provided that the Defenders "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*l.* sterling;" "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 William Drummond 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." And thus, by what was in that case made and provided, clear it is that there might be an accelerated payment, anticipating the date in the bond, or that of the passing of the Act.

Attending to the whole circumstances of the case,—to the power of taking possession of the Pursuer's land prior to the passing of the bill, and to the form into which the transaction had been thrown by the writings which were executed, which are all in perfect harmony, and reflect light on each other,—it is, I think, put out of all question that, by the agreement, the contraction of a debt of 14,500*l.* to the Pursuer did not stand suspended till ground should be broken; that, on the contrary, whatever might be the term of the actual payment in cash, whether that of breaking ground before the Act was passed, or the passing of the Act, or the breaking ground thereafter, it was a debt at once constituted for the consideration given by the Pursuer, and the Defenders' obligation for which (although in a possible case they might be entitled to some indulgence in the implement of it) was only to be dissolved in one event, viz., the proposed Act *not* being obtained, when everything was to be restored *hinc inde*. This is

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the only reading of which the writings are fairly susceptible. It is the only one which is consistent with the bond and discharge having been executed with the terms of the obligation for repayment in the bond by the Pursuer and Mr. Condie, and with the special provision in the explanatory memorandum for delivering up cancelled in the event, but only in the event there mentioned, the debenture bond which was granted and delivered, and taken as payment, or, as it is expressed, satisfactorily accounting for the sum for which the Defenders *were* indebted to the Pursuer, and not that in which they might *become* indebted if, after obtaining the Act, the Defenders chose to exercise their powers by breaking ground.

With respect to the circumstance that the Pursuer is an entailed proprietor, independently of the Lands Clauses Act, what is there in the character of an heir of entail which could prevent the Pursuer validly bargaining for, and the Defenders agreeing to pay to the Pursuer personally for his consent to the proposed Act a sum on account of the inconvenience he might suffer during the formation of the line? It was the Pursuer alone who could give the consent for which the money was to be paid. He might have given it without making any stipulation of the kind in question. And granting that by his death, not he, but succeeding heirs of entail had been the parties in possession during the formation of the line, the agreement would not have interfered with any right belonging to these heirs. They could have had no claim under it, and it could deprive them of none otherwise belonging to them. Therefore, the mere fact of the agreement being made by an heir of entail is, I apprehend, altogether immaterial. Then, again, with respect to the provision in the Lands Clauses Act, the answer is the same. All that the heirs of entail have an interest in, and to which the provision can be contended to apply, is left entire. It is not to any extent trenched upon. But even if there were more in the objection than there truly is, what would be its effect? Not, surely, to liberate the Defenders from the contract, if otherwise of binding efficacy. The only legitimate consequence of any peculiarity caused by the character held by the Pursuer would be to raise a question among the heirs of entail *inter se*, which would be entirely *jus tertii* to the Company. I am, therefore, of opinion that the Pursuer is entitled to a decree for the sum of 14,500*l*.

The second conclusion of the summons is to have the Company decreed to enter into a submission to Robert Walker Rannie.

The only question arising upon this conclusion is, the construction of the agreement of May 1848. An agreement to take the Pursuer's land to any extent that might be fixed for the intended purpose was not *ultra vires* of the Company, but was perfectly within their competency and powers. An agreement to purchase the land absolutely, and pay the price upon the passing of the proposed Act, or at any other date, was a contract which

might be lawfully entered into, and if made, was binding on the Company. It is no answer to an action to enforce the contract, that it would impose a great hardship upon the Company, inasmuch as were the land taken, it would now be useless to them. If the land would be useless, it is by the Defenders themselves that it has been rendered useless, who, had they thought fit, might undoubtedly have made the branch railway. Neither can it be maintained, that it cannot be enforced to the effect of specific performance, but must resolve into a claim of damages. To sanction such a plea would, in so far as I am aware, be a complete innovation in our practice.

The Company thereafter presented their Appeal to the House of Lords against the Interlocutor of Lord *Handyside*, except in so far as it assoilzied them, and against the Interlocutor of the Inner House *in toto*.

Sir *Richard Bethell* and Mr. *Anderson* for the Appellants (the Company). This in effect is a suit for specific performance of an agreement to purchase the Respondent's land. But the agreement was conditional; and the condition did not arise; for although the Company obtained their Act of Parliament, they were not bound to execute the line which it sanctioned: *Edinburgh, Perth, and Dundee Railway Company* v. *Philip* (*a*). The agreement, moreover, is void as against the Company: *Caledonian and Dumbartonshire Railway Company* v. *The Magistrates of Helensburgh* (*b*). The fact sought to be performed has become incapable of performance; there is therefore no mutuality; and if redress is demandable at all, it must be in the shape of damages. The decree below has ordered the Company to go into a submission; but no such decree can be sustained; and there is in truth no defence for the judgment appealed from, unless that it may be said to have the sanction of Lord *Cottenham's* unfortunate decisions in *Edwards* v. *The Grand Junction Rail-*

(*a*) 2 Macq. 514. (*b*) 2 Macq. 391.

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way Company, Stanley v. *The Chester and Birkenhead Railway Company*, and *Lord Petre* v. *The Eastern Counties Railway Company*,—all of which we submit are now overruled (*a*).

Mr. *Rolt* and Mr. *Roundell Palmer* for the Respondent. Specific performance in Scotland is a debt. It does not require mutuality.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*) :

The questions which are raised by the Appellants in this case may be reduced to two. First, whether the agreement entered into by the parties was conditional on the formation of the railway, or 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? Second, 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*l.* 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 William Drummond Stewart the sum of 14,500*l.* 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 Com-*

(*a*) See 2 Macq. 391.

(*b*) Lord Chelmsford.

Lord Chancellor's opinion.

pany (*a*), *The Edinburgh, Perth, and Dundee Railway Company* v. *Philip* (*b*), and *Preston* v. *The Liverpool, Manchester, and Newcastle-upon-Tyne Railway* (*c*). But unless former decisions lay down some general principles of construction, or the instrument to be construed is 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 any 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*l.* 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 Railway Company* v. *The Queen* (*d*), 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 William Drummond Stewart's land. Although there is nothing upon the face of the agreement to show 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

(*a*) 18 Q. B. Rep. 457.
(*b*) 2 Macq. Rep. 514.
(*c*) 5 H. of L. Reports, 605.
(*d*) 1 Ell. & Black. 858.

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they would be willing to offer him very favourable terms for the land to be taken for the railway, and for the necessary interference with his comfort and the enjoyments of his residence. Accordingly, by the fifth 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 first and third clauses of the agreement, for such state of things.

By the first clause Sir William Drummond Stewart is to give entry to the ground *required* (that is, *required* for the formation of the railway), so that 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 by the third clause, 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 appears 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*l.*, but would, of course, have entitled Sir William Drummond Stewart to that sum immediately after the Act had 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 William Drummond Stewart to anticipate the period when the 14,500*l.* would have regularly become payable under the agreement, and from the Company having favoured his views on this subject. A debenture bond for 14,500*l.* 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, upon 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 the inconvenience and annoyance to Sir William Drummond Stewart could be produced, and for which the 14,500*l.* 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 William Drummond Stewart and James Condie, in which the debenture bond is treated as an actual payment of the 14,500*l.*; and Sir William Drummond Stewart and James Condie bind 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 will repay to the Company the 14,500*l.* 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 Company

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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*l.*, subject as to amount to the condition in the finding by Buchanan (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*l.* which was to be paid to Sir William 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*l.* 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*l.* 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*l.* was to be subject to a deduction in case the sum to be awarded for the eighty acres of land belonging to Sir William Drummond Stewart, assumed to be required for the railway, should exceed 128*l.* 15*s.* per acre. Now as the 14,500*l.* was to be paid "so soon as the Company should break ground for the formation of the rail-

way," 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 eighty 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*l.* Until the particular land required and the quantity of it was ascertained, no valuation could be made, and therefore the payment of the 14,500*l.* must necessarily have waited upon 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*l.*, 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 that effect therein contained, until the date of the Company's 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

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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, that "the Company are bound to pay to the Pursuer the sum of 14,500*l.*, and decern accordingly for payment of the aforesaid sum."

With respect to the other part of their Interlocutor, which "finds and declares that the Company are bound to enter into a submission to Robert 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 William Drummond Stewart agree to "enter into a deed of submission to the said Robert Walker Rannie, as sole arbiter, for ascertaining and determining the amount which shall be paid by the said Railway Company to the said Sir William Drummond Stewart as the proprietor of the entailed estate of Murthly, for the land to be taken, and for injury done to the grounds and place at Murthly in a residential point of view, and for amenity, agricultural and intersectional damage, and for injury sustained by tenants, it being declared that the finding of the said arbiter shall proceed on the assumption that eighty 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 William Drummond Stewart has suffered by the breach of the Company's agreement, he may proceed by action, and may recover damages to the extent of the injury he has 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 deeds executed by the parties the sum of 14,500*l.* 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 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 could be decreed to pay the 14,500*l.*, although they might be assoilzied as to entering into the submission, there would still remain the question of fact, whether the Defenders had broken ground on the estate of Murthly for the formation of the railway, upon which the

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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*l.* 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; and I therefore submit to your Lordships that the Interlocutors ought to be reversed.

Lord Cranworth's opinion.

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*l.* there never was any contract binding upon them; that their obligation was conditional only, and that the circumstances, in 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 fifth article upon that point, are as follows: "The Company shall be bound, before breaking ground, to pay to the said Sir William Drummond 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 the said George Buchanan."

If I contract to pay 1,000*l.* 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 fifth 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*l.*, subject to reduction if the money to be awarded as the price of the entailed lands should exceed 128*l.* 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 transactions? The Respondent contends that the 14,500*l.* 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*l.* 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*l.*, without reference to the question of

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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 of 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*l.*

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 3rd 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*l.* *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, and his agent Condie binds himself as cautioner, that if the Bill should not pass they would repay the 14,500*l.* to the Company. The expression, it will be observed, is *towards* payment; from which it is plain, without reference to the contemporaneous correspondence set out in the Respondent's appendix, that the precise sum had not then been ascertained. The statement that the Company had paid the 14,500*l.* 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*l.* 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 at 14,500*l.*, subject to a deduction, if the sum to be afterwards awarded as the price of the entailed land taken should exceed 128*l.* 15*s.* per acre. On the 5th of May following, the Company gave to Condie a debenture for 14,500*l.* expressed to be for money advanced to them by him; 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*l.*, 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*l.* 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 of April, though it was not delivered to the Company till the 5th of 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 3rd 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*l.*, subject to possible reduction in respect to the price of the lands; and that as the Company could not lawfully apply their funds in payment of that sum

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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 in making the new line, and that they should take a counter-security for repayment to them of the 14,500*l.* 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 3rd of 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 the 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 on the 5th of May, the object of which was to explain the real meaning of the parties; and from 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*l.* 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 were to pay was to be *in implement of their obligation*, that is, their original obligation, which shows 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 ought 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*l.*, 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 on the contract in *Gage* v. *The Newmarket Railway Company* (*a*), and in *Preston* v. *The Liverpool and Manchester Railway Company* (*b*), the terms of which contracts are very similar to that now under consideration.

(*a*) 7 Rail. Cas. 268. (*b*) 5 H. of L. Cas. 605.

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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*l.*, 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*l.*, whether ground was broken. I think not. Such an issue could not be directed, unless, if 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 the agreement could not be sustained, it would have been an unwarrantable application of the funds of the Company.

Per Lord Cranworth :—
An agreement to give a sum of money as a bribe to buy off opposition to a Railway Bill in Parliament cannot be enforced.

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 not 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*l.*, 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 Cranworth's opinion.

Lord WENSLEYDALE:

Lord Wensleydale's opinion.

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 facts already in proof, there is an obligation on the Appellants to pay any certain sum of money to the Respondent. 2ndly. 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. 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, the adoption of which line would save considerable expense, and would be advantageous to the Company, the agreement stipulated 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 Company shall

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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 arbitrator, Mr. Rannie, to ascertain and determine the amount to be paid by the Company to the Respondent, as 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 eighty 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 tenth 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 eleventh, 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*l.* 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*l.*, but with this qualification, that if on the submission to be entered into to

Rannie, the sum to be awarded by him for the eighty acres should exceed 128*l.* 15*s.* per imperial acre, the excess was to be deducted from and taken out of the 14,500*l.*

By this agreement two different payments are provided for, to be made to Sir William Drummond 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 that estate.

These two payments require to be considered separately; and first, the sum to be paid personally to Sir William 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* the 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, therefore, 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 the specified direction, is a different consideration, now not necessary to be adverted to.

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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. Those instruments are set out in the Appellants' case. 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*l.* (subject, as to the amount, to the condition in a letter of finding and declaration, to which I will afterwards advert,) and that as soon as the Company should break ground on the estate of the Respondent for the formation of the proposed branch, on the payment 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 breaking ground as 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 or interest until the Company have broken ground for the formation of their proposed branch to Dunkeld.

This suit, therefore, for the 14,500*l.* certainly cannot at present be enforced.

The next part of the fifth 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 eighty acres cannot be fixed until their nature and quality is ascertained, nor of course the price of the excess above eighty, 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 fifth 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 not broken ground, neither the agreement nor the bonds 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

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agreement between the parties of 5th October 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 to a Company were obligatory upon them. The case of *Philip* v. *The Edinburgh, Perth, and Dundee Railway Company* (*a*), in Scotland, and that of *The Queen* v. *The York and North Midland Railway Company* (*b*), in 1852, in England, so decided. This latter case, however, was reversed in 1853 in the Exchequer Chamber (*c*), and the former in this House (*d*) in the year 1857.

But though the Company were not bound to exercise the powers because the Legislature have given them, it was 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 to be insuperable. If Mr. Buchanan had fixed a *precise* sum to be paid to Sir William 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 never has been done. How much of the 14,500*l.*

(*a*) 2 Macq. 514.
(*b*) 1 Ell. & Black. 178.
(*c*) 1 Ell. & Black. 878.
(*d*) 2 Macq. 514.

declared by Mr. Buchanan to be payable would really have 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 probably been otherwise had Mr. Buchanan declared that 14,500*l.* 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*l.*, for there is in the explanatory instruments 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 William Stewart's remedy is confined to an action against the Company for unliquidated damages on the agreement. Whether the agreement is invalid on the ground of not being authorized by the Acts regulating the Company, it is not at present absolutely 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 created or regulated 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 avoided. This is the doctrine of *ultra vires*, and is, no doubt, sound law, though the application of it to the points of each particular case has not always been satisfactory to my mind.

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Lord Wensleydale's opinion.

But no objection can, I think, be made on the *ultra vires* doctrine to a contract by a company who wish to alter one of the branches of its railroad, and are 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, 7 & 8 Vict. c. 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 William 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 monies 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 life-renter, or any person holding under any partial or 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 lands 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.

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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 permitted 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 Wensleydale's opinion.

Lord KINGSDOWN: My Lords, in this case, as in the preceding, 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 be only wasting time for me to say anything more upon the case.

Lord Kingsdown's opinion.

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 declaration, remit the cause.

Mr. *Rolt:* It was the unanimous judgment of the Inner House.

The LORD CHANCELLOR: We say nothing about the expenses, but merely reverse the Interlocutor.

Lord CRANWORTH: The expenses that have been paid should be returned.

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

JUDGMENT.

Ordered and *Adjudged*, That the said Interlocutors of the 1st of November 1854 and 26th of February 1856, so far as complained of in the said Appeal, be, and the same are hereby reversed, and that the Defenders (Appellants) be assoilzied from the conclusions of the summons, and that the expenses in the Court below, if paid by the Defenders (Appellants) to the Pursuer (Respondent), be returned to the said Defenders (Appellants): 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.

BURNFORD AND CO.—RICHARDSON, LOCH, AND MCLAURIN.