estate tail, and who, there can be no doubt, would be considered as taking by disposition from the author of the settlement, and not by devolution from the previous tenant in tail.

I agree with all my noble and learned friends, that the succession duty payable by the appellant, is to be at the rate of one per cent., and that the interlocutor appealed from ought to be reversed.

Mr. Rolt.—My Lords, I think the Crown will hardly oppose our having costs. We were decreed to pay the costs in the Court below, and we ought to have the costs either here or in the Court below, as your Lordships may think fit.

Mr. Solicitor General.—On the part of the Crown I should not presume to argue the question of costs, but leave it entirely to your Lordships.

LORD CRANWORTH.—Is it a matter to argue in this particular case? The Crown will only get one per cent. duty.

Mr. Rolt.—The Crown hardly opposes it.

LORD CHELMSFORD.—I should be very much disposed to think, that the appellant should have costs, either here or in the Court below.

LORD CRANWORTH.—The costs below, of course.

LORD CHANCELLOR.—Clearly it is not according to our course of proceeding to give the costs of the appeal when the judgment is reversed.

Mr. Rolt.—The costs in the Court below it would be quite according to your Lordships' course of proceeding to give us.

LORD CHANCELLOR.—Yes; I think so. I think the costs below ought to be awarded to the appellant.

Mr. Rolt.—That will be added to the declaration?

LORD CHANCELLOR.—I think so. I think we all agree in that.

LORD CHELMSFORD.—The Lord Ordinary gave costs?

Mr. Rolt.—Yes, my Lord.

LORD CHELMSFORD.—That was reversed by the Court of Session, and they gave costs against you.

Mr. Rolt.—And your Lordships now reverse that?

LORD CHANCELLOR.—That is the opinion of the House.

Interlocutor reversed, and the cause remitted to the Court of Session, with a declaration, that the duty due by the appellant to the Crown is at the rate of one per cent., and that the costs in the Court below are to be paid to the appellant.

Agents for the Appellant, Watkins, Hooper, Baylis, and Baker, Solicitors, London; Walter Duthie, W.S., Edinburgh.—*Agent for the Respondent*, J. Timms, Solicitor, London.

AUGUST 3, 1860.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*, *v.* JOHN HAMILTON COLT, *Respondent.*

Railway Clauses Act — Jurisdiction — Damage too Remote — Penalty — Action for Relief — *C. was owner of a clay field, to which he had a private railway, and the Caled. R. Co., under their act, having interfered with it, were bound by the Railway Clauses Act, to make a substituted road under a penalty of £20 per day, besides in the end restoring the private railway to its former state. C. agreed with M. to let to M. the clay field, and reciting the obligation of the Caled. Co. engaged to make the substituted road himself, if the Co. failed to do so.*

HELD (affirming judgment), *That C. could maintain an action against the Co. for failure to make the substituted road, though a penalty was also incurred.*

HELD (reversing judgment), *That C. could not recover from the Co. by way of relief the damages which he had to pay to M. for breach of his agreement with M., for this was not the natural consequence of the Co.'s failure.*[1]

In the year 1845 the defenders obtained their Act of Corporation, by which they were authorized to make the Castlecarry Branch from the Monkland and Kirkintilloch Railway to the Scottish Central Railway. The Castlecarry branch passed through the pursuer's estate of Gartsherrie, and crossed a branch railway belonging to him, connecting his fire clay field at

[1] See previous reports 21 D. 1108; 31 Sc. Jur. 621. S. C. 3 Macq. Ap. 833: 32 Sc. Jur. 707.

Castlespails with the Monkland and Kirkintilloch Railway. The parties having disagreed as to the compensation to be paid to him, the defenders entered into possession of the land, required by them from the pursuer, in virtue of an *ex parte* valuation, obtained in June 1847, under § 84 of the Lands Clauses Consolidation Act. Before commencing their operations, they did not cause a sufficient railway to be made and maintained, in lieu of the pursuer's private railway, as they were required to do under the Railway Clauses Consolidation Act; but they cut through the pursuer's private railway, providing no substitute, and did nothing to render it available for traffic until 1855. Explanations were made by the defenders tending to throw the blame of the delay on the pursuer, but it is unnecessary to specify them.

In the meantime, in September 1853, the pursuer let his clay field to John Macdonald, on the footing that the railway company were "bound to connect the branch line with their main line," and with the stipulation that "the proprietor is to do so at his own expense, should they fail or refuse so to do."

In August 1854 Macdonald raised an action against the pursuer, concluding that he was bound to make the connecting branch, and for damages for the want of it; and, in November 1854, the pursuer raised the present action against the railway company, concluding that it should be found and declared, "that the defenders are bound to relieve the pursuer of an action raised against him at the instance of John Macdonald, residing," &c., "concluding, *inter alia*, for damages in respect of the pursuer's alleged failure to connect a branch line of railway on the pursuer's property with the main line of the railway belonging to the defenders, or with the Monkland and Kirkintilloch line of railway, and of all claims competent to the said John Macdonald against the pursuer arising out of the defenders' failure to form the said connexion, all as set forth in the said condescendence; reserving to the pursuer such claims of damages, and other claims, as he may have against the defenders in respect of their interference with his private railways, and his estate of Gartsherrie."

Macdonald's claim was settled by payment of £200 of damages and £103 14*s.* of expenses; and the parties to the present action arranged that the defenders' liability under it, in the event of the pursuer succeeding, should amount to the £303 14*s.* so paid to Macdonald, and the pursuer's expenses in defending the action, amounting to £148 0*s.* 11*d.*, subject to taxation.

The pursuer pleaded, that the defenders having failed to restore the connexion between his private railway and the Monkland and Kirkintilloch Railway, were liable to relieve him of loss or damage arising from the want of said connexion.

The defenders' first and fifth pleas in law were as follows:—"1. The damages alleged to have been sustained by the pursuer's tenant having been solely occasioned by the pursuer's own acts, the defenders are not bound to relieve him thereof. 5. The defenders are not liable in relief to the pursuer of the damages claimed, in respect, that, by the 6th section of the Railway Clauses Consolidation (Scotland) Act, they are only liable to make payment to the pursuer of such compensation for damages sustained by him by reason of the exercise of the powers vested in them by their acts, as shall be ascertained and determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act, for determining questions of compensation with regard to land purchased or taken under the provisions thereof, and the damages claimed have not been ascertained or determined in any of the ways provided by the said act."

By the Railway Clauses (Scotland) Act, 8 and 9 Vict. cap. 33, it is provided by § 6, that "in exercising the power given to the Company by the special act to construct the railway, and to take lands for that purpose, the company shall be subject to the provisions and restrictions contained in this act and in the said Lands Clauses Consolidation (Scotland) Act; and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties, by reason of the exercise, as regards such lands, of the powers by this or the special act, or any act incorporated therewith, vested in the company; and, except where otherwise provided by this or the special act, the amount of such compensation shall be ascertained and determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof; and all the provisions of the said last mentioned act shall be applicable to determine the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

Section 11 confers on railway companies various powers as to operations on roads, water courses, &c., and, in general, power to do all acts necessary for making, maintaining, and using their railway:—"Provided always that, in the exercise of the powers by this or the special act granted, the company shall do as little damage as can be, and shall make full satisfaction, in manner herein and in the special act, and any act incorporated therewith, provided to all parties interested, for all damages by them sustained by reason of the exercise of such powers."

With reference to roads cut through, or otherwise interfered with by railway companies in exercise of their statutory powers, the act provides:—

"Sect. 49. If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored, by writing under their hands, consent to an extension of the period, and in such case within such extended period, (that is to say,) if the road be a turnpike road, within six months, and if the road be not a turnpike road, within twelve months.

"Sect. 50. If any such road be not so restored, or the substituted road so completed as aforesaid, within the periods herein or in the special act fixed for that purpose, the company shall forfeit to the trustees, commissioners, surveyor, or other person having the management of the road interfered with by the company, if a public road, or if a private road to the owner thereof, twenty pounds for every day after the expiration of such periods respectively during which such road shall not be so restored or the substituted road completed: and it shall be lawful for the Sheriff or Justices by whom any such penalty is imposed, to order the whole or any part thereof to be laid out in executing the work in respect whereof such penalty was incurred."

The Court of Session held, that the damage claimed was recoverable at law, notwithstanding the statutory penalty; and that the pursuer's claim for relief was valid.

The railway company appealed, maintaining in their case, that the judgment of the Court of Session should be reversed, because—1. The right to sue at common law for the recovery of alleged damages, in respect of failure to restore a road, in terms of the 49th section of the Railway Clauses Consolidation (Scotland) Act, is excluded, according to a sound construction of that act, and acts incorporated therewith. *Carruthers* v. *the Caledonian Railway Company*, 15 D. 591. 2. Assuming that the appellants were bound to make reparation to the respondent at common law for damages sustained by him by reason of their failure to restore the road, they were not liable to relieve him of specific claims of damage, brought against him in respect of breach of obligation on his part, although such breach of obligation might have resulted from the alleged failure to restore. 3. The appellants were not bound to relieve the respondent of the damages alleged to have been sustained by Macdonald, in respect, that they were occasioned by the respondent's failure to implement his own personal obligation to Macdonald, and not in respect of any failure on the part of the appellants.

The *respondent*, in his *printed case*, supported the judgment on the following grounds:—1. Sufficient and relevant grounds to support the conclusions of the libel were set forth in the record. 2. The Court of Session had jurisdiction in the case, such not being excluded, either expressly or by necessary implication of the provisions of any of the statutes founded on; and 3. No special tribunal for the trial of such a case as the present, nor mode of ascertaining the amount of damage sustained, was appointed by these statutes, so that an action at common law was the only remedy competent in the circumstances.

Sir F. Kelly Q.C., and *R. Palmer* Q.C., for the appellants. — The judgment of the Court below is wrong. There was no right in the appellant to recover damages for the failure of the company to restore the road in terms of the 49th section of the Railway Clauses (Scotland) Act, 1845. That section says, that a road interfered with shall be restored to as good a state within a certain time. But the 50th section imposes a penalty which is amply sufficient to compensate the owner, being no less than a penalty of £20 per day, part of which the Sheriff may order to be laid out in doing the repairs which were omitted to be done. That remedy extinguishes any remedy competent at common law to the owner of the private road in question. Such was the construction put on the parallel sections of the English Railway Clauses Act, in *Watkins* v. *Great Northern Railway Company*, 16 Q. B. 961. That case is an authority in the present. The case cited on the other side in the Court below, of *Samuel* v. *Edinburgh and Glasgow Railway Company*, 11 D. 968, has no bearing, for that was a claim of damages, not for omitting to do certain work, but for doing it badly. In the cases of *Shand* v. *Aberdeen Canal Company*, 2 Dow, 519; *Goldie* v. *Oswald*, 2 Dow, 534; *Burnet* v. *Knowles*, 3 Dow, 280, the statutes had been violated. In the present case the appellants acted within the statute, and were authorized to take possession of the respondent's land. Even assuming, that the company are liable in damages to the respondent, they are not bound to repay him the costs and damages he has paid to Macdonald. He chose to make a contract with Macdonald, and must bear the consequences himself of any breach of it. The company had nothing to do with such contract, and were no parties to it. It is obvious the respondent might, on the same principle, have made a hundred contracts with different people all depending on the company making the road; but it is obvious, that the company could not be made to pay a hundredfold damages merely because the respondent so chose to contract with third parties. Whatever damage the company did to the respondent

was quite independent of any contract made by him with strangers, and is not to be measured by the damages incurred for breach of such contract.

Rolt Q.C., and *D. Mure*, for the respondent.—The judgment of the Court below was right. The company were expressly bound by the statute to restore this private railway, and they were responsible to the respondent for whatever damage was caused by the non-fulfilment of that obligation. The respondent clearly had a right of action against the company for the damage caused by not making the road. The legislature, in providing a punishment by way of penalty, did not thereby take away the remedy at common law. The statutory tribunal applies only to such damage as is lawfully done by the company in executing the works so long as they keep within their statute. But when they exceed their statute, as they did in this case, they are still liable for the damage resulting from their conduct. This principle was acted on in *Shand* v. *The Aberdeen Canal Company; Goldie* v. *Oswald; Burnett* v. *Knowles; and Samuel* v. *Edinburgh and Glasgow Railway Company*, 11 D. 968. The English case cited of *Watkins* v. *Great Northern Railway Company* was not a decision on the corresponding section of the English statute, but was an action for damage caused in the course of doing their work. The company being, therefore, liable to the respondent in damages, the question is, What is the measure of the damages? The respondent was entitled to rely on their obeying the statute, and to make his contracts with third parties on the footing, that they would do so. When the respondent granted this lease to Macdonald he was merely turning his property to account in the ordinary way, as he was entitled to do. When, therefore, he has been made liable in damages to third parties, directly in consequence of the company's breach of the statute, the company are bound to reimburse him, as they must have contemplated such consequences as the ordinary result of their conduct. The case of *Mansfield* v. *Campbell*, 14 S. 585, shews, that an action of relief may be brought against the company in such circumstances as the present, for there a vendor of an estate was held liable for the damages incurred by the purchaser to his heritable creditor, in consequence of the purchase money not being paid according to the contract of sale, so as to enable the vendor to pay his creditor. So in *Bramley* v. *Chesterton*, 2 C. B. N. S. 592, a tenant holding over, after notice to quit had expired, was held liable to reimburse the damage caused by his landlord being unable to give possession to a new tenant according to agreement.

R. Palmer replied.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, in arguing this appeal at your Lordships' bar, two questions were made—first, whether, upon the facts alleged by Colt the pursuer, irrespective of any transaction between him and Macdonald the lessee, he could have maintained an action against the Caledonian Railway Co. for having neglected to restore his branch railway, according to the obligation imposed upon them by § 49 of 8 and 9 Vict. cap. 33, the Scotch Railway Clauses Consolidation Act. And secondly, if this be so, then, whether the pursuer has chosen the proper remedy by bringing this action of relief.

Upon the first question I have not been able to entertain any doubt. The company were under a statutory obligation to restore the branch railway within a given period. They neglected to do so, whereby the pursuer was clearly damnified. *Primâ facie*, therefore, he has a right of action against him.

One answer attempted in the Court below, and countenanced to a certain degree by the Lord Ordinary, is, that the pursuer was confined for a remedy to the statutory tribunal, which the legislature has provided, where losses are sustained in the formation of railways. But it is well settled, that the statutory tribunal is only established to give compensation for losses sustained in consequence of what the railway company may do lawfully under the powers which the legislature has conferred upon them; and that for anything done in excess of these powers, or contrary to what the legislature in conferring these powers has commanded, the proper remedy is a common law action in the common law courts. The company were guilty of a wrong in disobeying the act of parliament, which requires the restoration of the pursuer's branch railway, and for this wrong they are liable to an action *ex delicto*.

At your Lordships' bar the answer to the action chiefly relied upon was, that the pursuer is confined to the penalties given by the 50th section of the statute. But this seems to me to be only a cumulative remedy given with a view to hasten the performance of the duty which the legislature has imposed. All doubt upon this point seems to be removed when we observe, that the whole of these penalties may, at the discretion of the Sheriff, be applied to the expense of completing the work which the company ought to have performed, so that, when the penalties have been recovered, the individual who has suffered a heavy pecuniary loss may be left without any reparation or indemnity. The prior clauses of the act respecting the "making of a temporary road" are differently framed; and the English case relied upon of *Watkins* v. *The Great Northern Railway* has no application, for that proceeded on the maxim *expressio unius est exclusio alterius*. An action having been expressly given where special damage had been

suffered, it was held to take away an action which otherwise would have been maintainable where no special damage had been suffered.

But as to the second question, after great consideration, I am bound to say, that I agree with the Lord Ordinary and Lord Benholme against the opinion of the majority of the Second Division of the Inner House. There does not seem to have been much discussion in the Inner House upon the subject; and I am sorry to say, that we are very imperfectly informed of the reasons upon which the action of relief was, in this instance, held competent. According to the explanation given of this action, it is generally applicable where the pursuer and the defender were under a common obligation, which ought first to have been performed by the defender, and which, by his neglect, was cast upon the pursuer, so that the pursuer, having been sued, was forced to pay damages, together with the cost of his adversary and his own costs in the suit. The aggregate sum to be recovered in the action of relief being composed of these three items, I think it was admitted, that, in the action of relief, the pursuer is entitled to recover the whole or no part of this sum.

In the present case the damages which Colt was obliged to pay to Macdonald amounted to £200, with £103 14*s.* for Macdonald's costs. Colt's own costs, in defending that action, amounted to £148 0*s.* 11*d.*; and it was agreed between the parties to this suit, that these three sums, added together making £451 14*s.* 11*d.*, should be held to be the measure of the liability of the company in the action of relief, if this action should be held to be maintainable.

But here the action of *Macdonald* v. *Colt* was *ex contractu*, or an agreement between them to which the company were in no shape privy. The cause of action which Colt had against the company was *ex delicto* accruing at the time when the branch railway ought to have been restored, long before the lease had been granted to Macdonald. The measure of damages to which Colt was entitled against the company by no means coincides with the measure of damages in the action of *Macdonald* v. *Colt*. Moreover, there is great difficulty in seeing how Colt can be entitled to recover against the company either the costs he paid to Macdonald, or his own costs in that action. He had agreed with Macdonald to restore the road within a certain time upon a contingency which happened. By neglecting to do so he broke his agreement with Macdonald. He might have performed that agreement, and then he neither would have been liable in costs to Macdonald, nor would he have incurred any costs in resisting an action to which there was no defence. If he had restored the road according to his agreement, he then might clearly have maintained an action against the company, in which he would have been entitled to recover as damages the sum he had expended in restoring the road, together with a compensation for any further loss he had sustained, by reason of the road not having been restored by the company within the period prescribed by the act of parliament.

During the argument we in vain called for authority from text writers or books of practice to shew, that an action of relief was competent under such circumstances. The counsel for the respondent relied exclusively on the decision in *Mansfield* v. *Campbell;* but supposing that case to be well decided, and that there may be an action of relief without warrandice, or any obligation jointly binding upon pursuer and defender, that case by no means goes so far as to decide, that, where part of the sum of money, sought to be recovered in the action of relief, might have been recovered as a special damage in an action by the pursuer against the defender for a wrong, a compensation for that wrong may be recovered in an action of relief.

The manner in which this proceeding was conducted seems to shew, that those who first recommended it took the same view of the action of relief which I have done, for they called upon the company to defend the action brought by Macdonald against Colt as if it had been brought upon an obligation into which the company had entered with Macdonald, and that the cause of action as between Macdonald and Colt was the same as between Colt and the company.

For these reasons I must advise your Lordships to reverse the interlocutor appealed against, and to restore the interlocutor of the Lord Ordinary, finding that the allegations of the pursuer were not sufficient to support the conclusions of the summons, and also dismissing the action with the costs incurred in the Court below.

LORD WENSLEYDALE.—My Lords, I entirely agree with my noble and learned friend on the woolsack, that the judgment of the Second Division of the Court of Session should be reversed, and in the reasons which he has given for his advice to your Lordships.

The reasoning of the Lord Ordinary in his note seems to me to be perfectly satisfactory, save as to that part of it where he intimates an opinion, that the remedy of the pursuer was not by action against the company for not fulfilling the obligation cast upon them by the 49th section of the Railway Clauses Consolidation Act, 1845, 8 and 9 Vict. c. 33. In my opinion, an action will undoubtedly lie against the company for not obeying that direction of the act of parliament. But the opinion intimated by the Lord Ordinary in no way affects his decision, that the damages and costs in the action by Macdonald against the pursuer arose in the failure of his performance of his own personal obligation voluntarily entered into by him to Macdonald. The reasoning of the Lord Ordinary seems to me to be perfectly satisfactory in that respect. The Lord Ordinary, justly, I conceive, says, that the proper action of relief is founded on the obligation of warrandice

or mandate, cautionary or conjunct obligation, or the like; and there is no ground whatever to say, that the pursuer has put himself in the situation of a cautioner to Macdonald for the performance of the statutory obligation imposed on the company, and still less with the consent or privity of the company, which seems necessary in the proper action of relief according to the authority of Erskine, 6, 81, 65.

And supposing, that this strict construction is not to be put on the form of the action for relief, and that the case of *Mansfield* v. *Campbell*, 14 S. 585, was correctly decided, and that therefore damage could be recovered in that form of action for the breach of a sub-contract which one man reasonably made with a third person on the faith, that the original contract would be fulfilled, still I think, that the pursuer would not be entitled to recover the damages sought to be recovered in this case, for the contract of the pursuer with Macdonald could not be considered as a reasonable consequence of the statutory obligation incurred by the company to restore the road, which, in truth, had been already broken before the sub-contract with Macdonald had been entered into. Still less could he recover the costs paid to Macdonald, or his own costs incurred in the improper defence of the action. Therefore I agree in advising your Lordships, that the judgment should be reversed.

LORD CHELMSFORD.—My Lords, this is an action of declarator brought for the purpose of having it found and declared, by decree of the Lords of our Council and Session, that the defenders are bound to relieve the pursuer of an action raised against him at the instance of John Macdonald, residing at Kingshill Cottage, in the county of Lanark, concluding, *inter alia*, for damages in respect of the pursuer's alleged failure to connect a branch line of railway on the pursuer's property with the main line of the railway belonging to the defenders, or with the Monkland and Kirkintilloch line of railway, and of all claims competent to the said John Macdonald against the pursuer arising out of the defenders' failure to form the said connexion.

The question involved in the proceedings is, whether the liability of the railway company to the respondent is of the same nature, and to the same extent, as the liability of the respondent to John Macdonald, so as to entitle the respondent to call upon the company to take upon themselves all the burthen of the action brought against him by Macdonald, and to relieve from all the consequences of that action.

The respondent is possessed of a fire clay field called Castlespails, to which he had made a private railway communicating with the Monkland and Kirkintilloch Railway belonging to the appellants. The appellants in 1845 obtained an act by which they were empowered to make a branch line, called the Castlecary Branch, from the Monkland and Kirkintilloch Railway to the Scottish Central Railway. In making this branch the appellants interfered with the respondent's private railway to his clay field. They were therefore bound by the 46th section of the Railway Clauses Consolidation (Scotland) Act 1845, before the commencement of their operations, to cause a sufficient road to be made, instead of the road to be interfered with, under a penalty, by the 47th section, of £20 for every day after the interruption of the existing road, during which the substituted road should not be made, to be paid to the respondent, as the owner of the private road. And by the 48th section they were also liable for any special damage which any party entitled to a right of way over the road so interfered with might suffer by reason of their failure to cause another sufficient road to be made before they interfered with the existing road. In addition to these provisions applicable to the commencement of their operations, the company were afterwards bound to restore the private road to as good a condition as it was in when first interfered with, under a penalty of £20 a day, to be paid to the respondent as the owner of the road. By the words, "the owner of the road" in the 47th section, the owner of the soil of the road is evidently intended, and if the substituted road is not made, he is to receive, and to be satisfied with, the £20 a day penalty.

The only person who can maintain an action for any special damage for not making a sufficient road after the interruption of the existing one, is, by the express words of the 48th section, the person entitled to a right of way over the road. I cannot help thinking also, that the intention of the legislature in the 50th section is, that the penalty of £20 incurred by not restoring the road should be given to the owner as a complete satisfaction for the damage which he might sustain. The reason alleged for the difference, as to the action for special damage, between the penalties imposed in this section and in the 48th section, is the power which is given in it for the Sheriff or Justices to order the whole or any part of the penalty to be laid out in executing the work. But it seems so unreasonable, that the magistrates should possess any power of direction with respect to a penalty which is forfeited to the owner of a private road, that I am disposed to confine the application of this part of the section to the case of public roads. But however this may be, there can be no doubt, that the person entitled to a right of way over the road is not excluded from his action by any special damage which he may sustain by reason of a failure to restore the road, although no such right is expressly given to him, as it is by the 48th section, for not making the substituted road.

This being the state of things, the respondent entered into an agreement with Macdonald for a lease of Castlespails clay pit field for nineteen years, by which it was stipulated, that Macdonald

was to have the use of the private railway for all purposes connected with the beneficial working of the clay, and which contained these words: "it being understood the Caledonian Railway Co. is bound to connect the branch line with their main line, or with the Monkland and Kirkintilloch line: the proprietor (the respondent) is to do so at his own expense should they fail or refuse to do so." Macdonald, therefore, entering under this agreement, was entitled to maintain an action against the respondent for any breach of it, and against the company also for any special damage he might sustain by their failure to perform their duty in restoring the road.

Under these circumstances, the private railway not having been connected either with the main line or with the Monkland and Kirkintilloch line, Macdonald, in August 1854, brought his action of declarator against the respondent to have it declared, *inter alia*, that the respondent was "bound to connect the branch line with the main line, or with the Monkland and Kirkintilloch line, all as set forth in the heads of agreement referred to in the condescendence, and to make payment to the pursuer of the sum of £2000 sterling in the name of damages for his failure or breach of agreement."

By the pleas in law for the pursuer it is alleged, in the third plea, that the defender having undertaken and become bound by the agreement to connect the branch line of the railway in question with the main line or with the Monkland and Kirkintilloch line, it was his duty to implement and fulfil the said obligation without undue delay; and having failed in that duty, to the injury and damage of the pursuer, he is liable in reparation as concluded for in the summons.

It thus appears, that Macdonald's action was founded entirely on the agreement into which the respondent had entered with him. Notice of this action was given to the company, and they were requested to defend the same; but they denied all liability for any portion of the damages claimed by Macdonald, and declined to defend the action. Macdonald's action was ultimately settled, but, previously thereto, the respondent had brought an action against the company, which was arranged on the 12th May 1856, and a discharge of all claims against the company was given by the respondent, "with a reservation of my right of relief against the said Caledonian Railway Company of the claim brought against me by the said John Macdonald, my tenant, or any other claim that he may hereafter bring against me for damages alleged to be sustained by him in consequence of the non-formation or restoration of the private railway to connect his clay field with the main line of the said Caledonian Company or with the Monkland and Kirkintilloch Railway, and also the said Caledonian Railway Company's defences against my said claim of relief."

Under these circumstances, the question arises whether the present action for relief is competent.

In the course of the argument the learned counsel at the bar were pressed for some authority from text writers, to shew when an action of relief is competent, but they could refer to none; and your Lordships are left in doubt whether such an action can be maintained in any other cases than those which are mentioned by the Lord Ordinary, viz., those which are founded on some special obligation of warrandice or mandate, cautionary or conjunct obligation, or the like. But, whatever may be the nature of the rights to which this species of action applies, the principle upon which it proceeds must necessarily limit it to those cases, where liability of the party, from whom the relief is claimed, is exactly commensurate with that of the party claiming the relief. Thus, if the measure of damages to which the company were liable to the respondent was precisely co-extensive with the amount for which the respondent was liable to Macdonald, it would seem reasonable, in order to avoid multiplicity of actions, that the respondent should be entitled to call upon the company to come in and take his place in the defence of Macdonald's action. But this is by no means the case, as a short consideration will shew. It may be, that, upon the view which I am rather disposed to take of the act, the company were only liable to the respondent for the prescribed penalties, which, of course, would put an end to all difficulty in the case; but I will assume, that the respondent was entitled to maintain his action for all the special damage which necessarily flowed from their breach of duty. Thus, for instance, if, by reason of the non-restoration of the road, he had been unable to let the clay pit field, or had suffered any other injury directly arising from the omission of the company, he might have alleged it as a special damage in any action brought against them. But he had no such ground of special damage to allege against the company. He had entered into an independent agreement with Macdonald, which he had failed to perform; and although his engagement to Macdonald was to the same extent as the liability of the company, yet the damages which he had to pay to Macdonald, and the costs of the action, could not be recovered as special damage from the company, because they were not the direct consequence of their breach of duty, but were occasioned by the non-fulfilment of his own undertaking.

The point cannot be put more concisely and pointedly than it is by the Lord Ordinary. He says, "The ground of Macdonald's action is not simply, that the defenders have failed to make the connexion in question, but that the pursuer has failed to fulfil his own personal obligation undertaken to Macdonald. That obligation, too, was not undertaken on the faith of the

defenders doing their alleged duty, but it expressly contemplates the case of their failure in that respect, and takes the pursuer bound to Macdonald in that very covenant to do what was necessary."

The damages recovered by Macdonald cannot be considered as arising naturally, that is, "according to the usual course of things"—to use the words of Baron Alderson in *Hadley* v. *Baxendale*, 9 Exch. 354—from the company's breach of duty, but from something collateral to, and independent of it, viz., from the respondent's failure to perform his contract.

This is very different from the case of *Mansfield* v. *Campbell*, which was strongly relied upon on the part of the respondent. There the damage to which the vendor was liable was the immediate result of the non-fulfilment of the purchaser's contract. The purchaser had agreed to pay the purchase money by instalments. The vendor, relying entirely upon the performance of this promise, had given a notice to pay off the heritable bond, which, it must be observed, the purchaser knew, that the vendor must do in order to clear the title. The failure of the purchaser to perform his promise was the sole cause of the default of the vendor, upon which the creditor recovered his damages. And the damages to which the creditor was entitled were exactly those to which the vendor had been made liable by the default of the purchaser.

I should have felt much greater difficulty in this case if it had appeared, that the learned Judges of the Court of Session had distinctly determined, after argument, that this was a case for an action of relief. But their attention seems to have been principally, if not entirely, directed to the question, whether the action was incompetent on account of the damages being the subject of statutory jurisdiction, and whether the penalties prescribed by the act were not the sole measure of compensation. It is true, that their Lordships, in the consideration of the case, appear to have assumed, that the action for relief was well founded. But that there was no clear and distinct expression of an opinion upon this point appears from the note of the Lord Ordinary, for, upon the remit to him, he says, "The Lord Ordinary had been of opinion, that this was not a case for an action of relief such as the present; but, apparently, that view was considered too strict in the Inner House."

Resorting, then, to principle in the absence of authority, it appears to me, that the action of relief in a question of damages can be applicable only where the liability of a pursuer and defender are so completely co-extensive, that the defender, by standing in the pursuer's shoes in the action brought against him, would satisfy both his own and the pursuer's liability at the same time. That was not the case between the parties. The company, although liable to the respondent for their own breach of duty, were not liable to him for more, and could not be called upon to indemnify him against the consequences of an action which arose out of his own neglect to perform an independent contract into which he had voluntarily entered with Macdonald, and upon which alone Macdonald's right to recover his own peculiar damages was founded.

For these reasons, I think, that the interlocutors appealed against ought to be reversed.

Mr. Palmer.—The cause will be remitted to the Court of Session, with a direction to decern expenses accordingly. I apprehend, that will be the correct form of the order, because the expenses ought to have been given to us; we ought to have succeeded in the Inner House instead of failing.

LORD CHANCELLOR.—That will be right.

Interlocutor of Inner House reversed, and that of the Lord Ordinary of 23d February 1858 *affirmed.*

For Appellants, Grahame, Weems, and Grahame, Solicitors, London; Hope and Mackay, W.S., Edinburgh.—*For Respondents*, Connell and Hope, Solicitors, London; John Stewart, W.S., Edinburgh.

AUGUST 9, 1860.

JOHN CAIRNCROSS and Others, *Appellants*, *v.* JAMES LORIMER and Others, *Respondents.*

Church—Dissenting Congregation—Right to Chapel—Personal Bar—Acquiescence—Mora.

A congregation of dissenters, by their trustees, held the property of their church under a trust to adhere to "the original principles of the Secession."

HELD (affirming judgment), *That members of the congregation, forming a small minority thereof, were barred from claiming restitution of the church, which, by a resolution of the congregation, had been separated from the religious body to which it originally belonged, and annexed to*