

tender actual implement of the original obligation. The value of the shares may have materially changed.

I am therefore of opinion that he cannot complain if after he has refused to implement the contract found to be binding on him, he is now precluded from tendering actual specific implement.

LORD CRAIGHILL and LORD RUTHERFURD CLARK concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for Reclaimer—Trayner—Guthrie.
Agents—Macnochie & Hare, W.S.

Counsel for Respondent—J. P. B. Robertson
—Dickson. Agents—J. & J. Ross, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Lord Kinnear, Ordinary.]

JAMIESON (DUNDAS' TRUSTEE) AND ANOTHER *v.* THE FORTH BRIDGE RAILWAY COMPANY.

Railway—Construction of Railway—Compulsory Taking of Land—Compensation.

The promoters of a railway company, one of whose proposed undertakings was the erection of a bridge over an estuary, entered, while the bill in which they sought powers to carry out the undertaking was in Parliament, into an agreement with the proprietor of an island in the estuary to pay to him £1500 for the right to erect piers thereon, and in full of compensation for damage caused by such erection—the payment to be contingent on the Act passing and the works being commenced. The Act passed, the works commenced, and the £1500 was paid, and a discharge in full of claims for ground taken and for compensation was granted. Thereafter the company obtained a new Act, authorising a deviation from the line of railway which was to pass over the bridge, but under which the bridge was to be of the same position and character. This Act provided that the company should “abandon the construction of the railway” authorised by the former Act. It gave them power to take such land as might be required for the construction of the new line. They then gave notice that they intended to take the whole of the island. The proprietor maintained that the £1500 already paid to him by the company under the former Act was not to be taken into account in estimating the amount of compensation payable to him for the loss of the whole island. *Held* that the amount formerly paid ought to be taken into account.

In 1873, when the Forth Bridge Railway Bill of that year, for the incorporation of the Forth Bridge Railway Company, and for authority to the company to make certain railways, one of which was to cross the Firth of Forth by

a bridge, was passing through Parliament, one of the proposals of which bill was the acquisition of part of the island of Inchgarvie in the Firth of Forth, forming part of the estate of Dundas, an agreement was made between the provisional directors of the company of the first part, and James Dundas of Dundas, George Dundas, younger of Dundas, and George Auldjo Jamieson, Chartered Accountant in Edinburgh, trustee on the Dundas estate under trust-disposition executed by George Dundas, on the second part. The second parties had opposed the progress of the bill in Parliament. By the agreement they agreed to withdraw all opposition to the bill, “on the condition that the first parties, contingent on the Act being obtained, and also contingent on the works being commenced, paid to them ‘for the right to erect the necessary piers in execution of the powers asked by the said bill, on the island of Inchgarvie,’ and ‘in full of all claims for compensation therefor, amenity, residential damage, and damage to remaining lands, and of all other claims which they have or could have by or in consequence of the execution of the said works, whether of a temporary or permanent nature, the sum of £1500, said payment to be made within twenty-one days from the date of any portion of the said works being commenced.’” The first parties undertook, within six weeks after the passing of the bill, to deliver to the second parties a formal agreement to the above effect, under the seal of the company, the first agreement to be void on the execution of the formal agreement.

The bill passed in August 1873, and became the Forth Bridge Act of that year, the railways permitted by it to be made being enumerated in section 5.

On 17th September 1878, the company, by a minute endorsed on the agreement, ratified and confirmed it in its whole articles and conditions, and agreed, contingently on the works therein referred to being commenced, to pay to the second parties in the agreement, as proprietors of Inchgarvie, “for the right to erect the necessary piers in connection with the powers contained in the said Forth Bridge Railway Act 1873, and in full of all claims for compensation therefor, amenity, residential damage, and damage to remaining lands, and of all other claims which they have or could have by or in consequence of the execution of said works, whether of a temporary or permanent nature, the sum of £1500; said payment to be made within twenty-one days from the date of any portion of the said works being commenced.”

The company commenced their works on the island on 23d September following, and paid £1500 to Mr Jamieson as trustee, who granted a discharge, *inter alia*, in the following terms—“Therefore I do hereby, as trustee foresaid, discharge the Forth Bridge Railway Company not only of the said sum of £1500 paid to me as aforesaid, but also of all claims for ground required, taken, or occupied, or to be taken or occupied, by the said Forth Bridge Railway Company, on the said island of Inchgarvie, for the execution of the works authorised by the said Forth Bridge Railway Act, 1873, and for compensation for the right to erect the necessary piers in execution of the powers contained in the said Forth Bridge Railway Act 1873,

amenity, residential damage, and damage to remaining lands, and of all other claims which the said James Dundas, George Dundas, or I, the said George Auldjo Jamieson, as trustee foresaid, had, have, or might have by or in consequence of the execution of said works, whether of a temporary or permanent nature . . . and further, I, the said George Auldjo Jamieson, bind myself and my successors, proprietors of the island, to deliver to the said Forth Bridge Railway Company such a conveyance or other writ as may be necessary to constitute a legal and sufficient title to the said company, for their erecting and maintaining the piers of the said bridge, on the said island, authorised by the said Forth Bridge Railway Act 1873, including right of access to the said island at all times, and right to use the ground adjoining the said piers and site or sites thereof when and so far as necessary for the purposes of erecting, maintaining the said piers, and right to place and deposit materials on such adjoining ground for these purposes, and that when required by the said railway company, and at their expense."

In 1882—the works at Inchgarvie having then gone but a short way—it was found necessary to apply to Parliament for a new Act to vary somewhat the design of the bridge, to obtain additional powers, and to substitute a railway for one of those authorised in 1873. Another Act was applied for and passed (the Forth Bridge Railway Act 1882), by section 4 of which the Forth Bridge Company were authorised to make and maintain a deviation or substituted railway for that authorised by the Act of 1873, but which was also to cross the Forth by a bridge similar in position, character, and general features to that allowed by the Act of 1873. Section 19 provided—"The company shall abandon the construction of the railways and works authorised by and described in the fifth section of the Act of 1873, and the company shall, except only as is by this Act expressly provided, be absolutely freed and discharged from all obligations with respect to the making and maintaining of the aforesaid railways and works, and from all penalties and liabilities in respect of the non-completion thereof, or any part thereof."

Under the Act of 1882 the company required to take the whole of Inchgarvie, and in August 1883 they gave the statutory notice to the proprietors of Inchgarvie of their intention to acquire the whole of the island for the purposes of the Act. The parties having failed to agree on the amount of compensation to be paid for the whole island, entered into an arbitration. The proprietors lodged a claim in the reference for £13,000, making no allowance for the previous payment of £1500, while the company maintained that the £1500 already paid was sufficient compensation, but tendered a further sum of £600.

Mr Jamieson and Captain Adam Alexander Dundas Dundas (James Dundas and George Dundas having died in the interval) then raised the present action. They concluded for declarator that at the date of the notice served on them by the company of their proposed acquisition of Inchgarvie, "the said island was the absolute property of the pursuers, and that the defenders had and have no right or powers in or over the said island or any part thereof, and in particular that the defenders had and have no right or powers in or

over the said island under the Forth Bridge Railway Act 1873; and that the sum of £1500 sterling paid to the pursuer, the said George Auldjo Jamieson, as trustee foresaid, by the Forth Bridge Railway Company in September 1878, for the causes set forth in a discharge granted by the pursuer George Auldjo Jamieson to the said Forth Bridge Railway Company, dated 23d September 1878, does not, nor does any part thereof, fall to be deducted from, or taken into account in estimating, the compensation to be made by the defenders to the pursuers for taking the said island under the powers of the said Forth Bridge Railway Act 1882."

The pursuers pleaded—" (1) The island of Inchgarvie having been, at the date of the notice under the Act of 1882, the property of the pursuers, and subject to no right in favour of the defenders, the pursuers are entitled to compensation therefor in terms of the Lands Clauses Consolidation (Scotland) Act 1845. (2) The island of Inchgarvie having been, at the date of the notice under the Act of 1882, the property of the pursuers, and subject to no right in favour of the defenders, the pursuers are entitled to compensation therefor in terms of the Lands Clauses Consolidation (Scotland) Act 1845, without the payment of £1500 libelled being imputed to the said compensation. (3) The said sum of £1500 having been paid under an agreement which had regard to certain works authorised by the Forth Bridge Railway Act 1873, and the powers for the construction of these works having been subsequently repealed by the Act of 1882, it is incompetent and illegal for the defenders to plead said payment by way of deduction from or set-off against the amount of compensation now to be found due by them to the pursuers."

The defenders pleaded—" (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (3) On a sound construction of the agreement come to between the proprietors of the island of Inchgarvie and the defenders, and the discharge following thereon, the said sum of £1500 paid by the defenders under the Forth Bridge Railway Act 1873 ought to be taken into account or imputed as part of the compensation payable by the defenders under the foresaid submission. (4) In any view, the fact that the said sum of £1500 was paid by the defenders is a fair element for the arbiters to take into consideration in fixing the compensation payable under the said reference, and it is incompetent to exclude it, as is proposed in the present action. (5) In the circumstances stated, the present action is unnecessary, and the defenders ought to be assoilzied, with expenses."

The Lord Ordinary (KINNEAR) assoilzied the defenders.

"*Opinion.*—The parties are not in controversy as to the facts which are material for the decision of this case.

"By the Forth Bridge Railway Act 1873 the defenders' company was empowered to take and acquire a part of the island of Inchgarvie for the purposes of the Act. While the bill was passing through Parliament an agreement had been made between the pursuers and the promoters that £1500 should be paid to the pursuers, as proprietors of Inchgarvie, for the right to erect piers upon the island, and in full of all claims for com-

pensation which might arise to them from the execution of the powers asked by the bill, and this agreement was confirmed by the company after the Act had passed, and has in part been carried into effect. It had been stipulated that the agreement should be contingent upon the commencement of the works, but that the sum of £1500 should be paid to the pursuers within twenty-one days after any portion of the works was commenced. The company began their works on the island of Inchgarvie on 23d September 1878, and paid the £1500 in conformity with this agreement, and obtained a discharge from the pursuer Mr Jamieson, by which they are discharged 'not only of the said sum of £1500, but also of all claims for ground required, taken, or occupied by the company for the execution of the works authorised by the Forth Bridge Railway Act 1873, and for compensation for the right to erect the necessary piers in execution of the powers of the Act, and for damage to lands, and for all other claims which the pursuers might have in consequence of the execution of the said works.' And further, the pursuer bound himself and his successors, proprietors of the island, to deliver to the company such a conveyance or other writ as might be necessary to constitute a legal and sufficient title to the company, for the execution and maintenance of their works, and for the use of the ground which might be requisite for that purpose.

"There can be no doubt as to the effect in law of these transactions. The company had not acquired a feudal title to the land. But their right as against the proprietors was complete and absolute. They had purchased the land for the purposes of their Act, paid the price, and entered into possession, and if they had thought it necessary or desirable to complete a formal title they were in a position to demand a conveyance for that purpose, which the pursuers could not have withheld.

"While matters were in that position, and when very little had been done in the way of constructing works upon Inchgarvie, the Forth Bridge Railway Act 1882 was passed, authorising the company to construct a railway, varying in certain respects from the railway authorised by the Act of 1873, and in substitution for that railway. But the new railway, like that for which it was substituted, comprises a bridge across the Forth, and the new bridge, although it differs to some extent in design from that authorised by the Act of 1873, is, in like manner, to be supported by piers on the island of Inchgarvie. The company, however, say that for the execution of the new bridge they have found it necessary to take not merely a part, as before, but the whole of the island of Inchgarvie, and they have served the pursuers with notice to that effect in the exercise of their powers.

"In these circumstances the pursuers maintain that in estimating the compensation to be paid for the island the company are not entitled to take into account the rights which they had already acquired under the Act of 1873, or the price of £1500 which they have paid for the acquisition of these rights, and they accordingly seek to obtain a declarator—Firstly, That at the date when the notice was served they were themselves absolute proprietors of the island, and that the defenders had no right or powers in or over the same, or any part thereof, and in particular, that they

have no right in or over the island under the Act 1873; and secondly, that the £1500 which they have paid does not fall to be taken into account in estimating the compensation to be paid under the Act of 1882.

"I am of opinion that this contention is altogether groundless in law.

"It is founded mainly on the 19th section of the Act of 1882, by which it is enacted that 'the company shall abandon the construction of the railways and works authorised by and described in the 5th section of the Act of 1873, and that the company shall, except only as is by this Act expressly provided, be absolutely freed and discharged from all obligations with respect to the making and maintaining the railways and works.' The 20th section provides that the abandonment thus authorised shall not affect the right of any landlord to compensation for damage occasioned by the entry of the company upon land, or by the temporary occupation of lands for the purposes of the abandoned railways; and the 21st provides that where 'any contract has been entered into, or notice given by the company for the purchase of land in respect of the works to be abandoned, the company shall be released from all liability to purchase or complete the purchase of such lands, but that compensation shall be made to the owners and occupiers of such land for all damage which may be sustained by reason of the purchase not being completed according to the contract or notice.'

"I find nothing in these sections, or in any part of the Act, to extinguish the rights which the company may have acquired under completed contracts. If at the passing of the Act they were under contract to purchase land for the purposes of the Act of 1873 which will not be required for the Act of 1882, they are released from their obligation to carry out these contracts upon payment of compensation for non-performance. But if land which they had contracted to purchase for the purposes of the first Act may still be made available for the purposes of the second, there is nothing in the second Act to disturb such a contract, or to relieve either the company or the landowner from its obligations. And if a contract for the purchase of such land has been not only completed, but carried into execution, by the company taking possession and making payment of the price, there is nothing in the Act to extinguish the rights thus acquired, or to render them unavailable for the subsisting purposes of the undertaking.

"The pursuers, however, maintain that they agreed, in giving the rights which the company acquired by the contract in question, to grant a conveyance of the land for a specific purpose, viz., the erecting and maintaining of piers for the support of the bridge authorised by the Act of 1873. They say that the performance of that contract has been rendered impossible by the Act of 1882, which requires that the works which it contemplates shall be abandoned; that they are not bound to give a conveyance to the company for any other purpose except the erection of the bridge authorised by the Act of 1873; and that they are therefore released entirely from any obligation that the contract imposed upon them, and are entitled to withhold the conveyance without being required at the same time to repay the purchase money which they have received

It appears to me that that reasoning is altogether unsound. It may be that when land has been sold for a specific purpose, the seller at any time before he has actually conveyed the land, may be entitled to avoid the contract upon discovering that his land is to be applied to another and a different purpose; but the contract is still perfectly good until he sets it aside. It is not void, but voidable; and it follows, upon a principle of universal application in the rescission of contracts, that it cannot be set aside except upon condition of restoring the other party to the position in which he was before the contract was made. The rule is illustrated by a very well-known series of decisions, of which *Addie v. The Western Bank*, 5 M. (H. L.) 80, and *Houldsworth v. The City of Glasgow Bank*, 12th March 1880, 7 R. 53, are familiar examples. But it is of no consequence whether the ground of reduction is, as in these causes, that a contract has been obtained by fraud or that the purpose has failed. There can be no reduction upon whatever ground without restitution *in integrum*. Assuming, therefore, that if the railway company were now demanding delivery of the conveyance contemplated by the agreement, the pursuers would be entitled to withhold the conveyance and rescind the contract, I think it clear in law that they would be bound to repay the £1500 which they have received from the company. But except for the purpose of testing the pursuers' argument I am not prepared to make that assumption. I find nothing in the record which enables me to determine that the pursuers could have withheld a conveyance if the railway company had demanded it under the contract, giving notice, under the Act of 1882, with reference to those parts of the island only to which they have not already acquired right. I do not decide that, because it does not arise under this action, and probably it could not be decided without knowing more of the facts than appears upon the record. But I do not think that the pursuers' averments are sufficient to support that conclusion. It is manifest that the merely formal substitution of the authority of the Act of 1882 for that of the Act of 1873 does not necessarily involve such a perversion of the land to purposes alien to the contract as would give the pursuers right to withhold a conveyance. And it is equally clear that no immaterial variation in the design of the bridge would give the pursuers such a right. There must be a difference in the uses of the ground so material as to enable the pursuers to say that their land is about to be applied to a purpose substantially different from that for which they agreed to sell it. Now, there is, in one respect, a material difference between the bridge now proposed and the former, because the whole island is now required, and not merely a part of it. But it does not follow that there is any substantial difference in the use which they are to make of the part they have already acquired under their contract. Therefore I am not prepared to affirm the first proposition which the pursuers must establish, viz., that they are entitled to rescind this contract; and I am prepared to negative their second proposition, viz., that they are entitled to rescind it without repaying the purchase money which they have received. The defenders are therefore entitled to absolvitor."

The pursuers reclaimed, and argued—The

power to take the island under the Act of 1882 was a thing entirely different from the power to take part of it given by the Act and agreement of 1873, and what was done under the latter could not be taken into account in estimating compensation under the former. Under the agreement of 1873 the promoters of the company, incorporated by the Act of that year, acquired from the pursuers a servitude right for the purposes of that Act. These purposes were expressly abandoned by section 19 of the Act of 1882. By the service of their notice the company had acquired a right of property for another and a distinct undertaking, sanctioned by a separate Act. The contracts were entirely distinct. The abandonment of 1882 had swept away the works of 1873, and all contracts with regard to them.

Authorities—Brice on *Ultra Vires*, pp. 110-125, and cases there collected; *Bostock v. North Staffordshire Railway Company*, May 8, 1855, 24 L. J., Q. B. 225; *Edinburgh and Glasgow Railway Company v. Campbell*, 4 Macq. 570.

The defenders replied—The contract under the Act of 1882 was merely supplementary of that under the agreement of 1873. They were between the same parties, and for the same purposes, namely, the building of a bridge on the same site in either case. The amount paid in 1878 was to be regarded as an instalment, corresponding to the rights then acquired, of the whole price now to be paid for the acquisition in property of the whole site.

Authority—*Caledonian Railway Company v. Henderson*, November 17, 1876, 4 R. 140.

At advising—

LORD JUSTICE-CLERK—We have had this case very fully and ably argued; and it has also been presented to us by the Lord Ordinary in a very careful note. I have no hesitation in coming to the same conclusion as that at which the Lord Ordinary has arrived.

The declarator which is brought in name of the proprietors of Inchgarvie is a very simple one—first, that at the date when the notice was served they were themselves absolute proprietors of the island, and that the defenders had no right or powers in or over the island under the Act of 1873. That is the first conclusion, and I am quite prepared, and without any hesitation at all, to negative that as a legal proposition, or a proposition in point of fact, however desirable the pursuers may feel it to be. I think we cannot find that the island is the absolute property of the pursuers, because I think it is at this moment a property burdened by certain rights conferred by the Act of 1873, which still subsist, and that the defenders, the Forth Bridge Railway Company, who are the same parties who concluded the agreement referred to in the process, are in possession of that right. I am of opinion that they had that right before the Act of 1882 was passed, and that there is nothing in the Act of 1882 which can by possibility be taken to abrogate their right.

Then they have another conclusion—that the £1500 which the company have paid does not fall to be taken into account in estimating the compensation to be paid under the Act of 1882. Whether that is or is not to be deducted from the compensation which the arbiters may award, it does not fall within this action to determine; but that it does not fall to be taken

into account in estimating what is to be given for the whole island is a proposition that I am prepared to negative.

The grounds on which I proceed are very fully stated by the Lord Ordinary, and to state my own opinion on the points he discusses is almost unnecessary. But I may just add a few words.

This corporation, the railway company, made an agreement with Mr Dundas, or those representing him, in 1878, for the purpose of obtaining land on which to carry on their then project of a bridge across the Forth, by which they agreed to pay £1500 to the pursuers to get leave to carry their bridge over the island of Inchgarvie, according to plans that had been deposited, and also to obtain conveyances of any ground that might be required for the purpose of carrying their plans into effect. Now, the £1500 was paid before the Act of 1882 was passed. It is now contended—first, that the railway company incorporated by the Act of 1882 have no rights under that agreement at all; and secondly, that the proprietor prosecuting his claim for land to be taken under the new Act is not bound to give any allowance for the money he has already received. It is said that the works contemplated under this Act of 1882, whether identical or not with the works of the former Act, must be constructed under a statute different from that under which this first transaction took place; that the powers which the same parties—the same contractors—received in 1882 are not the same powers as were formerly granted—are, in fact, different as well as greater powers than the company possessed by the Act of 1873. I am clearly of opinion that that position is entirely and wholly fallacious. The company by the Act of 1882 got additional powers. They lost nothing that they had got before, but they got something in addition—the limits of deviation were extended. They were the same people, and they were authorised to do the same things. No doubt the Act of Parliament, for the purpose of not having two codes of authority between the parties, provides that the company, while they take the new powers, shall not be entitled to go on and exercise the old powers. But it is manifest that the legal rule as to the use to which a railway company can put the land taken under compulsory powers—that they are not to make a totally different use of the land taken from the use for which it was acquired—can have no possible application to a case where there is just a continuation of the same undertaking, with powers equal or superior to the powers already obtained, and which powers are in no way derogated from by the new provisions. The claim is an undecided one, and what the arbiter is to do is a matter on which I would rather not express my opinion. It is enough to say that we are not prepared to affirm, but to negative, the whole conclusions of this action in so far as they are intended to set up a claim for unburdened property, and to negative the pursuer's contention under the agreement of 1873.

I see that the 17th clause of the Act does not relate to this matter at all. But I cannot doubt that the whole powers that the company had under the Act of 1873 are substantially renewed and reaffirmed by the Act of 1882.

LORD YOUNG—I am in all respects of the same opinion. I think, although the bridge authorised

by the Act of 1882 may in some respects differ from that authorised by the Act of 1873, it is nevertheless substantially the same bridge, and so far as regards any question between the railway company and the proprietor of Inchgarvie, the very same bridge; and I think the case must be decided on the same footing. Now, in 1873 the promoters of the Act of that year made a bargain with the proprietor of Inchgarvie, which immediately after the passing of the Act was confirmed and ratified, in terms of the provisional agreement of the railway company acquiring the ground, or a right to use the ground, and make such use of the land as was necessary for the construction of that bridge, and resting the piers upon it, on paying the proprietor £1500 therefor. It was stipulated that the money should be paid as soon as the works were commenced. They were commenced, we are informed, on 23rd September 1873—that is, after the expiry of the five years—after the expiry of the period within which statutory powers alone could be exercised; but so far as acquiring the right from the proprietor of Inchgarvie to make such use of his ground as was necessary for the construction of the bridge was concerned, there was no occasion to exercise any statutory powers. The agreement of 1873, which was quite a statutory proceeding, rendered it unnecessary to exercise any statutory powers thereafter, so far as the proprietor was concerned. They were entitled to take and use the ground so far as necessary for their purpose; and accordingly after the expiry of the period for the exercise of the statutory powers they commenced their works. When they commenced their works they paid him the sum of £1500, and got his discharge acknowledging that the £1500 had been paid to him, and discharging “all claims for ground required, taken or occupied, or to be taken or occupied, by the said Forth Bridge Railway Company, on the said island of Inchgarvie, for the execution of the works authorised by the said Forth Bridge Railway Act 1873, and for compensation,” and so on. The railway company had thus acquired a right—a valuable right—for a money consideration, to take and use the ground necessary for making and maintaining a bridge. Now, that right has never been taken from them; it is a right which they have on written deeds. It is theirs, and I altogether demur to the proposition that they are not entitled to exercise that right, so acquired and paid for, for the purposes of the Act of 1882, rejecting altogether the argument that they acquired and paid for the right in order to exercise the same powers under the Act of 1873. I must say I should be ashamed of the law if I felt compelled to give effect to an argument so altogether inequitable as that—that the right to take and use the ground necessary for the bridge was with reference to the powers to make it under the Act of 1873, and not with reference to the powers to make the identical same bridge under the Act of 1882. I say I reject that unhesitatingly, as not supported by law or by any consideration of equity or good sense. The right is in the railway company, and I think they are entitled, as in a question with the party from whom they acquired it, and to whom they paid the price, to use the ground for the very purpose which was contemplated, namely, the erection of

the bridge. That was the thing which was in the contemplation of the parties, and not the particular statute—whether of 1873, of 1876, or of 1882—under which the bridge was to be made. The railway company now desire to acquire the property of the island. It is only two and a-half acres in extent, we were told, and I assume that the railway company have legitimate occasion to have the whole of it in property. They have certainly authority to acquire it. They are thus seeking to acquire the property of an island, two and a-half acres in extent, over which, or with respect to which, they had previously acquired and paid for a valuable right, namely, the right to take and use the ground necessary for the purpose of making and maintaining the bridge. I think the question for the arbiter would be—What is the fair compensation for the proprietary right which they acquired in the land, which at the date of the acquisition was subject to that obligation on the part of the proprietor—that is to say, the proprietor had to submit to their taking and using all the ground necessary for making and maintaining the bridge. We were informed incidentally in the course of the argument that the railway company estimated that at £600—at least they tendered that sum. I am not to give any opinion as to whether that is too much or too little, or just about the thing; but I should hope that now, after the opinion of the Court is known, it will not be found necessary to resort to the arbiter, and to raise subtle questions there, in order to get money, which plainly, either in equity or honesty, the party has no manner of right to. Having that strong feeling on the want of equity, I have been a little more careful in examining, or endeavouring to the best of my ability to examine, critically, the legal grounds upon which it has been maintained; and I think, for the reasons which your Lordship has stated, and which I have to some extent supplemented—chiefly, no doubt, by repetition—that those legal grounds urged by the pursuer are untenable, and that we only do justice in assailing the defenders from the conclusions of this action, leaving the arbiter to deal with the matter of damage, if the parties think it requisite to go before him, on the footing on which the case will stand with reference to the opinions we are now delivering.

LORD CRAIGHILL—I am of the same opinion as that expressed by your Lordship and Lord Young. I come to the conclusion at which I have arrived upon very simple and what are to me very satisfactory grounds. In the first place, it appears to me that the contract which was concluded between the parties, and afterwards ratified by the commencement of the works and payment of the money—the works described and provided for in the Act of 1873—had nothing whatever to do with the particular title under which these works were to be executed. If the works were to be executed at all, it was unimportant to the pursuers whether it was under the Act of 1873, or whether it was under the powers which, being originally given by the Act of 1873, were afterwards recognised or continued by any subsequent statute. With my brother Lord Young, I am of opinion that this view of the contract is confirmed by what occurred between the parties when the contract was entered into. The Act of 1873 expired in 1878, and there was, as I understand, a

continuance of the statute in that year. After the expiry of the Act of 1873 this contract is made, and it is made with reference to the works authorised by that statute. It surely could not be said that it was matter of contract between the parties, after paying the £1500, that the company were to have no right to execute the works except they had powers under the statute of 1873, which had ceased to exist. It was the works, and not authority at the particular time when those works were to be executed, that formed the subject-matter of contract. Therefore the question comes to be—There having been leave given for the execution of works, and the price paid for that which was granted, are the company now to be debarred from the exercise of that which they claim as their right, merely because the particular statute under which operations are now to be carried on is not exclusively the Act of 1873? The works with reference to which the question has to be determined were works for which authority was granted in 1873. If authority was granted then, when did it come to an end? The Act of 1873 expired, but was continued in 1882 by the statute of that year—which is the last statute with reference to which the pursuer seeks that there shall be a declaratory decree—and the company remained in possession of their powers conferred by contract and by ratification. Well, if they had that power in 1873, when and how did they cease to have those powers? That Act of 1873, no more than the rights conferred by it, or which were obtained by virtue of the contracts entered into by the authority of that Act, was not brought to an end. It is quite clear what the 19th section of the Act of 1882 provides—[reads]. The reason of that is plain enough when you look at section 4, which provides that what the Act of 1882 was to do was to carry forward the work already authorised. It would have been anomalous if the powers conferred by the Act of 1873 were to be exercised at the time when a renewal of the same powers had been obtained to complete what had already been begun. But the 19th section gives no countenance to what was pleaded for the pursuer. It relates merely to the abandonment of the construction of works—the construction of that which remained to be executed—while all the properties and rights acquired for the execution of the works which were contemplated when the Act of 1873 was passed went from the unincorporated to the corporate company. They bought land, paid for it, and got it. They bought lands, paid for them, and got them,—because they had not abandoned them. The idea that there were rights given back under the 19th section to the owners of land, from whom the rights had been acquired and who had paid for them, and given back, too, without repayment of anything, seems to me to be an extravagant idea, to say the least, for which no countenance whatever is afforded by the statute. Therefore, the company having acquired in 1878, and having continued till the present time in possession of this right, I cannot see upon what ground the pursuer can reasonably ask that there shall be declarator that the whole island is his absolute property, and that the defenders, the railway company, have no right whatever in or over that island or any part of it. I do not say that they had any right to

land. They had only a right to erect the piers of a particular bridge. That right was paid for and secured to them in 1878, and remains with the company. And so, with regard to the first conclusion, the Lord Ordinary has, I think, come to the right conclusion. In regard to the second conclusion—that with regard to the taking the £1500 already paid into account in estimating the compensation to be now paid—I am of the same opinion as your Lordships.

LORD RUTHERFURD CLARK—I am also of opinion that the interlocutor of the Lord Ordinary should be adhered to.

The Court adhered.

Counsel for Pursuers (Reclaimers)—Graham Murray—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defenders (Respondents)—Sol.-Gen. Asher, Q.C.—Trayner—Comrie Thomson. Agents—Millar, Robson, & Innes, W.S.

Wednesday, December 3.

SECOND DIVISION.

[Lord Fraser, Ordinary.

WILKIE v. ALLOA RAILWAY COMPANY.

Process—Expenses—Action for Larger Sum than Appeared in Pursuer's Own Books.

Where a pursuer raised an action of damages in the Court of Session for £50, and was awarded £12, that amount being arrived at from an examination of his own books, the Court refused to allow him expenses although the defenders had made no tender.

The Alloa Railway Company were empowered by "The Alloa Railway Act 1879," to construct the railway therein described from Alloa to the South Alloa Branch of the Scottish Central system of the Caledonian Railway crossing the river Forth by a bridge. By section 7, sub-section 1, of the Act it was provided, for the purposes of protecting the navigation of the river, that the bridge should be constructed so as to leave opening spans in the fairway of the channel of the river of certain specified widths. By sub-section 2 of this section the company were to regulate the spans as to allow vessels to pass through the spans "at all times" without delay or hindrance, "and maintain lights and signals on the bridge." The Act incorporated, *inter alia*, Part I. of the Railway Clauses Act 1863, section 15 of which provided that where a company constructs a bridge with an opening span, it shall not be lawful for the company to detain any vessel at the bridge for a longer time than is necessary for admitting an approaching engine to cross the bridge, and for opening the bridge to admit the vessels to pass, and that if the company detain a vessel longer than the time mentioned they are to be liable in the penalty mentioned in the Act, without prejudice to a claim of damage by the person sustaining loss through such detention.

The railway bridge had been partially carried across the river, and one of the opening spans had

been formed in the fairway of the channel. To admit of the works being carried on on both sides of it, a temporary wooden bridge was thrown across it, which was run or swung back by a steam crane whenever the bridge required to be opened for vessels passing through it.

This action was raised against the railway company by the owner of the steam-tug "Yorkshire Lass" for £50 as the loss and damage he had sustained through their failure to give his steam-tug passage through the bridge on 27th March, 25th July, and 13th August 1883, or at least within a reasonable and proper time. He averred that on these three occasions he had sounded the tug's whistle to attract the attention of the watchman on the bridge, but the passage was not opened, and on the 27th March he lost the morning tide and the towage of two ships from Bo'ness Roads, on the 25th July he lost the towage of the "Fairy Queen," and on August 13th he lost a tide when travelling up the river to tow the lighter "Prompt." "(Cond. 10) It was the duty of the defenders, under the foresaid statutes and at common law, to have proceeded with the construction of the said bridge without causing any undue obstruction to the navigation of the river, and in particular, to have opened the said temporary bridge, and to have allowed the said tug and vessels towed by her to pass through on the occasions condescended on without any delay or hindrance, or at least without any further delay than was necessary in opening the bridge. Further, it was the duty of the defenders to have erected such a temporary swing bridge as could have been opened within a reasonably short space of time. By their failure to discharge the said duty as before mentioned, they have rendered themselves liable to the pursuer for the said loss and damage thereby occasioned."

The defenders admitted delay on the 13th August, but explained that the failure to open the bridge on that day was due to the sudden breaking of a wheel connected with the mechanism by which the bridge is opened; that "said wheel broke in consequence of a latent defect therein, for which consequently the defenders are not responsible."

A proof was led at which the pursuer produced his books. It appears from them that he had not suffered damage to an extent beyond £12.

The Lord Ordinary (FRASER), after findings in fact to the effect above stated, found that by the failure of the defenders to give the pursuer's tug-steam passage through the bridge on the three several occasions, the pursuer had suffered loss and damage to the extent of £14, and decerned for that sum.

"*Opinion.*—It was the duty of the defenders to keep an open passage for vessels passing up the river. No person who had business to sail up the river could be obstructed by the operations of the defenders beyond what was actually necessary in swinging back the bridge. The railway company are authorised by the Act of Parliament to construct the bridge, but in the construction of their undertaking they are not allowed to interfere with the business of others. The Act makes special provision for an open space being left in the bridge to admit vessels to pass, and this is applicable to the bridge, not merely when completed, but also when in the course of con-