Counsel for the Claimant John M'Watt—C. S. Dickson—Chisholm. Agent—J. Gordon Mason, S.S.C.

Counsel for the Claimant Miss Christie—W. C. Smith—Findlay. Agents—Lindsay & Wallace, W.S.

Counsel for the claimant Daniel Bernard—H. Johnston—J. Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Claimant—John Thyne—W. Campbell—T. B. Morison. Agent—P. Morison, S.S.C.

Counsel for the Claimant—J. A. Molleson—Howden. Agents—Boyd, Jameson, & Kelly, W.S.

Wednesday, June 26.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GLASGOW DISTRICT SUBWAY COMPANY *v.* CRABBIE AND OTHERS (ROBERTSON'S TRUSTEES.)

Railway—Compensation for Lands Injuriously Affected—Act of Parliament—Special and General Act—Construction—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 6—*Glasgow District Subway Act* 1890 (53 *and* 54 *Vict. cap.* 162), *sec.* 73.

By section 73 of the Glasgow District Subway Act 1890, it was provided that, if by reason of the construction of the subway any structural damage should be caused to buildings "fronting or abutting on the streets in or under which" the subway was constructed, or if by reason of such construction any damage should be done to the effects in any such buildings, the company should make compensation to the owners, lessees, or occupiers, and that such compensation should be recoverable from time to time as the injuries might be discovered. The Act also incorporated certain sections of the Railway Clauses Consolidation Act 1845, "except where expressly varied by or inconsistent with this Act," and, *inter alia*, the sections dealing with the construction of the railway. The first of these sections (sec. 6 of the general Act) provides that full compensation shall be made to the owners and occupiers of lands injuriously affected by the construction of the railway.

Held (*aff.* judgment of Lord Stormonth Darling) that there was no inconsistency between this section and section 73 of the special Act, and that the proprietors of buildings, injuriously affected by the construction of the subway, but not fronting or abutting on streets under which it was being constructed, had a claim against the railway company under the 6th section of the general Act.

John Miller Crabbie and others, trustees under the marriage-contract of Mr and Mrs James Robertson, and as such proprietors of heritable subjects in Abercorn Street and Burnside Street, Glasgow, lodged a claim for compensation with the Glasgow District Subway Company, for damage done to the said subjects through the operations of the company in constructing their subway under New City Road, Glasgow. The heritable subjects in question did not front or abut on the New City Road, and were not built upon land by the side of the subway. The trustees nominated an arbiter to fix the amount of compensation in terms of the "Railway Clauses (Scotland) Act 1845," and "The Lands Clauses Consolidation (Scotland) Act 1845." The company under protest also appointed an arbiter, but thereafter brought a note of suspension and interdict to prevent the arbitration being proceeded with.

The complainers pleaded, *inter alia*,—"(3) The respondents' said property not having a frontage to or abutting on the streets or roads in or under which the subway is constructed, and not being built upon land by the side of the subway, the said notice of claim is incompetent, and the complainers are entitled to decree as craved."

The respondents pleaded—"(2) The respondents' property having been damaged and injuriously affected within the sense and meaning of the complainer's special Act, and of the Acts of Parliament incorporated therewith, the arbitration proceedings complained of are competent and valid, and the suspension and interdict craved ought to be refused with expenses."

The Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 33), by section 6, enacts that ". . . 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." . . .

The Glasgow District Subway Act 1890 (53 and 54 Vict. cap. clxii.), section 3, enacts that "The following clauses and provisions of the Railway Clauses Consolidation (Scotland) Act 1845, are, except where expressly varied by or inconsistent with this Act, incorporated with and form part of this Act, that is to say, the clauses with respect to the following matters (namely)—. . . the construction of the railway" (which include section 6).

Section 73 enacts that "If by reason of the construction of the subway, any structural damage shall be caused to any buildings, present or future, fronting or abutting on the streets or roads in or under which the subway is constructed, or any buildings erected or which may hereafter be lawfully erected upon the land by the

side of the subway, or to the foundations of any such buildings, or if by reason of such construction any damage shall be done to any stock or effects in any such buildings, the company shall make compensation therefor to the owners, lessees, or occupiers of such buildings, and such compensation shall be ascertained in the manner provided in the Lands Clauses Consolidation (Scotland) Act 1845, in cases of disputed compensation, provided that compensation for injuries recoverable under this section shall be recoverable from time to time as such injuries may accrue or be discovered." . . .

Section 74 enacts, "And whereas, in order to avoid, in the execution and maintenance of any works authorised by this Act, injury to the houses, cellars, and buildings within one hundred feet of the subway, it may be necessary to underpin or otherwise strengthen the same; therefore the company at their own costs and charges, may, and if required by the owners and lessees of any such house, cellar, or building, shall, subject as hereinafter provided, underpin or otherwise strengthen the same." . . .

Interim interdict was granted on 27th September 1894. Upon 2nd February 1895 the Lord Ordinary (STORMONTH DARLING) refused the prayer of the note of suspension and interdict, and recalled the interim interdict formerly granted.

"*Opinion.*—The respondents are owners of house property in Abercorn Street, Glasgow, which they say has been damaged and injuriously affected by the complainers' operations in constructing their subway under New City Road. The damage for which they claim compensation is structural damage—the sinking of foundations, the cracking of walls, the fall of ceilings, and such like—and they say it has made the premises so dangerous that their tenants have been warned out of the houses by order of the Dean of Guild. They have accordingly served a notice of claim on the complainers, and arbiters have been appointed to assess the compensation.

"The complainers deny that there is any case for compensation, even assuming (which they also deny) that damage has been done, and they accordingly ask that the arbitration should be stopped. There is undoubtedly a certain presumption against stopping a statutory arbitration when it may possibly turn out that some compensation is due. But I think it may be conceded to the complainers that the point which they raise is a short and sharp one, and that it may be decided quite as conveniently now as at the end of the arbitration.

"The point is this—By the 73rd section of the special Act it is provided that the complainers shall make compensation for any structural damage caused by the construction of the subway to any buildings, present or future, fronting or abutting on the streets or roads in or under which the subway is constructed, or any buildings erected or to be erected upon the land by the side of the subway, or for damage done to any stock or effects in any such buildings, such compensation being recoverable from time to time as the injuries may accrue or be discovered. Now, the premises in question do not front or abut on New City Road, under which the subway is being constructed, nor are they built on land by the side of the subway. But the respondents do not make their claim under the 73rd section of the special Act. They make it under section 6 of the Railway Clauses Act, which by section 3 of the special Act is incorporated with and forms part of the special Act, except where expressly varied by or inconsistent with it. If section 6 of the general Act applies, the respondent's right to claim for damage to their land caused by the construction of the subway is clear. They are owners of lands said to have been injuriously affected by the construction of the works, and in such a case the complainers are bound to make full compensation for all damage caused to the lands by reason of the exercise of their powers. The question, therefore, comes to be whether there is any inconsistency between the provisions of the special Act and section 6 of the general Act? I am of opinion that there is not.

"This question, be it observed, is quite different from that decided by Lord Low on 2nd June 1893,—*Provan's* case, reported in Scots Law Times, vol. i. p. 60. The sole question there was whether property in a side street off New City Road fell under the provisions of section 73 of the special Act. Lord Low decided that it did not, and (if I may say so) I entirely agree with him. But the 6th section of the general Act was not pleaded in that case, probably for the reason that the damage alleged to have been caused was by smoke from an engine at a shaft sunk in an adjoining street, and therefore it may not have been damage (though there I speak merely from conjecture) of a kind recoverable under the 6th section. But whether this was the reason or not, the fact remains that the section was not founded on.

"Now, it is not to be lightly assumed that the Legislature, in granting compulsory powers for an undertaking of this kind, has departed from the settled principles embodied in the general Acts which regulate such undertakings. And the most fundamental of these principles is, that the grantees of the compulsory powers shall make full compensation to all having an interest in any heritable property which is injuriously affected by the exercise of the powers.

"It is in my view not at all inconsistent with this principle that the Legislature should make specific provision for the protection of property in a particular situation. In this case buildings immediately above or by the side of the line of subway were, of course, by much the most likely to suffer from the effects of its construction, and with respect to these, it was quite natural that there should be conferred on the owners and occupiers a right to recover compensation from time to time, instead of once for all, and that the right should be extended to moveable effects in the build-

ings, instead of being confined to the buildings themselves. But that does not in the least infer that there should not be the ordinary right to recover compensation for injury done to land in a different situation if it could be shown in point of fact that such injury had been sustained.

"Nor am I at all moved by the sections of the special Act to which I was referred, such as section 50, dealing with the property of certain public bodies, and section 68, dealing with the Lansdowne United Presbyterian Church. These sections afford special protection to the properties with which they deal, but they do not imply that other properties not so protected are to be left without the ordinary protection which the general Act confers.

"None of the cases are directly in point, but the case of *Metropolitan District Railway Company* v. *Sharpe*, L.R., 5 App. Ca. 425, is instructive as to the true relation of the general compensation statutes to special Acts authorising the construction of works.

"I shall therefore refuse the note of suspension, and recal the interdict formerly granted, with expenses."

The complainers reclaimed, and argued—The Subway Act contained a complete and exhaustive list of those who had a remedy in consequence of their property being injuriously affected by the construction of subway. If their property fronted or abutted upon the streets under which it was being constructed, they had a right to compensation under section 73, and that section allowed wider claims than previous statutes. The section was inconsistent with section 6 of the Railway Clauses Act, and superseded it in respect of claims under the Subway Act. If property did not abut, but was situated within 100 feet of the subway the proprietors had right to demand underpinning under section 74. If they were neither under section 73 nor under section 74 their claims were entirely excluded. This was made plain by sections 50 and 68, which contained provisions for the protection of parties whose properties were likely to suffer from the construction of the subway. Such special provisions would have been unnecessary if claims under the 6th section of the Railway Clauses Act had not been excluded. In *Glasgow City and District Railway Company* v. *MacGeorge, Cowan, & Galloway*, February 25, 1886, 13 R. 609, the arbiter made it plain that he had given damages under the section of the special Act, and not under section 6 of the Railway Clauses Act—See *London, Chatham, and Dover Railway Company* v. *Wandsworth Board of Works*, 1873, L.R., 8 C.P. 185.

The respondents argued — Their claim was made under section 6 of the Railway Clauses Act. Sections 73 and 74—as also sections 50 and 68 — of the Subway Act made special provision for those whose properties were most likely to be injuriously affected. That did not take away the rights enjoyed under section 6 of the Railway Clauses Act, which, not being inconsistent with these special provisions of the Subway Act, was in terms incorporated into that Act. The law bearing on the relation of a special Act to a general one was laid down by Lord Chancellor Westbury in *The Vicar of St Sepulchre in re Westminster Bridge*, 1864, 33 L.J. Chan. 372, see p. 376. See also *The Queen* v. *St Luke's*, 1871, L.R., 7 Q.B.D. 148, and *Metropolitan District Railway Company* v. *Sharpe*, 1880, L.R., 5 App. Cas. 425.

At advising—

LORD PRESIDENT — The clauses of the Railway Clauses (Scotland) Act with respect to the construction of the railway and the works connected therewith are incorporated with and form part of the reclaimers' special Act, subject to the general qualification "except where expressly varied by or inconsistent with the special Act." Those specified clauses of the Railway Clauses Act include and begin with section 6. The respondents have given notice of a claim for compensation in respect of certain house property having been damaged and injuriously affected by the construction of the reclaimers' subway, and for the purposes of the present question the claim must be held a good one under section 6. But the reclaimers maintain that that section is inconsistent with the provisions of their special Act, and that the claim is therefore bad.

This contention is mainly founded on the provisions of section 73 of the special Act. That section provides for compensation being made under certain conditions for structural damage, caused by the construction of the subway, to any buildings fronting or abutting on the streets or roads in or under which the subway is constructed. The respondents' property does not front or abut on any of those streets or roads, and accordingly they are not under this section and have none of the rights conferred by it. The view of the reclaimers is that, inasmuch as one class of injured proprietors are provided for under section 73 of the special Act, therefore all other injured proprietors are excluded from claiming under the general statute. This would certainly be a very strange result.

The condition of the argument of course is that the respondents' house has in fact been injured, and that according to the incorporated clauses of the Railway Clauses Act he would receive compensation. What reason is there for holding such compensation to be inconsistent with certain other people getting compensation under different conditions? One can understand the argument that the people who are entitled to compensation under section 73 are impliedly deprived of the right to resort, either cumulatively or even alternatively, to section 6 of the Railway Clauses Act. Section 73 gives to the frontagers and abutters a somewhat different compensation to what they would have had under the Railway Clauses Act. It is limited to structural damage; on the other hand, it covers damage to stock or effects in the buildings, and it allows recurring claims as injuries accrue or are discovered—only the claim must be

made within six months of the discovery of the injury. In some respects this is a better, in others perhaps a worse, remedy than that under the general statute. I am not required to determine whether the frontagers and abutters are by reason of the enactment of section 73 confined to this as their sole remedy, or may elect between it and a claim under the Railway Clauses Act, or may claim under both. But even were it assumed in favour of the reclaimers that their view is sound, the argument which excludes the frontagers and abutters from section 6 does not touch injured persons who are neither frontagers nor abutters. In the case of the frontagers and abutters the argument is that the one remedy is practically inconsistent with the continuance of the other, and must be held to come in substitution of it. But it will hardly do to say, because the frontagers and abutters who get a new remedy have the old withdrawn, that the old remedy is also to be held as withdrawn from people who get nothing in its place. Of course, the thing might have been done, but what we have got to consider is, whether, in the words of the special Act, section 6 of the Railways Clauses Act, as affecting the respondents, is inconsistent with section 73 of the special Act. I find no implication in section 73 to lead to the conclusion contended for.

The 74th section was also referred to. So far as it goes it seems adverse to the reclaimers. It confers on the company the right, and the duty when required, to underpin houses in order to avoid injury to them; and this section is not limited to houses fronting or abutting the streets in or under which the subway goes. But by sub-section 8 it is provided that nothing in the enactment, nor any dealing with property in pursuance of it, shall relieve the company from the liability to compensate under the Lands Clauses Act, or under any other Act.

I agree in the remarks of the Lord Ordinary about sections 50 and 68, as well as with the rest of his Lordship's opinion, and I think that his interlocutor should be adhered to.

LORD ADAM — I agree on the same grounds.

LORD M'LAREN—I also concur.

LORD KINNEAR—I am of the same opinion. The respondents complain that their property has been injured by the complainers in the exercise of their statutory powers. The injuries are said to have been caused by the construction of the railway, and they are such as would have been actionable if the operations which are said to have caused them had not been authorised by Act of Parliament. The respondents therefore have a relevant case to support the claim for compensation under the 6th section of the Railways Clauses Act. But it is said that the provisions of that section have been varied by the 73rd section of the special Act, in such a manner as to deprive persons in the position of the respondents of all claim for compensation for injury done to their property, while, on the other hand, their right to recover damages for such injury as for an actionable wrong is effectually excluded by the statutory powers.

I agree with your Lordship for the reasons you have stated that the 73rd section of the statute has no such effect.

In the case of *The Vicar of St Sepulchre in re Westminister Bridge*, Lord Westbury laid down a rule for determining whether an enactment in a general Act is varied or excluded by the special Act. If the particular Act gives in itself a complete rule on the subject the expression of that rule would undoubtedly amount to an exception of the subject-matter of the rule out of the general Act. Now, the question is, whether the 73rd section of the special Act does or does not amount to what Lord Westbury describes as a complete rule on the subject. It may or may not be a complete rule with reference to the particular persons or rights which are alone dealt with, that is to say, persons whose premises adjoin or abut upon the streets or roads in which the subway is constructed, but it provides no rule whatever for the rights of other persons—persons in the position of the respondents. I agree, therefore, with your Lordships that it is entirely beside the present question to plead the provisions of section 73 of the special Act.

The Court adhered.

Counsel for the Complainers—Asher, Q.C. —Orr Deas. Agent—W. & J. Burness, W.S.

Counsel for the Respondents—Dundas—Aitken. Agents—Forrester & Davidson, W.S.

Wednesday, June 26.

SECOND DIVISION.

[Sheriff of Lanarkshire.

LITTLE *v.* STEVENSON & COMPANY.

Ship—Charter-Party—Demurrage—Commencement of Lay-Days—Notice that Ship Ready to Receive Cargo.

A charter-party provided that the "River Ettrick" should proceed to Bo'ness and there receive . . . a full cargo of coals . . . the coals to be loaded in sixty running hours. . . . If longer detained, demurrage to be paid at 12s. 6d. per hour . . . lay-days to count from the time the master has got ship reported, berthed, and ready to receive cargo, and given notice of same in writing to charterers or their agents.

On 17th October the shipowners intimated in writing to the charterers that the vessel had left for Bo'ness, and requested them to have the cargo forward on the 19th. The "River