EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY . . . } APPELLANTS (*a*).

LEVEN . . . . . RESPONDENT.

1852.
29th and 30th March.

(TWO APPEALS.)

Under the Lands Clauses Consolidation Act of Scotland, notice by a Company that they are willing to treat with a landowner is a contract which constitutes the relation of vendor and purchaser.

So likewise notice by the landowner that he demands a jury trial, or in the alternative, a certain price. In this last case unless the Company take the course prescribed by the Act, they will be bound to pay the sum demanded.

Such consequence not penal; but the result of a constructive agreement.

When the Company present their petition to the Sheriff to summon a jury, if it appear that they have not taken the course prescribed by the Act, he cannot adjourn, but must at once refuse, the petition.

THE Lands Clauses Consolidation Act of Scotland (*b*), after disposing of purchases on the part of public Companies, by voluntary agreement, proceeds next to deal with purchases by compulsion.

The statute gives power to refer questions of compensation to arbitration. But if the person claiming compensation do not choose to refer, or if, having referred, the submission go off for want of an award, in that case the question must be settled by the verdict of a jury.

By the 36th section it is enacted, that when the person claiming compensation desires a trial by jury he shall give notice of such desire to the Company, declaring in such notice the amount of compensation which he claims. And then the Company shall, within twenty-one days, present a petition to the Sheriff to summon a jury, and in default shall pay to the owner the amount of his claim as stated in his notice.

Before, however, presenting such petition to the Sheriff to summon a jury *for settling "any case of disputed compensation,"* the Company are required by the 37th section to give the person claiming compensation not less than ten days' notice of their intention to cause such jury to be summoned; and in such notice they shall state what sum they are willing to give him as compensation.

(*a*) Reported Second Series, vol. x. p. 1013.
(*b*) 8 Vict. c. 19.

The object of this 37th clause was evidently to afford the owner another opportunity of agreeing, and thus avoiding the necessity of a trial by jury.

The Respondent on the 12th of June, 1846 (an attempt at arbitration having failed), served the Appellants with notice requiring a jury to be summoned, and stating that he claimed 3000*l.* for his land. The Appellants omitted to give the counter-notice required by the 37th section, but presented their petition *per saltum* to the Sheriff, who refused the application; holding that his power to summon a jury did not accrue. The Respondent, thereupon, insisted that he was entitled to the sum he had claimed by his notice. The Court below held that he was right. This was the subject of the *first* appeal.

The *second* was from the decision of the Court below against the Appellants in a separate action, brought by the Respondent to recover from them the sum for which they were alleged to have rendered themselves liable, by their inattention to the requirements of the 37th section.

The *Solicitor-General* (Sir *Fitzroy Kelly*) and Mr. *Moncreiff*, for the Appellants. The attempt at arbitration miscarried.

[The LORD CHIEF-JUSTICE OF ENGLAND (*a*): Then the case is as if there had been no arbitration.]

Afterwards the demand was made by the Respondent for 3000*l.* This was on the 12th of June, 1846. The Company then, within twenty-one days, presented a petition to the Sheriff; and the argument on the other side is, that, for want of the ten days' counter-notice, the petition was a nullity. There has been no default under the 36th section, and the 37th is directory, not compulsory. The 37th section applies only to the case

(*a*) Lord Campbell.

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where the Company take the initiative. Here the proceeding commenced with the Respondent.

[The LORD CHIEF-JUSTICE: The 37th section says "before the promoters shall present their petition for summoning a jury for settling *any case of disputed compensation*, they shall give not less than ten days' notice to the other party." How can you get over the words "*any* case of disputed compensation?"]

[The LORD CHANCELLOR (*a*): It is required that there shall be an offer made by the Company.]

The more important question is whether the failure to give the notice makes the petition a nullity.

[The LORD CHIEF-JUSTICE: What do you say the Sheriff ought to have done on the petition? He has no *nobile officium*.]

The Sheriff, in the exercise of his ordinary duty, without attributing to him a *nobile officium*, ought to have called on the promoters to give the ten days' notice required by the 37th section.

[The LORD CHANCELLOR: Where is the authority for such a step?]

As to the second appeal, even supposing that the Company ought in strictness to have given the counter-notice to the Respondent under the 37th section, the demand of 3000*l.* did not arise. The provision is directory, not imperative. The demand, moreover, is in the nature of a penalty. If the Respondent's notice, instead of claiming 3000*l.* for this inconsiderable piece of land, had asked 100,000*l.*, the Respondent would have been entitled to that extravagant amount according to the view taken by the Court below. This would be to countenance extortion.

[The LORD CHIEF-JUSTICE: On the 12th of June, 1846, the relation of vendor and purchaser was complete by virtue of the notice from the Respondent to

(*a*) Lord St. Leonards.

the Company (*a*). The demand does not appear to me to be penal, although it may operate severely.]

(*a*) It has been decided that the service of a notice to treat by the Company creates a contract, and gives rise to the relation of vendor and purchaser. In the *Birmingham and Oxford Junction Railway Company* v. *The Queen* (20 Law Journ. Q. B. 304), Mr. Baron Parke, delivering the opinion of the Exchequer Chamber upon Error, said: "We are all of opinion that the judgment given by Lord Chief-Justice Campbell is correct; namely, that the notice to treat is an inchoate purchase; and that after that notice has been given in due time, it is competent for the landowner to compel the completion of the purchase." In the *Marquis of Salisbury* v. *Great Northern Railway Company* (21 Law Journ. Q. B. 185; Law Times, January 31st, 1852), the Court of Queen's Bench held to the same effect; citing, among other authorities, the Scotch case of *The Edinburgh and Glasgow Railway Company* v. *The Monklands Railway Company* (12 Court of Session Reports, Second Series, 1304); where Lord Moncreiff gave it as his opinion that "the notice constituted the contract; and that the parties stood in the relation of vendor and purchaser when once the notice was given;" the Lord Justice-Clerk saying also: "I think that we are to consider the land as taken, when the notice is given;" and Lord Cockburn laying it down that "when the Company indicate their resolution, they are fixed to take the land."

The clauses material to this discussion are as follows:—

§ 36. But if any party entitled to any compensation in respect of any such lands, or interest therein, exceeding 50*l.* as aforesaid, shall desire to have the amount of such compensation determined by a jury, it shall, in like manner, be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interest in such lands, in respect of which he claims compensation, and the amount of the compensation so claimed by him; and unless the promoters of the undertaking be willing to pay the amount of compensation so claimed, and shall enter into a written agreement for that purpose, then, within twenty-one days after the receipt of any such notice from any party so entitled, they shall, unless the question shall previously have been agreed to be settled by arbitration, present their petition to the sheriff to summon a jury for settling the same, in the manner hereinafter provided; and in default thereof, they shall be liable to pay to the party so entitled, as aforesaid, the amount of compensation so claimed; and the same may be recovered by him, with costs, by action in any competent court.

§ 37. Before the promoters of the undertaking shall present their petition for summoning a jury for settling any case of disputed com-

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Mr. *Bethell* and Mr. *Broun*, for the Respondent.

The words of the Act are imperative. The allegations of hardship are groundless; but, even if they were true, the House cannot regard them. The intimations thrown out show that the case must stand on the 36th and 37th sections; the provisions of which are plain.

Mr. *Moncreiff*, in reply.

The LORD CHANCELLOR:

Lord Chancellor's opinion.

My Lords, this Act of Parliament gives power to Companies to take lands *in invitum*. If they can, they are to agree with the parties; and if they cannot agree, the question may be referred; and in the event of the arbitrators failing for three months to make their award, the compensation shall be settled by the verdict of a jury.

In this case, under section 17, the Company gave notice of their intention to buy, and that notice followed up by what took place made as perfect a contract as could exist.

It is said that clause 36 is highly penal. It may be very disadvantageous, and may operate very harshly on the Company in this case, but there is nothing penal in it. If there be no agreement and no award, the party claiming compensation shall have liberty to require a jury, stating the price he is willing to take, and he does that at the peril of having to pay the costs under a subsequent section (*a*). Supposing the 37th clause is to be embodied into the 36th, where would be the hardship or difficulty of construction? If a person

pensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned; and, in such notice, the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works.

(*a*) Section 50.

entitled to compensation gives a notice such as is required by the 36th section, the Company will have to serve him with a counter-notice, intimating that they do not agree to give the sum demanded by him, and that they intend to present a petition to the Sheriff for a jury. But this is not all; they are required to incorporate in their notice a statement of the price they are willing to pay. This exigency of the 37th section is of the deepest importance, for by its means the parties are put in a state of equality; one party is bound to state the sum he asks, and the other the sum he is willing to give. It may be a low price, or it may be a high price; but the Act of Parliament, in requiring a price to be stated, had in view the prevention of litigation.

A singular argument was advanced by the Appellant's counsel; who contended that the enactments in question applied to the case where there was an initiative on the part of the Company, but not where the initiative was on the part of the person claiming compensation. But no one can look at the collocation of the sections without seeing that the arbitration clauses are to form one system, and the jury clauses another system; and then the whole scheme is plainly carried out.

Now section 38 requires that in every case in which any such question of disputed compensation shall arise, the counter-notice by the Company shall be given. This requirement cannot apply more strongly than to those cases provided for in Sections 36 and 37. It may apply to other cases, but it clearly applies to those; and it is admitted at the bar that if it does apply to section 37 it clearly and equally applies to section 36.

Without, therefore, going further into the consideration of this Act of Parliament, which I take leave to say in my mind admits of no doubt, the clear construction I submit to your Lordships is that section 37 is to

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govern and rule section 36, and the moment you hold that section 37 is embodied into and forms part of section 36, there is an end of all difficulty. This, my Lords, disposes of the first appeal.

Lord Chancellor's opinion.

Now, my Lords, the second appeal is in regard to the price. As soon as the Company has elected to take the estate at the sum asked, a right of action is given to the party entitled to the sum to recover it from the Company. That action appears to me not to have admitted of any defence, and I suppose from what I see in the papers, that hardly any defence was attempted to be set up; if any defence was set up, it did not succeed. The right of action has accrued; the Company are in possession of the land which they took under their clauses giving them the right to do so; they deposited the money; they are not to be prejudiced undoubtedly by that circumstance, but the effect of the affirmance which I propose, with your Lordships' concurrence, to give to the decision of the Court below will be, that the land will belong to the purchasers and the 3000*l.* to the vendor.

Lord BROUGHAM:

Lord Brougham's opinion.

My Lords, this case depends entirely on the construction of the 36th and 37th sections of the Lands Clauses Consolidation Act of Scotland. The question then is whether the 37th section of this Act comes within and governs the proceedings referred to in the 36th, and I have really no doubt whatever that it does.

Now then, my Lords, it is said that this 36th section is in the nature of a penal enactment. It does not strike me in that light at all. It is a statement of that which should be done in certain circumstances. The words, "and in default," in the 37th section, are only a mode in which the statute points out what should be taken to be acquiesced in; the silence of one of the

parties being the indication of his consent. I apprehend, therefore, that the course pointed out is imperative, and if that course is not taken, the alternative follows.

The LORD CHIEF JUSTICE:

Lord Chief Justice's opinion.

My Lords, I entirely agree.

With regard to the first appeal, the question was whether the Sheriff, in the absence of notice, ought to have summoned a jury. In my judgment he would have been guilty of a gross breach of duty if he had done so; for it is expressly enacted that before the promoters of the undertaking shall present a petition to summon a jury, they shall give the notice required. Such notice had not been given. Therefore the Company had no right to present this petition; and they having no right to present the petition, the Sheriff was bound to refuse it. This disposes of the first appeal.

The second admits, perhaps, of some doubt, although, on consideration, I concur with my noble and learned friends. We cannot leave entirely out of our consideration that there had been an abortive attempt at arbitration, although that point was not presented to the Court below. If, however, it had been raised by the record, we should have been bound to consider it. It would indeed have come very ungraciously; every presumption would have been against it; but we should not have excluded the Counsel at the bar from remarking on it. When, however, the allegations are examined, it is clear that the parties abandoned the arbitration, and placed themselves precisely as if no reference had ever taken place.

Upon the 12th of June, when the demand was made by the Respondent, the title to the land had been acquired by the Company. They were then the owners of the property, although the price remained to be

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ascertained in the mode prescribed by this Act of Parliament (*a*). In short, my Lords, the legislative power has enacted that if the Company do not pursue the course pointed out, they shall be conclusively bound to pay the sum demanded by the landowner. I am therefore of opinion, on the second appeal, as well as on the first, that the interlocutors complained of must be affirmed.

Interlocutors affirmed, with Costs.

(*a*) The price was not ascertained till it appeared that the Company had failed to take the proper steps on receiving the Respondent's notice.

T. W. WEBSTER—RICHARDSON, LOCH, & MCLAURIN.