CALEDONIAN AND DUMBARTONSHIRE JUNCTION RAILWAY COMPANY, ... } APPELLANTS.

THE MAGISTRATES OF HELENSBURGH, ... } RESPONDENTS.(a)

1855. *Feb. 6th, 9th, 19th, and 20th.* 1856. *June 19th.*

Railway Contracts by the originators—how far binding on the Company.—The original promoters of a railway project have no power to bind the corporation ultimately constituted by Act of Parliament.

The corporation so constituted, though owing its existence to the exertions of the promoters, is not bound to fulfil their contracts.

The promoters are not agents by anticipation of the corporation.

Anterior engagements can only bind the corporation when incorporated in their Act, or when deliberately adopted by them.

Right of Shareholders to object.—The policy of railway legislation is to prevent surprizes on the shareholders, who are consequently entitled to look to their Act, and to disregard everything else.

Agreements before Parliamentary Committees.—Parties contesting before a Parliamentary Committee come to an agreement to the effect that certain stipulations shall be deemed to be as binding and obligatory as if they were made the subject of express enactment in the Bill; which is consequently allowed to pass without them. The agreement in such a case, though sanctioned by the Committee and binding on the parties, will not bind the future Company created by the Act.

Lord Cottenham's Decisions.—The doctrines of Lord Cottenham in *Edwards* v. *The Grand Junction Railway Company*, *Stanley* v. *The Chester and Birkenhead Railway Company*, and *Lord Petre* v. *The Eastern Counties Railway Company*,—criticised and questioned.

(a) Reported in the Court of Session, Second Series, vol. 15, p. 148.

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Result.—The Court of Session having pronounced a decree against the Caledonian and Dumbartonshire Railway Company, decreeing them to perform an agreement entered into by the Committee of Management on behalf of the projected company before their Act was obtained, and the agreement being one of which the Act did not authorize the execution: *Held*, that performance of the agreement was *ultra vires*, and that the decree, consequently, must be *reversed*.

On the 7th February 1846, an agreement was entered between the Magistrates of Helensburgh and three gentlemen calling themselves "a quorum of the Committee of Management of the Caledonian and Dumbartonshire Railway Company," then unincorporated, whereby the Magistrates on the one hand agreed with the said quorum as follows:—

1. They approved of the extension of a line of railway from Dumbarton to Helensburgh. 2. They undertook not to object to the Railway Company laying their rails in a certain direction. 3. They engaged to obtain an Act of Parliament for the formation of a quay and harbour, but at the expense of the Railway Company. 4. They became bound to apply the dues and rates to be levied at the said quay and harbour in defraying the expenses of the management and in paying four per cent. interest on 3,000*l.*, to be borrowed by them from the Railway Company, and laid out in erecting the said quay and harbour, and in securing repayment of the said sum of 3,000*l.* and other sums mentioned. 5. The Magistrates became bound to forward the objects of the Railway Company.

On the other hand, "the quorum of the Committee of Management" agreed with the Magistrates as follows:—

1. Authorized as aforesaid, they undertook to advance to the Magistrates the whole costs already incurred in the proposed extension of the harbour and the expense of procuring the Act, the amount of which to form a debt upon the proposed quay and harbour and the duties leviable thereat. 2. They undertook that the Railway Company should make the advance stipulated for by the Magistrates; and, 3. They undertook that the Company should aid the Magistrates in procuring their Act.

Both parties applied to Parliament in the session of 1846, the Magistrates for their Harbour Act and the Company for their Railway Act. While they were before Parliament, on the 5th May 1846, an agreement in writing was concluded between them, whereby it was arranged that the stipulations contained in the deed of the 7th February 1846, should be held to be as binding on the parties respectively, as if the same were expressly inserted and "enacted in the Bill, anything therein contained notwithstanding." Both parties obtained the assent of Parliament to their measures respectively.

On the 6th June 1849, the present action was commenced by the Magistrates against the Company.

The summons prayed that it should be found and declared that the agreement aforesaid was binding on the Company and its directors, and that they ought to be decreed to perform the same in all respects, and in particular that they ought to be decreed to advance to the Pursuers the costs, charges, and expenses already incurred in the extension of the said quay and harbour, together with the expenses incurred and to be incurred in procuring the Act of Parliament for erecting the same, with sundry other expenses in the summons mentioned.

The defence of the Company was as follows:—

"The Defenders, as an incorporated company, are not bound to implement the agreement libelled on, and the action cannot be maintained against them to any extent or effect.

"Supposing the Defenders as an incorporated company bound to recognize the agreement entered into by the parties, and to the effect and manner set forth in the libel—the obligations thereby undertaken in favour of the Magistrates and Council of Helensburgh are not binding, in respect that the conditions

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stipulated for in consideration thereof were not duly fulfilled by the said Magistrates and Council, and these obligations consequently are not binding, and cannot be enforced.

"On the same supposition of the agreement being otherwise binding upon the incorporated company—its whole terms and stipulations show it to have been an inherent and essential condition of the obligations it contains taking effect, that the shareholders of the Company should resolve to act upon their statutory power of forming the branch railway from the main line to Helensburgh, and no resolution to that effect having been adopted, but the formation of the branch line being for the present postponed, this action for implement of the agreement cannot be maintained."

This brought out the question how far the projectors of a railway have the power of binding by anticipation the corporate body which comes subsequently into being by virtue of an Act of Parliament.

The Court of Session decided in favour of the Pursuers; Lord *Jeffrey* observing that "a party having passed from the chrysalis to the butterfly state," created no difficulty; Lord *Cuninghame* going much on the English cases, particularly those before Lord *Cottenham*, who, in *Stanley* v. *The Chester and Birkenhead Railway Company*, had "characterized the plea of the Company as one of the grossest frauds he had ever seen attempted" (*a*); while the other learned Judges (namely, the Lord President *Colonsay* and Lords *Fullerton*, *Cowan*, and *Ivory*) relied on general reasoning as well as English analogies; but all concurred in holding that the defence of the Company in the present case was unsustainable, and they decided against them.

(*a*) 3 Myl. & Cra. 781.

The Caledonian Railway Company consequently presented this appeal to the House.

The *Solicitor General* (*a*) and Mr. *Roundell Palmer* for the Appellants: This is an action of declarator and implement, corresponding with a bill filed in this country for specific performance. The Railway Company say they are not bound by what was done before their incorporation. The question has never been discussed in this House, nor has it occurred in any of the inferior courts until the present case made its appearance in Scotland.

Before an agreement such as this can be enforced against a Railway Company two conditions are necessary,—1, that the Company must have the benefit of the agreement; and 2, that what is sought to be enforced shall be something which it is competent for the Company under its Act to perform.

[The LORD CHANCELLOR: The principle may be that the Company is brought into existence *cum onere*.]

The case relied upon in the Court below, that of *Hawkes* v. *Eastern Counties Railway* (*b*), is really of little weight, because there the contract was not by projectors, but by an incorporated Company under their seal, and Lord *St. Leonards* went expressly on that circumstance.

[The LORD CHANCELLOR: They were the same body contemplating the acquisition of additional powers.]

But here the parties to the contract are not the parties to the suit. There is no legal identity between them; the Company do not stand in the shoes of the projectors. It is, therefore, clear that at law the Company cannot be bound; and where there is no contract at law, equity will not create one. The corporate funds cannot be diverted from the purposes of the Act. The directors would be restrained by injunction from so diverting them. It would, indeed, be odd if a mere

(*a*) Sir R. Bethell. (*b*) 7 Rail. Ca. 182; De Gex, M'N., & G. 737.

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provisional committee could bind a company, including all the shareholders, where the directors after incorporation have not the power to do so. In *The East Anglian Railway Company* v. *The Eastern Counties Railway Company* (*a*), the *Lord Chief Justice* delivering the opinion of the Court of Common Pleas lays it down, "The Company cannot embark in undertakings not sanctioned by the Act. They can do nothing beyond the scope of their authority. Every proprietor when he takes shares has a right to expect that the conditions upon which the Act was obtained will be performed. The public also has an interest in the proper administration of the powers conferred by the Act, for the safety of the line may be impaired if the funds destined for the railway be expended in other undertakings." The principles here promulgated are enough for our case, and therefore we submit that this decision cannot stand.

Sir *Fitzroy Kelly* and Mr. *Anderson* for the Respondents: The question is certainly new in this House. It is not that we seek to restrain the Appellants from violating, but that we call upon them specifically to execute their agreement; and we contend that we are entitled to do so, although there may be no power or authority in their Act for the purpose. If, indeed, the agreement had been *subsequent* to the Act, the case would have been different; what is called the *ultra vires* principle might then have applied, for it is well settled that whoever enters into a contract with a company constituted by Act of Parliament must at his peril see that the company are acting within the limits of their authority; *M'Gregor* v. *The Official Manager of the Dover and Deal Railway Company* (*b*), *East Anglian Railway* v. *Eastern Counties* (*c*). But this was an agreement with *projectors* unincorporated,

(*a*) 7 Rail. Ca. 154; 21 Law Journ. 23; 11 C. B. 811.
(*b*) 19 L. T. 316, June 1852. (*c*) 21 L. J., C. P., 23.

a more favourable case, because they cannot be affected by restrictions introduced after their agreement. The *Solicitor General* had tried to persuade their Lordships that the ground on which agreements, though *ultra vires*, were enforced against companies was because they were *beneficial*. But this was not so. The ground was that whether beneficial or not, they were *binding*, since they had the support of a sufficient consideration; *Stanley* v. *Chester and Birkenhead Railway* (*a*), *Edwards* v. *Grand Junction* (*b*), *Lord Petre* v. *Eastern Counties Railway* (*c*). In this last case the enormity of the sum stipulated for by Lord Petre would, perhaps, have formed a difficulty had not the principle been so clear and so strong, and had it not so often been put in force.

The projectors, as mere projectors, were at liberty to make an agreement not within the scope of their Act subsequently obtained. In *The East Anglian Railway* v. *The Eastern Counties Railway*, there was matter in the agreement which was not in the Act, yet the agreement was enforced, and, so far as the agreement was concerned, the Eastern Counties Railway company were projectors, just as much as the parties with whom we have contracted in the present case.

[The LORD CHANCELLOR: Is there any instance of a decree for specific performance of a contract not authorized by the Act?]

We believe that *Hawkes* v. *The Eastern Counties Railway* (*d*) is the only instance of such a decree.

[The LORD CHANCELLOR: The Court might say, "You shall not make your railway until you have done a certain thing;" but that would be different from decreeing specific performance. It is possible, however, that projectors may be regarded as a sort of anticipated agents of the incorporated company after-

(*a*) 1 Rail. Ca. 58. (*b*) Ibid. 173. (*c*) Ibid. 462.
(*d*) 7 Rail. Ca. 178; 1 De Gex, M'N., & G.

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wards constituted by the Act; and if so, the Company would be bound.]

But even if it should be held that the Company are not bound to execute the contract of the projectors, it so happens that they have adopted that contract after obtaining their Act. This plainly appears by the evidence set out in the Appendix; and although such acts of adoption are not under the seal of the incorporated Company, the law does not require that formality to bind them. The Respondents further cited *Capper* v. *Lindsay* (*a*), *Bland* v. *Cowley* (*b*), *Great Western Railway* v. *Birmingham and Oxford Junction* (*c*), *and Phillips* v. *Edinburgh, Perth, and Dundee Railway* (*d*).

The *Solicitor General*, in reply: *Hawkes* v. *The Eastern Counties Railway Company* has thrown every thing into confusion (*e*). The distinction attempted to be set up by Sir *F. Kelly* between agreements before and after incorporation is unsustainable. He said that agreements by an incorporated body must be within their Act, but that when the agreement was by projectors it would be enforced, though not authorized by the Act. This doctrine was extravagant. No Judge in Equity ever said anything to warrant so singular a position. Two rules had been established:— First. That an agreement before incorporation will bind the Company if it has been adopted by the Company. Equity has so far departed from the common law as to hold that if there be a ratification, it will bind the

(*a*) 3 H. of L. Cases, 292. (*b*) 6 Exch. 522.

(*c*) 2 Phill. 597. (*d*) 16 Sec. Ser. 1065.

(*e*) *See*, however, 5 H. of L. Cases, 331, from which it appears that *Hawkes* v. *The Eastern Counties Railway Company* was affirmed on the 11th July 1855, the marginal note saying, "the promoters of a company proposing to make a railway, or persons standing in a similar situation, may enter into a contract; and when the Bill passes such contract may be enforced." *See* the remarks of Lord St. Leonards, ib. p. 374. But *see also* the observations of the Lord Chancellor, *infrà*, p. 420.

Company from its inception. Secondly, there is a more questionable class of cases where the withdrawal of opposition to a Bill in Parliament has been held a good consideration to support an agreement in equity. But this House has not yet recognised the principle of these cases, which originated with Lord *Cottenham* in *Edwards* v. *The Grand Junction Company*. There he undoubtedly did affirm that an agreement with projectors bound the afterwards incorporated Company, but he was careful to confine it to the case where the agreement was within the scope of the Act (*a*).

But suppose the Company don't desire to take the benefit of the agreement. This contingency was not adverted to by Lord *Cottenham*. The Company has been called into existence by the Legislature. The shareholders have a right to keep their governing body within the terms of the Act; and as the Company is not bound to adopt an anterior agreement, so unless they have adopted it they may disregard it. The case

(*a*) In Lord Petre's case the Act gave authority to take the land but not to perform the agreement; yet Lord Cottenham granted the injunction, and Sir Launcelot Shadwell refused to dissolve it, although it was stated that the agreement, if executed, would, in fact, amount to a virtual repeal of the Act. It would seem, therefore, that Lord Cottenham was not so "careful" to keep companies within their Acts; and that what he went upon was the identity (not technical but substantial) between the projectors and the subsequently incorporated company, and the impolicy of allowing the latter to escape performance of compacts from which they were ready enough to take benefit. If the shareholders had had any chance before Lord Cottenham, they would have come to him, and said, "Don't allow our directors to pay a Californian price to Lord Petre for having withheld his opposition." Lord Cottenham's decisions on these questions (beginning more than twenty years ago, and forming a code of railway morality), are now, it would seem, shaken, though not perhaps expressly overruled. The 120,000*l.* was paid to Lord Petre by instalments. Hence the execution of the line was retarded. This brought the case within the doctrine laid down by Jervis, C. J., that "the public has an interest in the proper administration of the powers conferred by Railway Acts."—*Suprà*, p. 396.

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of *Spencer* v. *The Vauxhall Bridge Company* (*a*), although relied upon by Lord *Cottenham*, really did not support him.

Infinitely better, therefore, is it to leave these parties to their legal remedies against those with whom they have contracted. Lord *Cottenham* held that the Company stood in the shoes of the projectors. But here he was wrong. There is no legal identity between them.

One of the great duties of a Court of Equity is to keep corporations within the line of their powers. Suppose a Company diverts its funds from its legitimate purpose. A Court of Equity will interfere. Lord Petre's case is certainly extravagant; but we are not affected by it here. In *The East Anglian Railway* v. *The Eastern Counties Railway* (*a*), the Court said, "The Company cannot embark in speculations." The conditions are that the capital shall not be diverted from its proper objects.

[The LORD CHANCELLOR: Suppose Lord Petre had sued on the bond, could the obligors have had contribution against the Company?]

I apprehend not. Hawke's case goes on the principle that there is no remedy but by Bill in Equity for a specific performance; whereas there was a plain remedy at law, and where that exists, Equity will not interfere. The decision in this case corresponds with a decree for specific performance, and on the principle that such a decree would be clearly wrong, we submit with confidence that the judgment appealed against must be reversed.

The case stood over during the whole of the session 1855, and was not put in the paper for judgment till the 19th June 1856, when the *Lord Chancellor* delivered in writing the following opinion:—

(*a*) Jac. 64; 2 Madd. 356. (*b*) 11 C. B. 811, and 7 Rail. Ca. 150.

Lord Chancellor's opinion.

The LORD CHANCELLOR:

My Lords, this was an appeal against an interlocutor of the Court of Session, the effect of which was to declare the Appellants liable to contribute the funds, or a large portion of the funds, necessary for constructing and enlarging the pier and harbour at Helensburgh.

Early in the year 1846 an agreement was entered into between the then provost, bailies, and councillors of the burgh of Helensburgh of the one part, and Gibson Stott, Mark Sprot, and Andrew Buchanan Yuille, being a quorum of the Committee of Management of the then projected Caledonian and Dumbartonshire Junction Railway Company of the other part, by which the first party agreed to afford to the then projected Railway Company, if they should obtain their Act, certain facilities enabling them to carry a branch line through some of the streets of the town of Helensburgh up to the harbour and quay which the authorities of the town then proposed to form, and for enabling them to make which they were then about to apply to Parliament. They farther agreed, by petitioning Parliament. or otherwise, to promote the objects of the proposed Railway Company. On the other hand, the quorum acting for the Committee of Management of the then projected Railway Company agreed that the Company should advance and pay to the first party all the costs then already incurred in getting plans for the projected harbour and quay, and the expenses to be incurred in obtaining an Act of Parliament for liberty to construct the same; such costs and expenses to be charges in favour of the Railway Company on the said quay and on the dues payable thereon; and further, they agreed that the said Company should advance and pay all the expense of making the quay and harbour, of which they should

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be entitled to receive back the sum of 3,000*l.*, but no more.

In conformity with the terms of this agreement the Magistrates of Helensburgh applied for and obtained an Act of Parliament, 9 Victoria, Chapter 16, entitled An Act for improving and maintaining the Port and Harbour of Helensburgh in the County of Dumbarton. This Act received the Royal Assent on the 14th of May 1846. By its provisions the provost, bailies, treasurer, and councillors of the burgh were made trustees for carrying the Act into execution; and the then harbour, pier, quay, and other works connected therewith were vested in the trustees, and powers were given enabling them to carry into effect the projected improvements.

On the 26th day of the following month of June, the Caledonian and Dumbartonshire Junction Railway Act received the Royal Assent. By that Act the Company, now Appellants, and who were Defenders below, were incorporated for the purpose of making and maintaining the line of railway and several branch railways, one of such branches being a branch from Dumbarton to Helensburgh.

The harbour trustees from time to time called on the Railway Company to perform the agreement so entered into by the three gentlemen acting for the Committee of Management. This the Company decline to do, and the present action was accordingly instituted in the Court of Session.

The summons states the desire of the Magistrates of Helensburgh to have a pier. It states the agreement that had been entered into with the Company, that the Company should advance the money for making the pier, and that 3,000*l.* of the money so advanced by them should be secured by a charge upon the pier and harbour. The summons then states that the

harbour trustees first, and the Railway Company afterwards, obtained their Acts of Parliament, and then various applications were made by the Pursuers, that is, the Helensburgh harbour trustees to the directors of the Caledonian and Dumbartonshire Railway Company, with a view to their implementing the obligations under which they had come, and certain proposals were made for settling the question, but eventually they came to nothing. And then the summons concludes in these terms:—Therefore it ought to be found and declared by a decree of the Lords of Session that the agreement entered into between the provost, bailies, and councillors of the burgh of Helensburgh, on the first part, "and the said Committee of Management of the said Caledonian and Dumbartonshire Railway Company on the second part, has been from the date thereof and is now binding and obligatory in all its clauses, conditions, and obligations upon the said Caledonian and Dumbartonshire Junction Railway Company, and the said directors of the said Railway Company, Defenders. And the said Caledonian and Dumbartonshire Junction Railway Company Defenders ought and should be decerned and ordained by decree foresaid, to implement, perform, and fulfil all the conditions and obligations come under by them by the said original agreement, and specially and without prejudice to the said generality they ought and should be decerned and ordained to advance and make payment to the said Pursuers of the whole costs, charges, and expenses already incurred in the proposed extension of the said quay and harbour, by procuring plans, surveys, or otherwise, or that may be incurred in relation thereto, or in procuring the whole plans for the said quay and harbour;" and also that they shall pay all the costs, charges, and expenses that they might incur in making it.

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"That the sum so to be advanced and paid by the said Defenders as the costs, charges, and expenses in extending and erecting the foresaid quay or quays, and jetty or jetties, shall, to the extent of 3,000*l.*, but no farther, bear interest in manner provided in the agreement, and form a real burthen on the quays."

Those being the terms of the agreemen which was entered into, the important question raised in this case is whether the Defenders (now Appellants) can be compelled to perform the engagement entered into by the Committee of Management on behalf of the projected Company before it had actually come into existence.

On behalf of the Respondents it was argued that, though the agreement in question was not entered into by the Appellants themselves, that is, by the Railway Company, yet it was entered into by a Committee of Management formed for the object of obtaining the Act of Parliament by which the Appellants were afterwards incorporated, and so that, on principle as well as on authority, the Appellants are bound to implement what the Committee had so undertaken to do.

Suppose this question not to be settled by the authority of previous decisions, I cannot think that the proposition thus put forward by the Pursuers below can be supported. It proceeds on the ground that the Committee of Management ought to be treated in the nature of agents for the Company, which owes its existence to their exertions, and that when the Company came into being it was, from its very birth (so to say), bound to fulfil the contracts by which its projectors had stipulated that it should be bound.

This reasoning rests on the assumption that a Railway Company when established by Parliament is, in substance though not in form, a body succeeding to

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the rights and coming into the place of the projectors. On no other hypothesis can such a Company be bound by engagements to which it was not a party. It therefore becomes necessary to consider whether this is a true view of the relative positions of a company established by the Legislature, and of the persons, whether called a committee of management or provisional committee, or a body of projectors, who have applied to and obtained from Parliament the Act constituting the Company.

When such a body apply for an Act of incorporation, what they ask for of the Legislature is not an Act incorporating and giving powers to those only who are applying,—not necessarily even incorporating and giving powers to any of them,—but an Act incorporating all persons who may be willing to subscribe the specified sums, and so to become shareholders in the Company. If the Legislature accedes to such an application, the Act when passed becomes the charter of the Company, prescribing its duties and declaring its rights, and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the Act, and liable to no obligations beyond those which are there indicated. If this be not the true principle, the Legislature might be making itself ancillary to serious injury. When a capitalist, believing in the probable success of any particular project sanctioned by the Legislature, is satisfied with the terms of incorporation embodied in the Act, he reasonably advances his money on the faith of those terms; and if the project turns out a failure he has no right to complain. The speculation was one as to the prudence of which he had the means of judging, and no injustice is done to him if in the result he sustains a loss.

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But surely the case is very different, if behind the terms of incorporation expressed in the Act there are others of which the public have no notice, but which are to be held equally binding on the shareholders as if they had formed part of the charter of incorporation. If such secret or unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation. The principle on which all Railway Acts and Acts of a similar character proceed is to specify the sum to be raised and the shares into which the funds of the Company are to be divided, to incorporate the shareholders, and to prescribe the objects to which the funds are to be applied. It is inconsistent with the policy of such Acts to hold that there can be any other terms binding on those who subscribe their money beyond what appears on the face of the Act itself.

Not only is such a doctrine calculated to occasion injury to shareholders, but it may often be a fraud or at all events a surprise on the Legislature. The statutory powers are given on the faith of the terms apparent on the Act itself. It may well be that the additional terms, if communicated to Parliament, would have prevented the passing of the Act at all.

Special terms as to particular cases or particular persons are often made the subject of special clauses, and then neither the Legislature nor any person taking shares can complain. The whole truth is disclosed. The Legislature sanctions the special provision, and the shareholder purchases his shares with full notice of the exceptional enactment. I know that it is said to be a common practice, sanctioned by Committees of both Houses when these Bills are before them, not to insist on the insertion of these special and private

clauses at the instance of persons alleging grounds for their introduction, if agreements between the promoters and the persons asking for the special clauses are entered into, whereby the promoters engage that the Company when incorporated shall give to those who are asking for special enactments the same benefit as if there were clauses in the Bills to the effect asked for. That may be. Of the propriety of such a practice I am not bound to say anything. But the question is, what is the effect of such arrangements? Do they bind the future Company, or only those who enter into the agreement? I need hardly say that the practice of Committees cannot alter the law of the land, and I confess I can discover no principle, legal or equitable, whereby such contracts can be held to be obligatory on the Company.

And here I must remark, that I cannot accede to the argument that the distinction between the Company and those who may previously to its formation have entered into contracts purporting to bind it, is one of a technical nature, or calculated to occasion substantial injustice to any one. The suggestion that the distinction is one of a technical nature proceeds on the fallacy that the Company are substantially the same persons as the projectors, only embodied in a new form. This is not so. Probably, though not certainly, the projectors may be among the shareholders, but the great bulk of the shareholders will always be persons who have taken shares on the faith of the Act after it has passed or in its progress through Parliament, and who know nothing of what is not apparent on the face of the Act.

In holding that the Company is a body different from its projectors in substance as well as in form, I am acting on what is the mere truth, and no injustice can arise to those who have dealt with the pro-

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jectors, for against them and all under whose authority they acted there will be a clear right of action if the Company does not fulfil the engagements which they have contracted that it shall perform, and that is surely all which those who have dealt with the projectors can claim as their right. For these reasons, I am, of opinion that, on principle, there is no ground for holding that a Company is bound by any engagement made by those who obtained its Act of Incorporation, unless those engagements are embodied in the terms of the Act itself.

It remains, however, to be considered how far this question, whatever may be my opinion of its merits, has been settled by authority. The three cases mainly relied on in support of the doctrine contended for by the Respondents, who were Pursuers below, namely, that a Railway Company, after it has obtained its Act of Incorporation, is bound by the contracts of those by whom the Act was obtained, are those of *Edwards* v. *The Grand Junction Railway Company, Stanley* v. *The Chester and Birkenhead Railway Company,* and *Lord Petre* v. *The Eastern Counties Railway Company.* In the first of these cases, that is *Edwards and others* v. *The Grand Junction Railway Company,* the Plaintiffs were trustees of a turnpike road which the proposed railway was intended to cross. While the project for establishing the railway was in progress, the Plaintiffs entered into a negotiation with its promoters for settling the manner in which the railway should be made to traverse the road, and clauses were prepared for that purpose to be introduced into the Act. These clauses were agreed to, but as the Bill was then in the House of Lords, and it was desirable to prevent delay, the trustees agreed to dispense with the necessity of getting these clauses inserted in the Bill, on receiving from the promoters an undertaking

that the trustees of the road should be in the same situation as if the clauses had formed part of the Act. Such an undertaking was given and signed by the authorized agent of the Promoters. It bore date the 18th of April 1833, and was, according to the Report of the case in First Railway Cases, page 179, in the following terms, "I, the undersigned, John Moss, do undertake to execute an agreement to the effect of these clauses so soon as the same is prepared, and to get the same confirmed under the seal of the Company intended to be incorporated so soon as circumstances will permit. This agreement being made on the express understanding that there shall not be any opposition to the Bill now in Parliament, either by the trustees of the road from Liverpool to Warrington, or the mortgagees of the tolls of the roads, and this agreement is to be void on my delivering to the road trustees or their clerk the engagement of the intended Company to the said effect." Then there was a memorandum signed by the other party who contracted for the trustees. On this assurance, the trustees assented to the passing of the Act, which accordingly became law. The Railway Company afterwards proceeded with their works, and in so doing they proposed to make the road across the railway, not of the width or in the manner contemplated by the clauses which had been agreed on, but of a narrower width, though of a width which, but for the agreement in question, would have been a proper width, being authorized by the terms of the Act. The trustees of the road thereupon filed their bill, for the purpose of having it declared that the agreement of the 18th of April was binding on the Company, and that they might be decreed to perform the same, and to execute a proper deed conformable thereto, and that they might be restrained by Injunction from proceeding with the road then in

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course of formation, or with any other road not in accordance with the terms agreed on.

A motion was made for an Injunction in the terms of the prayer, which was granted by the *Vice Chancellor*, and afterwards confirmed on appeal by Lord *Cottenham*.

That very learned Judge in his judgment says, in page 197 of the same case:—"The Railway Company contend that they, being now a corporation, are not bound by anything which may have passed or by any contract which may have been entered into by the projectors of the railway before the Act of incorporation. If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subject to the power of these incorporated companies. The objection rests upon grounds partly technical, and these applicable only to actions at law. It is said that the Company cannot be sued upon the contract, and that Mr. Moss entered into a personal contract undertaking to procure from the Company, when incorporated, a similar contract. It cannot be denied that the act of Mr. Moss was the act of the projectors of the railway. It was, therefore, the agreement of the parties seeking an Act of incorporation, that when incorporated certain acts should be done. The question is not whether there be any legal binding contract at law, but whether the Court will permit the Company to use the powers under the Act in direct opposition to the arrangement with the trustees before the Act, and upon the faith of which they were permitted to obtain such powers. If the Company and the projectors cannot be identified, still it is clear that the Company have acceded to and are now in possession of all that the projectors had before. They are entitled to all their rights, and subject to their liabilities. If any one individual had

projected such a scheme, and in prosecution of it had entered into an arrangement, and then had assigned all his interest in it to another, there could be no legal obligation by those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the Company stand in the place of the projectors, they cannot repudiate the arrangement into which such projectors have entered in their corporate capacity; they cannot use the powers given by Parliament to such projectors and refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld."

In reasoning on this and other cases decided by Lord *Cottenham*, it has been contended that his judgments went no further than to decide that if the incorporated Company took the benefit of the contracts entered into by third persons with the promoters, they, the Company, must at the same time perform the obligations binding the promoters. I cannot reconcile such a supposition, either with what fell from him in that case or with the decision itself. The language which I have quoted seems to me to show clearly that he carried his views much further. He says expressly that the Company are entitled to all the rights and subject to the liabilities of the projectors. He assumes that the Company stand in place of the projectors, and treats the powers of the Act as powers given by Parliament to the projectors, and the injunction restrains the company from exercising a power which they possessed, independently of any contract with the road trustees, because such an exercise would be at variance with the contract between the trustees and the projectors. The judgment further proceeds upon the assumption that the forbearing to oppose the Bill was a consideration moving from the trustees to the Company, and not solely to the projectors. It is,

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therefore, plain that according to Lord *Cottenham's* view of the law the Company when incorporated cannot exercise its powers in violation of contracts entered into by the projectors before the incorporation.

The next case, *Stanley* v. *The Chester and Birkenhead Railway Company*, was of this nature. Two rival lines were projected, and the promoters of one of them agreed to give Sir Thomas Stanley 20,000*l.* for about 14 acres of his land, and in consideration of that agreement he withdrew all opposition. This line, however, was afterwards abandoned in favour of the rival line, the projectors of which agreed, amongst other things, to take on themselves all the contracts of the abandoned line, including, of course, that for the purchase of Sir Thomas Stanley's land; the projectors of the rival line then obtained their Act; the Company incorporated under the Act refused to perform the contract entered into by the projectors of the other line with Sir Thomas Stanley. He filed his bill for a specific performance of the contract to purchase his land at 20,000*l.* To this bill the Company demurred, but the *Vice Chancellor*, and afterwards Lord *Cottenham*, overruled the demurrer, holding that the Plaintiff was entitled to the relief he sought. This could only have been because it was considered that the rival company, when incorporated, became bound to fulfil the engagements entered into by the projectors of the other line.

The third case, that of *Lord Petre* v. *The Eastern Counties Railway Company*, was decided on similar grounds. There certain persons were applying to Parliament for an Act enabling them to make a railway which would, if a particular line was adopted, traverse the Plaintiff's park. He agreed to withdraw all opposition on receiving a deed executed by six of the projectors, whereby they covenanted that if the Act should pass, and the Company should carry their

line across the Plaintiff's land, then the Company would pay to the plaintiff 20,000*l.* for the value of the land taken, and 100,000*l.* for injury done to the rest of his estate, and further that within three weeks after the passing of the Act the Company should, by instrument under their common seal, ratify and confirm the deed then executed by the said six projectors so as to bind the Company. In consideration of these covenants, the Plaintiff agreed that he would withdraw his opposition to the bill. The bill passed, but the Company refused to execute any deed or to pay the 120,000*l.*, and proceeded to take by the intervention of a jury the land they required, and which crossed the Plaintiff's park. Upon this Lord Petre filed his bill praying that the Company might he decreed to execute the necessary deed of confirmation, and might be restrained from entering on the land, or causing its value to be assessed by a jury. The Lord Chancellor, Lord *Cottenham*, granted an injunction, *ex parte*, restraining the Company from proceeding to take the land under the powers of the Act. A motion was afterwards made before the *Vice Chancellor* to dissolve the injunction, but it was refused with costs, and the Company paid the 120,000*l.*

In this, a s in the other cases, Lord *Cottenham* clearly considered that the Company was bound by the contract of the promoters. The case is a very strong one, because the bill contained a statement that the payment of the 120,000*l.* would so reduce the funds of the Company as to make it impossible for them to complete their line, and yet Lord *Cottenham* con sidered that Lord Petre had a right as against the Company to insist on the contract entered into by the six projectors, although the Company refused to confirm it by deed under their seal.

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In one of these cases Lord *Cottenham* referred to the case of *The Vauxhall Bridge Company* v. *Lord Spencer*, reported in 2 Maddock, page 356, and in Jacob, page 64, as in some degree sustaining his views of the law on this subject. That case was in substance as follows: Certain persons proposed to make a bridge over the Thames at Vauxhall, and for that purpose to obtain the necessary powers from Parliament. The proprietors of Battersea Bridge thinking that the proposed new bridge might operate prejudicially to them, threatened to oppose the passing of the Bill through Parliament. In order to buy off their opposition, certain of the subscribers to the proposed new bridge executed a bond to the trustees for the owners of Battersea Bridge, whereby they bound themselves to pay to the trustees a sum of 5,000*l.* in case the Act should be obtained, which sum should be invested by the trustees in the three per cents. in trust if the bridge should be made to pay over the funds to the owners of Battersea Bridge by way of compensation for the loss they might sustain from the erection of the new bridge, but if the new bridge should not be made, then to transfer the funds to the Company incorporated by the Act. The Act was passed, and the obligors in the bond paid over out of the funds of the Company the stipulated sum of 5,000*l.* to the trustees named on behalf of the Battersea Bridge proprietors, and they duly invested the amount in the three per cents. The Vauxhall Bridge having been completed, the Vauxhall Bridge Company filed their bill against the proprietors of Battersea Bridge, alleging that the arrangement entered into for the purpose of inducing them to withdraw their opposition to the passing of the Bil was void, as being against the policy of the law, and

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therefore praying that the bonds might be cancelled and the stock transferred to them. To this bill there was a general demurrer—but it was overruled by Sir *Thomas Plumer*. The cause then proceeded to a hearing, and on the hearing Sir *J. Leach*, considering the only question to be, whether the arrangement was void on grounds of public policy, ordered the bill to be retained for a year, with liberty for the obligees in the bond to bring an action at law, in which the whole question would probably be tried. That course was approved by Lord *Eldon*, but the matter was afterwards settled by arrangement.

When this case is examined, it is plain that it affords no countenance for the doctrine on which Lord *Cottenham* acted in the cases I have referred to. In the Vauxhall Bridge case there was no attempt to make any one liable on the bond except the obligors, and the only question was as to the validity of the engagement itself. It is true that the 5,000*l.* was in fact advanced out of the funds of the Company, but that arrangement did not form any part of the contract with the Battersea Bridge proprietors, who looked only to the persons with whom they contracted. The decision therefore may be disregarded, as not bearing on the present question.

The result is, that in the three cases to which I have referred, Lord *Cottenham* acted on the principle that a company incorporated by Act of Parliament is, or may be, bound by the previous contracts of those by whom the act of incorporation has been obtained. I have stated my reason for thinking that such a doctrine rests on no sound principle, and may lead, as in Lord Petre's case I think it did lead, to great injustice. And if, therefore, the case now to be decided was in all respects similar to the three cases I have referred to, what I should have to decide would be

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whether I should advise your Lordships to adhere to the precedents established by Lord *Cottenham*, on the ground that it is unsafe to act against a series of decisions, even though they may appear not to rest on any solid foundation, or to depart from them and to adopt what I consider a just and more correct principle.

I am, however, relieved from the necessity of coming to any positive decision on this point, because I think the present case is distinguishable from those decided by Lord *Cottenham*. and so that even if those authorities are to be held binding still they do not govern the present case.

In all the cases before Lord *Cottenham* the contracts which he held to be binding on the Company were contracts to do things warranted by the terms of the incorporation. In the case of *Edwards* v. *The Grand Junction Railway Company*, Lord *Cottenham* expressly points out that the making of the road of the width stipulated by the contract was within the powers of the Act, and in both the other cases the purchase of the land for the purposes of the railway was clearly authorized by the Legislature. The question in those cases was not whether the Company had authority to make the road or to purchase the land, but whether they were making the road and purchasing the land in the mode and on the terms by which they were bound to make the one and to purchase the other. But here, what the projectors of the railway contracted to do, and what the interlocutors appealed from, oblige the Appellants to do, is to apply the funds raised under legislative authority for the purpose of the railway to an object foreign from that of the railway, namely, the construction of a pier and harbour at Helensburgh. It is in vain to say that such an application of the funds might, if the projected branch line from Dumbarton to Helensburgh had been made, have

been beneficial to the Railway Company. It is a sufficient answer to such a suggestion that it is not the purpose for which the shareholders subscribed their money; and there are numerous authorities both in England and in Scotland, to show that such a diversion of the funds from their statutable destination cannot be permitted. Any shareholder in a railway company may, by legal proceedings, prevent its directors from applying its funds to a purpose not authorized by the act of incorporation, and it is inconsistent with such a principle to hold that the Company can be compelled, even in pursuance of the contracts of its own directors, and much more in pursuance of engagements entered into by its projectors before it had any existence, to do that which it can only do by being guilty of a breach of duty towards the shareholders. It is not necessary to refer to authorities in support of this proposition. They have, in the course of the last twenty years, been very numerous both in England and in Scotland.

In coming to the opinion which I have thus expressed, I differ from the conclusion at which the Court below arrived. The Judges before whom the case was brought, as well the *Lord Ordinary* as the four Judges of the First Division, all proceed on the principle, following the English authorities, that a Company may be bound by the engagements entered into before its formation by those who procured the act of incorporation, provided the engagement was to do an act within its competency; and secondly, that the agreement to make or contribute to the making of this pier and harbour was an act within the powers of the Railway Company. Now, with all respect to the very learned Judges who decided this case, I think it is clear, both on principle and on authority, that even if

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they were right on the first point, they certainly miscarried on the second. The *Lord President* was evidently distrustful of his own judgment on this point. He says, "There it was that my difficulty arose on the question of competency. My difficulty was as to the Railway Committee placing the harbour trustees under the obligation to make the harbour. This comes very nearly to a Company coming into existence to make, not a railway merely, but a railway and harbour also. However, I have come to be of opinion that there was no incompetency in the matter, though I think it certainly comes very close upon incompetency." And Lord *Fullerton* says, "There seems no ground for taking the case out of the rule of the English cases." And similar opinions are expressed by the other learned Judges. But, my Lords, I must take leave to say that the English cases do not warrant the doctrine relied on. It is not enough to show that the proposed application of the funds will be beneficial to the Company. That can only be matter of opinion. The question is, not whether it will be beneficial, but whether it will be beneficial in the mode sanctioned by the Act. If the branch line had been carried to Helensburgh, the construction of a pier and harbour there would probably have been useful to the Railway Company, by increasing the facilities for their traffic; but there is nothing in the Railway Act which authorizes su h a mode of dealing with the money of the shareholders.

In *Colman* v. *The Eastern Counties Railway Company*, 10 Beavan, page 1, the directors were applying a part of their funds towards the establishment of a Steam Packet Company at Harwich, as being a speculation very much calculated to benefit the Railway Company, by causing a great increase of their traffic. Lord *Langdale*, however, held that the directors in so

applying the funds were acting *ultra vires*, and he would not listen to any argument founded on the supposed benefit to the Railway Company.

There have been many decisions resting on the same ground, and they seem to me clearly to govern the present case. Indeed, the facts here forcibly illustrate the expediency of the rule which holds an incorporated company to a strict compliance with the terms of the act of incorporation in the application of its funds. The formation of a good harbour and pier at Helensburgh might, though beyond the scope of their powers, have been of essential use to the Railway Company if, in pursuance of the authority given in the Act, they had made a branch line to Helensburgh. In fact, however, this has not been done, so that the Company has no interest in the construction of the pier and harbour, and the application of its funds in the mode insisted on by the Respondents would be a loss to the shareholders, without any possible compensation.

I am, therefore, of opinion, that even supposing the law to be (and in this respect the laws of England and Scotland are the same), that in respect of contracts entered into by the projectors of a Company, that the Company when formed shall do acts within the scope of their powers in a particular mode or on specified terms, the Company is bound, still that doctrine does not apply here, where the act to be done was not an act for the effecting of which the Company when established could lawfully devote its funds.

This case was argued early in the last Session of Parliament, and I regret that the final decision should have been so long delayed. But it was postponed because it was suggested that two other cases in your Lordships' paper would probably turn on the same or nearly the same principles.

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The first of these, *The Eastern Counties Railway Company* v. *Hawkes*, was heard and disposed of in the last Session (*a*). But that case proceeded on grounds clearly distinguishable from those on which the decision here will turn.

There a Railway Company already incorporated by Act of Parliament, being desirous of extending its line, entered into a contract with a landowner to purchase from him a piece of land necessary for the extended line, but the contract was to be of no force unless the legislature should give the Company authority to make the proposed extension. This authority was afterwards given by the legislature, the Company was authorized to extend its line, and for that purpose to raise additional money by the creation of new shares, to be deemed part of its original capital. When this Act was passed the extended line was as much within the scope and objects of the incorporation as the original line, and the purchase was made in pursuance of a contract by the Company itself, and not by persons standing towards the Company merely in the relation of projectors or promoters. That case, therefore, is inapplicable to the present, where the question is, whether the Company can be compelled to perform a contract entered into not by itself, but by those through whose exertions it obtained its existence, and where the contract is a contract to do what the Legislature has not authorized it to do.

The other case was that of *Preston* v. *The Liverpool, Manchester, and Newcastle-on-Tyne Railway Company*, heard in the present Session, on appeal from a decree of the *Master of the Rolls* dismissing the Plaintiff's bill. In that case, before the Defendants had obtained their Act of incorporation, two of the gentle-

(*a*) 5 H. of L. Ca. 331.

men engaged in attempting to obtain the Act agreed with the Plaintiff amongst other things, that if the Company obtained their Act they would pay him 1,000*l.* for all land required by the Company, and also 4,000*l.* for residential injury. The Act passed, but the Company eventually abandoned the undertaking and consequently no land was taken, nor was any residential injury occasioned. The Plaintiff filed his bill praying that the Company might be decreed specifically to perform the contract entered into by the projectors and to pay to him the two sums of 1,000*l.* and 4,000*l.* But the *Master of the Rolls* held, that looking at the whole of the agreement, there was no contract to take land or to pay money if land was not taken; that according to the true meaning of the parties it was not intended, if no land was required by the Company, that there should be any obligation to pay the money, and his Honour accordingly dismissed the bill. The decision was then brought by way of appeal to this House, and it was heard at your Lordships' Bar in the present Session. Your Lordships concurred in the view of the *Master of the Rolls*, and so dismissed the appeal (*a*).

These cases evidently afford no authority to guide your Lordships in that now under consideration, which must be decided on other grounds. I have already stated that I think the decision of the Court of Session must be reversed. Its effect is to compel the Appellants to do an act which they have no authority to do, in performance of a contract entered into, not by themselves, but by others who had no authority to bind them.

I shall, therefore, move your Lordships to reverse the interlocutors below, and to assoilzie the Defenders.

(*a*) Not yet reported.

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Mr. *Solicitor General:* My Lords, the expenses in this case that have been paid by the Defenders in the Court below will be returned, and the Pursuers in the Court below found liable in costs?

The LORD CHANCELLOR: Yes.

Mr. *Anderson:* My Lord, I submit to your Lordship that considering the state of the authorities upon which the Court below acted, there should be no costs.

The LORD CHANCELLOR: Mr. *Anderson*, I have thought of this very much. I think if I had decided upon a case exactly similar to those before Lord *Cottenham*, I should have come to that conclusion; but though I have intimated my opinion upon those authorities, I think they do not govern this case, and it appears to me that the Court of Session also very much doubted it.

Mr. *Anderson:* My Lord, a great portion of the expense was incurred in arguing this branch of the case. There were two branches of the case. The Court of Session was bound by the authorities although this House is not bound by them.

The LORD CHANCELLOR: If this case had come within the case of *Edwards* v. *The Grand Junction Railway Company*, I should have adopted that view; but I am of opinion that the expenses in the Court of Session must be paid by the Respondents.

I ought to state that I have been in communication with Lord *Brougham* upon this subject, and from the first we both took the same view; and having reduced into writing what I have now read, I sent it to him, and he has desired me to express his full and entire concurrence in the whole. The reason why we could not give judgment before was, that we had been led to suppose (and from my own recollection of the

case I thought it was so) that the case of *Preston* v. *The Liverpool, Manchester, and Newcastle-on-Tyne Railway* would involve the same question, but it certainly went off upon a totally different ground.

Ordered and adjudged accordingly.

GRAHAME, WEEMS, AND GRAHAME.