THE CALEDONIAN RAILWAY COMPANY, . . . . . } APPELLANTS.
COLT, . . . . . RESPONDENT.

1860.
*June 19th, 21st, and Aug. 3rd.*

*Scotch Railway Clauses Consolidation Act.—Statutory Tribunal.*—Per the Lord Chancellor: The statutory tribunal is established to give compensation for losses consequent on what a railway company may do lawfully under the powers which the Legislature has conferred upon them; p. 838.

Per the Lord Chancellor: For anything done in excess of or contrary to powers given by the Legislature, the proper remedy is an action *ex delicto* at common law; p. 839.

Per the Lord Chancellor: The penalties given by 50th section of the Statute are in the nature of cumulative remedies to hasten performance; p. 839.

*Action of Relief.*—Per the Lord Chancellor: This remedy is generally applicable where the Pursuer and Defender are under a common obligation, which ought first to be performed by the Defender; p. 840.

Per Lord Chelmsford: The principle on which an action of relief proceeds must necessarily limit it to those cases where the liability of the party from whom the relief is claimed is exactly commensurate with the liability of the party claiming the relief; p. 848.

By the Railway Consolidation Act it is provided that when a railway company, in executing their line, break up or interfere with existing communications, they shall either restore them or substitute new ones, within certain periods and under certain penalties prescribed.

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The above Company being under the statutory obligation of restoring a connecting branch line leading to a clay-pit on the estate of Mr. Colt, he, without waiting for the necessary junction, entered into an agreement with one John Macdonald to grant him a lease of the clay-pit. Macdonald was to have the use and benefit of the branch railway for the more convenient and effective carrying on of his works, the agreement reciting the Caledonian Railway Company were bound to connect the branch line, but that, if they failed to do so, the lessor; Mr. Colt, would himself do it at his own expense.

The Railway Company failing or delaying to execute the connecting operation, and Mr. Colt himself not executing it, Macdonald brought his action against Colt for "breach of agreement." Upon this Mr. Colt instituted the present action against the Company, to have it declared that they were bound to relieve him from Macdonald's action, and from all claims competent to that individual against Mr. Colt, and arising, as he alleged by his summons, out of the Company's default in omitting to execute the junction aforesaid.

The Pursuer, Mr. Colt, supported his case against the Company by the following pleas in law :—

1. The Defenders having failed to restore the connexion between the Pursuer's private railway and the Monkland and Kirkintilloch Railway, are liable to relieve the Pursuer of all loss and damage arising from the want of the said connexion.

2. The damages and expenses sued for by Macdonald having been occasioned by the Company's failure and delay, they are liable to relieve the Pursuer of the same.

On the other hand, the Company relied on the following pleas in law :—

1. The damages alleged to have been sustained by the Pursuer's tenant having been solely occasioned by the Pursuer's own acts, the Defenders are not bound to relieve him thereof.

2. The obligations undertaken by the Pursuer, for the non-fulfilment of which the alleged damages are claimed, never having

been made known to or intimated by him to the Defenders, they are in no view liable in the consequences of the non-fulfilment of these obligations, of the existence of which they were ignorant.

3. The matter of the alterations and junctions of the Pursuer's private railway with the main lines being at the time, and having long been the subject of negotiation between the parties, with the view to an amicable arrangement, the Defenders are not bound to relieve the Pursuer of the consequences of obligations undertaken by him to a third party with reference to these alterations and junctions, and the more especially that the Pursuer never intimated the same to them.

4. The Defenders not having wrongfully refused or delayed to restore the connexion between the Pursuer's private railway and the Monkland and Kirkintilloch Railway, are not liable in the relief claimed.

5. The Defenders are not liable in relief to the Pursuer of the damages claimed, in respect that by the 6th section of the Railway Clauses Consolidation (Scotland) Act they are only liable to make payment to the Pursuer of such compensation for damages sustained by him by reason of the exercise of the powers vested in them by their Acts, as shall be ascertained and determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act, for determining questions of compensation with regard to land purchased or taken under the provisions thereof, and the damages claimed have not been ascertained or determined in any of the ways provided by the said Act.

The *Lord Ordinary* (*a*), after having heard Counsel, pronounced the following Interlocutor :—

23rd Feb. 1858.—Finds that the grounds of action founded on by the Pursuer are not sufficient to support the conclusions of the libel, and to that effect sustains the first plea in law for the Defenders : Dismisses the action, and decerns : Finds the Defenders entitled to expenses, &c.

To this Interlocutor his Lordship annexed a Note, stating, among other things, that the required junction had at last been formed, and that the case between Macdonald and Colt had been settled under an arrangement with the Company, whereby " they gave " their consent to a tender or payment, on the under- " standing that their objections to Mr. Colt's claim of " relief were reserved entire, and that the only effect

(*a*) Lord Neaves.

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" of giving their consent was that the tender, with " the expenses, should be held the measure of the " Company's liability in the event of Mr. Colt suc- " ceeding in his action." His Lordship then proceeded to state that the question was, whether the Pursuer Colt's "grounds of action were such as to support " his conclusions for relief." With this question the learned Judge dealt as follows :—

An action of relief is not the proper remedy in every case where a party subjected in damages to another has himself a claim of reparation against a third party. A purchaser who makes a sub-sale has a claim of reparation in his own right against the original seller failing to deliver, but he has not necessarily a claim to be specifically relieved of the action of damages which the sub-purchaser may bring against him. In general, the right to bring a proper action of relief must be founded on some special obligation of warrandice or mandate, cautionary or conjunct obligation, or the like.

Here, if right on the merits, the Pursuer has a claim of reparation against the Defenders for the damage they have occasioned him. But he does not therefore seem to have a right to call on them to relieve him of the action or claim of damages at Macdonald's instance, for the injury the Pursuer has done to Macdonald. The ground of Macdonald's action is not simply that the Defenders have failed to make the connexion in question, but that the Pursuer has failed to fulfil his own personal obligation undertaken to Macdonald. That obligation, too, was not undertaken on the faith of the Defenders doing their alleged duty, for it expressly contemplates the case of their failure in that respect, and takes the Pursuer bound to Macdonald in that very event to do what was necessary. The failure of the Defenders was the condition of the Pursuer's obligation, and the Pursuer should not have taken such a burden upon him unless he meant to discharge himself of it. The Defenders are not said to have prevented him from doing so by any unexpected interference, and thus the Pursuer was exposed to Macdonald's action by a special and personal breach of an obligation of his own, not dependent on the Defenders' performance of their obligation, but actually assuming their non-performance of it as the event on which the Pursuer was to do what he undertook. The Defenders do not seem to be bound to appear and relieve the Pursuer from a claim by his own tenant for such a breach of contract on his part, when it does not appear that they authorized or were parties to that contract.

It is another matter whether the Pursuer's liability to Macdonald may not in some way be made an item or element in his

case against the Defenders, as increasing the damage he has himself sustained. That might well be, and yet it would not support the action of relief here brought.

The case is the more unfavourable for the Pursuer if the Defenders be right in their contention (as the Lord Ordinary is disposed to think they are) that the Pursuer's claims of damage against them are, by the Railway Clauses Act, appointed to be settled by the statutory process before the Sheriff. It would be at variance with that view if the Defenders could thus have been compelled to compear and defend the Pursuer in Macdonald's action against him, which was founded on a common law contract between those parties, and could only therefore be disposed of by the ordinary process of common law. But it is not necessary to decide this question, or to sustain as a direct defence the Defenders' fifth plea in law, which relates to this subject. The proper question here seems to be, not whether in respect of the Statute any action at common law was competent to the Pursuer, but whether this action of relief was competent at all.

The Interlocutor of the *Lord Ordinary* was submitted by Reclaiming Note to the Second Division of the Court of Session, who, on the 2nd March 1859, recalled it, and remitted to the *Lord Ordinary* to proceed with the adjustment of issues. The parties, however, failed to agree as to the terms of the issues; and thereupon the *Lord Ordinary* reported the cause back to the Second Division. The Second Division heard Counsel on the Company's fifth plea, and further gave them permission to lodge the following additional plea :—

The action ought to be dismissed in respect that the right to sue at common law for the recovery of alleged damages in respect of failure to restore a road in terms of the 49th section of the Railway Clauses Consolidation (Scotland) Act, 1845, is excluded, according to a sound construction of the said Act and Acts incorporated therewith.

Thereafter the Second Division pronounced the following Interlocutor :—

1st July 1859.—The Lords having heard Counsel for the parties on the fifth plea in law, and additional plea in law for the Defenders —Repel said pleas, and find the Pursuers entitled to expenses.

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Against this judgment of the Second Division the Company appealed to the House; Sir *Fitzroy Kelly* and Mr. *Roundell Palmer* appearing on their behalf.

Mr. *Rolt* and Mr. *Mure* were of Counsel for the Respondent.

The nature and course of the argument, as well as the authorities cited on both sides, appear sufficiently from the following opinions.

*Lord Chancellor's opinion.*

The LORD CHANCELLOR (*a*):

In arguing this Appeal at your Lordships' bar two questions were made:—1. Whether, upon the facts alleged by Colt, the Pursuer, irrespective of any transaction between him and Macdonald, the lessee, he could have maintained an action against the Caledonian Railway Company for having neglected to restore his branch railway, according to the obligation imposed upon them by section 49 of the Scotch Railway Clauses Consolidation Act (*a*)? 2. If this be so, then, whether the Pursuer has chosen the proper remedy by bringing this action of relief?

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

One answer attempted in the Court below, and countenanced to a certain degree by the *Lord Ordinary*, is, that the Pursuer was confined for a remedy to the statutory tribunal which the Legislature has provided where losses are sustained in the formation of railways. But it is well settled that this statutory tribunal is only established to give compensation for

(*a*) Lord Campbell. (*b*) 8 & 9 Vict. c. 33.

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losses sustained in consequence of what the Railway Company may do lawfully under the powers which the Legislature has conferred upon them, and that for anything done in excess of these powers, or contrary to what the Legislature, in conferring these powers, has commanded, the proper remedy is a common law action in the Common Law Courts. The Company were guilty of a wrong in disobeying the Act of Parliament which requires the restoration of the Pursuer's branch railway, and for this wrong they are liable to an action *ex delicto.*

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

(*a*) 16 Q. B. Rep. 961.

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

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

But here the action of *Macdonald* v. *Colt* was *ex contractu* on an agreement between them, to which the Company were in no shape privy. The cause of action which Colt had against the Company was *ex*

(*a*) 24 June 1859. See 21 Sec. Ser. 1108.

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

During the argument we in vain called for authority from text writers or books of practice, to show that an action of relief was competent under such circumstances. The Counsel for the Respondent relied exclusively on the decision in *Mansfield* v. *Campbell* (*a*); but supposing that case to be well decided, and that there may be an action of relief without warrandice or any obligation jointly binding upon Pursuer and Defender, that case by no means goes so far as to

(*a*) 14 Shaw, 585.

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decide that where part of the sum of money sought to be recovered in the action of relief might have been recovered as special damage in an action by the Pursuer against the Defender for a wrong, a compensation for that wrong may be recovered in an action of relief.

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

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

*Lord Wensleydale's opinion.*

Lord WENSLEYDALE:

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

The reasoning of the *Lord Ordinary* in his Note seems to me to be perfectly satisfactory, save as to that part of it where he intimates an opinion that the remedy of the Pursuer was not by action against the Company for not fulfilling the obligation cast upon them by the 49th section of the Railway Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 33. In my

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opinion an action will undoubtedly lie against the Company for not obeying that direction of the Act of Parliament. But the opinion intimated by the *Lord Ordinary* in no way affects his decision, that the damages and costs in the action by Macdonald against the Pursuer arose in the failure of his performance of his own personal obligation, voluntarily entered into by him to Macdonald. The reasoning of the *Lord Ordinary* seems to me to be perfectly satisfactory in that respect. The *Lord Ordinary*, justly, I conceive, says, that the proper action of relief is founded on the obligation of warrandice or mandate cautionary or conjunct obligation or the like; and there is no ground whatever to say that the Pursuer has put himself in the situation of a cautioner to Macdonald for the performance of the statutory obligation imposed on the Company; and still less with the consent or privity of the Company which seems necessary in the proper action of relief, according to the authority of *Erskine* (*a*).

And supposing that this strict construction is not to be put on the form of the action for relief, and that the case of *Mansfield* v. *Campbell* (*b*) was correctly decided, and that, therefore, damages could be recovered on that form of action for the breach of a sub-contract which one man reasonably made with a third person, on the faith that the original contract would be fulfilled, still I think that the Pursuer would not be entitled to recover the damages sought to be recovered in this case; for the contract of the Pursuer with Macdonald could not be considered as a reasonable consequence of the statutory obligation incurred by the Company to restore roads, which in truth had been already broken before the sub-contract with

(*a*) B. 3. tit. 3. sect. 65. (*b*) 14 Shaw, 585.

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Macdonald had been entered into. Still less could he recover the costs paid to Macdonald, or his own costs incurred in the improper defence of the action.

Therefore I agree in advising your Lordships that the judgment should be reversed.

*Lord Chelmsford's opinion.*

Lord CHELMSFORD:

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

The Respondent is possessed of a fire-clay field called Castlespails, to which he had made a private railway, communicating with the Monkland and Kirkintilloch Railway, belonging to the Appellants. The Appellants in 1845 obtained an Act by which they were empowered to make a branch line, called the Castlecarry Branch, from the Monkland and Kirkintilloch Railway to the Scottish Central Railway. In making this branch the Appellants interfered with the Respondent's private railways to his clay-field. They were, therefore, bound by the 46th section of the Railway Clauses Consolidation (Scotland) Act, 1845, before the commencement of their operations, to cause a sufficient road to be made instead of the road to be interfered with, under a penalty, by the 47th section, of 20*l.* for every day after the interruption of the existing road, during which the substituted road should not be made, to be paid to the Respondent as the owner of the private road; and by the 48th section they were also liable for any special damage

which any party entitled to a right of way over the road so interfered with might suffer by reason of their failure to cause another sufficient road to be made before they interfered with the existing road. In addition to these provisions, applicable to the commencement of their operations, the Company were afterwards bound to restore the private road to as good a condition as it was in when first interfered with, under a penalty of 20*l.* a day, to be paid to the Respondent as the owner of the road. By the words "the owner of the road," in the 47th section, the owner of the soil of the road is evidently intended; and if the substituted road is not made, he is to receive, and to be satisfied with, the 20*l.* a day penalty. The only person who can maintain an action for any special damage for not making a sufficient road after the interruption of the existing one, is, by the express words of the 48th section, the person entitled to a right of way over the road. I cannot help thinking also that the intention of the Legislature in the 50th section is, that the penalty of 20*l.*, incurred by not restoring the road, should be given to the owner as a complete satisfaction for the damage which he might sustain. The reason alleged for the difference as to the action for special damage between the penalties imposed in this section and in the 48th section, is the power which is given in it for the Sheriff or justices to order the whole or any part of the penalty to be laid out in executing the work. But it seems so unreasonable that the magistrates should possess any power of direction with respect to a penalty which is forfeited to the owner of a private road, that I am disposed to confine the application of this part of the section to the case of public roads. But however this may be, there can be no doubt that the person entitled

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to a right of way over the road is not excluded from his action for any special damage which he may sustain by reason of a failure to restore the road, although no such right is expressly given to him, as it is by the 48th section, for not making the substituted road. This being the state of things, the Respondent entered into an agreement with Macdonald for a lease of the Castlespails clay-pit field for nineteen years, by which it was stipulated that Macdonald was to have the use of the private railway, for all purposes connected with the beneficial working of the clay, and which contained these words: "It being understood the Caledonian Railway Company is bound to connect the branch line with their main line, or with the Monkland and Kirkintilloch line, the proprietor (the Respondent) is to do so at his own expense, should they fail or refuse so to do." Macdonald, therefore, entering under this agreement, was entitled to maintain an action against the Respondent for any breach of it, and against the Company also for any special damage he might sustain by their failure to perform their duty in restoring the road. Under these circumstances, the private railway not having been connected either with the main line or with the Monkland and Kirkintilloch line, Macdonald in August 1854 brought his action of declarator against the Respondent to have it declared, *inter alia*, that the Respondent was bound to connect the branch line with the main line, or with the Monkland and Kirkintilloch line, "all as set forth in the heads of agreement referred to in the condescendence, and to make payment to the Pursuer of the sum of 2,000*l.* sterling, in the name of damages, for his failure or breach of agreement." By the pleas in law for the Pursuer, it appears that Macdonald's action was

founded entirely upon the agreement into which the Respondent had entered with him (*a*). Notice of this action was given to the Company, and they were requested to defend the same; "but they denied all liability for any portion of the damages claimed by Macdonald, and declined to defend the action." Macdonald's action was ultimately settled; but previously thereto the Respondent had brought an action against the Company, which was arranged on the 12th May 1856, and a discharge of all claims against the Company was given by the Respondent, "with a reservation of," &c (*b*). Under these circumstances, the question arises whether the present action for relief is competent.

In the course of the argument the learned Counsel at the bar were pressed for some authority from text-writers to show when an action of relief is competent, but they could refer to none, and your Lordships are left in doubt whether such an action can be maintained in any other cases than those which are mentioned by the *Lord Ordinary;* viz., those which are "founded on

(*a*) Macdonald's third plea in law was as follows :—

The Defender having undertaken and become bound by the agreement to connect the branch line of the railway in question with the main line, or with the Monkland and Kirkintilloch line, it was his duty to implement and fulfil the said obligation without undue delay, and having failed in that duty, to the injury and damage of the Pursuer, he is liable in reparation, as concluded for in the summons.

(*b*) The reservation here referred to was as follows :—"Reserving to me, the said John Hamilton Colt—First, my right of relief against the said Caledonian Railway Company of the claim brought against me by the said John Macdonald, my tenant, or any other claim that he may hereafter bring against me for damages alleged to be sustained by him in consequence of the non-formation or restoration of the private railway to connect his clay-field with the main line of the said Caledonian Railway, or with the Monkland and Kirkintilloch Railway, and also the said Caledonian Railway Company's defences against my said claim of relief."

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some special obligation of warrandice or mandate cautionary or conjunct obligation, or the like." But whatever may be the nature of the rights to which this species of action applies, the principle upon which it proceeds must necessarily limit it to those cases where the liability of the party from whom the relief is claimed is exactly commensurate with that of the party claiming the relief. Thus, if the measure of damages to which the Company were liable to the Respondent was precisely co-extensive with the amount for which the Respondent was liable to Macdonald, it would seem reasonable, in order to avoid multiplicity of actions, that the Respondent should be entitled to call upon the Company to come in and take his place in the defence of Macdonald's action. But this is by no means the case, as a short consideration will show. It may be, that upon the view which I am rather disposed to take of the Act, the Company were only liable to the Respondent for the prescribed penalties, which of course would put an end to all difficulty in the case; but I will assume that the Respondent was entitled to maintain his action for all the special damage which necessarily flowed from their breach of duty. Thus, for instance, if by reason of the non-restoration of the road he had been unable to let the clay-pit field, or had suffered any other injury directly arising from the omission of the Company, he might have alleged it as special damage in any action brought against them. But he had no such ground of special damage to allege against the Company. He had entered into an independent agreement with Macdonald, which he had failed to perform, and although his engagement to Macdonald was to the same extent as the liability of the Company, yet the damages which he had to pay to Macdonald, and the costs of the action, could not be recovered as special

damage from the Company, because they were not the direct consequence of their breach of duty, but were occasioned by the non-fulfilment of his own undertaking. The point cannot be put more concisely and pointedly than by the *Lord Ordinary*. He says, "the ground of Macdonald's action is not simply that the Defenders have failed to make the connexion in question, but that the Pursuer has failed to fulfil his own personal obligation undertaken to Macdonald. That obligation, too, was not undertaken on the faith of the Defenders doing their alleged duty, for it expressly contemplates the case of their failure in that respect, and takes the Pursuer, bound to Macdonald in that very covenant, to do what was necessary (*a*)." The damages recovered by Macdonald cannot be considered as arising naturally, *i.e.* "according to the usual course of things," to use the words of Baron *Alderson* in *Hadley* v. *Baxendale* (*b*), from the Company's breach of duty, but from something collateral to and independent of it, viz. from the Respondent's failure to perform his contract. This is very different from the case of *Mansfield* v. *Campbell* (*c*), which was strongly relied upon on the part of the Respondent. There the damage to which the vendor was liable was the immediate result of the non-fulfilment of the purchaser's contract. The purchaser had agreed to pay the purchase money by instalments. The vendor, relying entirely upon the performance of this promise, had given notice to pay off the heritable bond which it must be observed the purchaser knew that the vendor must do, in order to clear the title. The failure of the purchaser to perform his promise was the sole cause of the default of the vendor, upon which

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(*a*) See *suprà*, p. 836. (*b*) 9 Exch. 354.
(*c*) 14 Shaw, 585.

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the creditor recovered his damages. And the damages to which the creditor was entitled were exactly those to which the vendor had been made liable by the default of the purchaser. I should have felt much greater difficulty in this case if it had appeared that the learned Judges of the Court of Session had distinctly determined, after argument, that this was a case for an action of relief. But their attention seems to have been principally, if not entirely, directed to the questions whether the action was incompetent on account of the damages being the subject of statutory jurisdiction, and whether the penalties prescribed by the Act were not the sole measure of compensation. It is true that their Lordships, in the consideration of the case, appear to have assumed that the action for relief was well founded. But that there was no clear and distinct expression of an opinion upon this point appears from the note of the *Lord Ordinary*, for upon the remit to him he says, "The *Lord Ordinary* had "been of opinion that this was not a case for an "action of relief such as the present, but *apparently* "that view was considered too strict in the Inner "House." Resorting, then, to principle in the absence of authority, it appears to me that the action of relief on a question of damages can be applicable only where the liability of a Pursuer and Defender are so completely co-extensive that the Defender, by standing in the Pursuer's shoes in the action brought against him, would satisfy both his own and the Pursuer's liability at the same time. That was not the case between these parties. The Company, although liable to the Respondent for their own breach of duty, were not liable to him for him for more, and could not be called upon to indemnify him against the consequences of an action which arose out of his own neglect to perform an independent contract into which he had

voluntarily entered with Macdonald, and upon which alone Macdonald's right to recover his own peculiar damages was founded.

For these reasons, I think the Interlocutors appealed from ought to be reversed.

## JUDGMENT.

It is *Ordered* and *Adjudged*, That the said Interlocutors, complained of in the said Appeal, be, and the same are hereby reversed, and that the said cause be, and the same is hereby remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the Interlocutor of the Lord Ordinary in the said cause, dated the 23rd of February 1858, reclaimed against, and to decern in terms thereof, and also for payment by the said Respondent to the said Appellants of the costs incurred by them in the Court of Session, as well since as before the date of the said Interlocutor of the Lord Ordinary: And it is further *Ordered*, That the said Respondent do repay to the said Appellants the costs to which he was found entitled by the said Interlocutors of the 2nd of March 1859 and of the 1st of July 1859, appealed from, if paid by the said Appellants.

GRAHAME, WEEMS, & GRAHAME—CONNELL & HOPE.