quire that specialty, and it is not necessary in point of relevancy. It would be unjust for this reason, that the pursuer, the master of a foreign vessel, unacquainted with the forms of diligence in use in this country, and possibly not speaking our language, may be in doubt as to the particular time when the arrestments were used. He may not be in a condition to condescend upon it, and accordingly he has wisely refrained from condescending on it. His record leaves it open to show that the arrestments were used either before or after the vessel entered the harbour. I think it is not necessary to insert the *locus* in the second issue. Now, the third issue proceeds on this, that the persons who were acting under the orders of the defenders caused the vessel to strike against the quay to her injury and damage. It is said that it is not shown whether this took place before or after the execution of the arrestment. That objection is founded on the assumption that it is a fact that the parties did make the vessel strike against the quay, and if that is the case, it is not of much consequence whether it was before or after the arrestments. If all that was done was without warrant at all, that may aggravate the damages; but, supposing the arrestments were executed before the injury took place, there might still be a quite good ground for damages, for the mere circumstance of arresting a vessel will not fairly justify parties in handing her over to ignorant persons who will cause damage. The fourth issue is said to be a part of the second issue. I do not think it is. The question is whether this harbour was an unsafe place for this vessel to be detained. Here, again, I think the wrong will be committed whether there was a good arrestment or not, and that the issue purposely leaves that open, because, even if the arrestments were good, and the damages to be claimed for malicious use of the arrestments may fail, he may still be entitled to prevail on the fourth issue if he show that the arrestment was followed by such gross unskilfulness as to cause damage. I am therefore for allowing these four issues.

The other judges concurred.

Agent for Pursuer—A. Duncan, S.S.C.

Agent for Defenders—John Ross, S.S.C.

Thursday, January 16.

BRIDGE OF ALLAN WATER COMPANY *v.* ALEXANDER.

Advocation—Lands Clauses Consolidation Act—Competency. A company having agreed to purchase land for public works, and the compensation to be paid to the landowner having been ascertained in terms of the Private Act and the Lands Clauses Consolidation Act 1845, but the landowner refusing to accept the money on its being tendered, or make out a title, the company, under sections 75 and 76 of the Lands Clauses Act, consigned the money in bank, but did not expede a notarial instrument. The company then presented a petition to the Sheriff for possession under section 89 of the Act. *Held*, under sections 138 and 139, that advocation of the petition was incompetent.

Statute—Lands Clauses Consolidation Act 1845—*Construction—Interdict. Held*, that a company consigning money under sections 75 and 76 of the Lands Clauses Act, but failing to expede a notarial instrument, are not in a position to ask the Sheriff to put them in possession of the subjects, and may be interdicted from entering on them.

Sir James Edward Alexander is proprietor of Westerton, in the parish of Logie, and for a number of years he and his predecessor, Major Henderson, were in use to supply the village of Bridge of Allan with water by means of a reservoir on their property, from which the water was conveyed to the village by means of pipes. In 1866 the Bridge of Allan Water Company's Act (29 and 30 Vict., c. 241) was obtained by certain inhabitants of Bridge of Allan for enabling them to supply Bridge of Allan and places adjacent with water. By the 28th section of the Act, it was provided that the company should purchase the said water-works, including the reservoir, main-pipe, distributing-pipes, and all appurtenances connected therewith, and the compensation payable to Sir James Alexander might be agreed on between him and the company, or, in case of difference, such compensation was to be fixed and determined by arbitration, provided that, in fixing the amount of compensation, the arbiter should take into consideration the value of the water, the plant, and the whole circumstances of the case. Section 29 enacted that, on payment of the compensation, Sir James was to grant a conveyance of the water-works to the company, and, on such conveyance being granted, the works were to form part of the undertaking of the company, and be vested in them for the purposes of the Act. Section 75 of the Lands Clauses Consolidation Act 1845 (8 Vict., c. 19), which Act is incorporated with the former Act, provides that, if the owner of any lands purchased or taken by the promoters of the undertaking, on tender of the purchase-money, or compensation either agreed on or awarded to be paid, refuse to accept the same, or fail to make out a title, or refuse to convey the lands, the promoters may deposit the purchase-money or compensation in bank, subject to control of the Court; and section 76 provides that, on such deposit being made, "the cashier, or other proper officer of such bank, shall give to the promoters of the undertaking, or to the party paying in such money by their direction, a receipt for such money, specifying therein for what and for whose use (described as aforesaid) the same shall have been received, and in respect of what purchase the same shall have been paid in; and it shall be lawful for the promoters of the undertaking, if they think fit, to expede an instrument under the hands of a notary-public, containing a description of the lands in respect whereof such deposit shall have been made, and declaring the circumstances under which, and the names of the parties to whose credit such deposit shall have been made, and such instrument shall be stamped with the stamp duty which would have been payable upon a conveyance to the promoters of the undertaking of the lands described therein; and thereupon all the estate and interest in such lands of the parties for whose use and, in respect whereof such purchase-money or compensation shall have been deposited, shall vest absolutely in the promoters of the undertaking, and as against such parties they shall be entitled to immediate possession of such lands; and such instrument, being registered in the register of sasines in manner hereinafter directed in regard to conveyances of lands, shall have the same effect as a conveyance so registered."

No compensation having been agreed on between the parties, Mr Thomas Ranken, S.S.C., was ap-

pointed arbiter. After certain procedure, the arbiter, on 7th August last, fixed the amount of compensation at £1365.

Sir James Alexander declined to accept of the sum in the award as the amount to which he was entitled in respect of the transaction, and refused to grant a conveyance. On the 17th August he presented to the Sheriff of Stirling a petition to have the company interdicted from entering upon or interfering in any way with the water-works. In the condescendence ordered by the Sheriff-substitute, the petitioner alleged that, on or about Friday the 16th August, the respondent, the said Thomas Chalmers, as contractor for the said Bridge of Allan Water Company, and by and with their authority and instructions, but without any right or title on the part of the respondents, or either of them, entered by himself, or others in his employ, in or upon the reservoir above-mentioned, part of the petitioner's works, with the alleged object of building upon or excavating in said reservoir, and although desired and required to desist from so doing, refused to do so, which rendered the present proceedings necessary. The petitioner farther intimated an action of reduction of the award.

The company, in defence, maintained a right to possession of the reservoir and works under their special Act and the Lands Clauses Act, and also alleged that, independent of this right, their engineer, before commencing operations at the reservoir, had obtained the consent of the petitioner to entering into possession.

On 9th September 1867, the company presented a petition to the Sheriff, under the 89th section of the Lands Clauses Act, for immediate possession of the works. They had previously tendered the price, and the tender not having been accepted, the money had been deposited in bank. A minute of defence was given in, and the two petitions were litigated before the Sheriff-substitute. In the petition for possession the Sheriff-substitute found that the company had failed to expede the notarial instrument specified in section 76 of the Lands Clauses Act, and, therefore, on the ground that they had not followed out the forms provided by statute, dismissed the petition. The Sheriff, on appeal, adhered. In the interdict case the Sheriff-substitute allowed the respondents a proof of their averments to the effect that they had obtained the consent of the petitioner to their operations on the reservoir, and to the petitioner a conjunct probation; and, in respect of his judgment in the other case, repelled the other pleas of the company. The Sheriff adhered.

The company advocated in both cases.

In the possession case, the respondent, Sir James Alexander, pleaded that review was excluded by section 139 of the Lands Clauses Act. That clause enacts that "in all cases which may come before any Sheriff-substitute under this, or the special Act, or any Act incorporated therewith, in which written pleadings shall have been allowed, and a written record shall have been made up, and where the evidence which has been led by the parties shall have been reduced to writing, but in no other case whatever, it shall be competent for any of the parties thereto, within seven days after a final judgment shall have been pronounced by such Sheriff-substitute, to appeal against the same to the Sheriff of the county, by lodging a minute of appeal with the Sheriff-clerk of such county or his depute; and the said Sheriff shall thereupon review the proceedings of the said Sheriff-substitute, and whole process, and, if he think proper, hear the parties *viva voce* thereon, and pronounce judgment; and such judgment shall in no case be subject to review by suspension or advocation, or by reduction on any ground whatever."

YOUNG, CLARK, and BURNET for advocators.

GIFFORD and MACDONALD for respondent.

LORD PRESIDENT—The question we have to dispose of is the competency of the advocation in the possession case, and in order to enable us to dispose of that more satisfactorily, it was thought expedient that we should know something of the merits of the question in that case before the Sheriff. We have now a complete understanding of what that question was, and it appears to me to be a very simple question; and, as my opinion on the competency depends on the nature of the question before the Sheriff, I shall explain what that question is.

It seems to me that, under the Lands Clauses Act, promoters of an undertaking are entitled to have possession of subjects which they have acquired under their compulsory powers in two different sets of circumstances. For I do not comprehend within "possession" that entry on lands permitted by the provisions in the 83d section. That is not, in my opinion, possession within the meaning of the Act. One of these modes of possession is provided in the 84th section, which contemplates the case of there being difficulty or delay in ascertaining the amount of compensation or purchase money to be paid for the subjects acquired. The personal contract of sale is by this time complete, either by notice or in some other competent way, and wha remains to be done is to ascertain the price, and deliver the conveyance. But delay is apprehended in ascertaining the amount of the price, and to prevent inconvenience to the promoters it is provided by the 84th section that a certain *interim* rough estimate is to be made by a valuator, and on the promoters depositing the sum so ascertained provisionally, and also granting bonds for the amount to be ultimately ascertained, they are to be entitled to possession. That is one case. The only other case is provided for by the 76th section. Now, the 76th section is very distinctly expressed. It refers to the case where the purchase money or compensation has been ascertained, and provides—[*reads from section*]. Now here, if the matter is not carried out amicably under the 75th section, is the only other alternative mode in which the promoters can obtain possession of the subjects, that is, by making a title. They have the privilege conferred upon them, and a very anomalous privilege it was at the time when the statute was passed, of making a title for themselves instead of obtaining a conveyance from the other party, and when that is done, it is declared that that title shall give them the same right of property as if they had got a conveyance. Looking at the kind of case which was presented to the Sheriff, the statute has so clearly and plainly defined the two cases—the only two cases, in which the Sheriff is to put the promoters into possession, that one can hardly think it a judicial Act at all. I do not mean to say absolutely that the Sheriff is not then acting judicially, but it is very like a Ministerial Act, and like what is done by a notary in some circumstances. That being the nature of the question before the Sheriff, we come to construe the clauses of the Act of Parliament which prohibit review of proceedings under the statute. There are three clauses in this Act which require to be

read in connection in order to ascertain the mind of the Legislature on this subject. The first of these is the 138th. That section provides that "no proceeding in pursuance of this or the special Act, or any Act incorporated therewith, shall be quashed or vacated for want of form, nor shall the same be removed by suspension or otherwise into any superior court." That is a very large and broad prohibition of review. Then follows the clause on which we have heard most argument, the 139th —[*reads section*]—and then follows the 140th section, which provides for an appeal against the determination of any justices with respect to any penalties under the Act, or special or incorporated Act, to the Quarter Sessions; such appeal not to be entertained after four months from the date of the determination, nor without recognisances to prosecute the appeal, and abide the order of the Court thereon. Taking these three sections together, it is to be observed that although the 139th is the one particularly applicable to the shape of the case before us, it is by no means the leading section excluding review. It applies only to the particular case of the question coming before the Sheriff-substitute in the first instance, and being conducted on the principle of written pleadings, and where there is an appeal to the Sheriff that is final. But if the same case comes before the Sheriff in the first instance, or if it were before the Sheriff-substitute with no written pleadings, then it would be the 138th section that would apply. As to the 140th, it is of great importance to observe that it stands in direct contrast both with the 138th and 139th. It is limited to one particular class of cases—namely, prosecutions for penalties, and it is for that only, while all the other sections are in much more general terms. One is, "no proceedings in pursuance of this Act," &c.; and the other is, "in all cases which may come before the Sheriff under this or the special Act," &c. Now, reading these sections of the statute in this way, the natural meaning of the 139th is, that no case which is brought before a Sheriff-substitute under this Act, and which is conducted before him by written pleadings, and is afterwards taken to the Sheriff, can be brought here by advocation. And I think that the 139th section applies, although there be no proof in the case. I think the plain meaning of that section excludes this advocation.

But we have heard argument to this effect, that the particular place in the statute where this clause occurs, confines its operations to the subject matter of that sub-division of the statute. That is a very important argument, and I have listened to it with great attention, all the more on this account, that I think it is an argument which may be pressed with much greater effect with regard to the construction of some more recent statutes, where the sub-division of the Act is precise and logical, and it is not necessary to travel out of any sub-division in order to get other clauses relating to the same subject. But in the Lands Clauses Act, and the other earlier statutes, that has been imperfectly executed, and it would be impracticable to adopt that rule of construction as applicable to them. The division of the Lands Clauses Act into parts is not logical, but the reverse. And I shall give three examples of cases under this Act to show that you must look in different sub-divisions for things that do not naturally belong to them. In the first place, there is that sub-division of the statute relating to purchase of lands by agreement, beginning with the 1st section, that is, the purchase of land by voluntary arbitration, and not in the exercise of compulsory powers; and yet in that division of the statute you find that the 15th and 16th sections have reference to compulsory powers. The following sub-division relates to the purchase of lands in the exercise of compulsory powers, but you must go back to the former part for two of its provisions. Then, again, in that division which relates to entry on lands—a not very long division—there is a section, the 90th, which prohibits promoters from taking by compulsion a part of houses, which has no connection with entry on lands, and should have been included in the part which deals with compulsory powers. Lastly, the 120th section occurs in the division relating to the sale of surplus land, while its purport is to reserve the rights of superiors in lands taken for any purpose. This is enough to show that it is impossible here to adopt a rule of construction which must be assumed to be founded on a perfectly logical division of the statute. And, indeed, it is not necessary to go far to see that this is out of the question. For if the clause we are dealing with, relating more especially to the recovery of penalties, could only refer to that, what is to be said of the 138th section? Plainly the words cannot be confined to that division of the statute in which they are placed. Reference was made to a case under the Railway Clauses Act, the *Caledonian Railway Company* v. *Glasgow and Redburn Bridge Road Trustees*, 12 D. 399. His Lordship then criticised that case, and continued—As to the Act before us, I entertain no doubt, and therefore I am for holding the advocation of the possession to be incompetent.

The other judges concurred.

After argument on the Interdict case:—

Lord President—This advocation of the interdict process in the Sheriff-court does not depend entirely, at least not necessarily so, on the same considerations as the possession case which we have just decided. We there held the advocation to be incompetent on the authority of certain clauses of the Lands Clauses Act, declaring the judgment of the Sheriff to be final. But this is an application for interdict, not at the instance of the promoters of the undertaking, but at the instance of the owner of the lands. And the ground on which that application is presented is, that the promoters have not clothed themselves with any statutory title of possession, and that, nevertheless, they had attempted to take possession of his property. Two answers are made to this. One is, that the respondents had a right to possess under the Act; the other is, that they acted with consent of the proprietor. As to the latter ground, we are not in a condition to dispose of it at present, for the facts are disputed, and may require to be ascertained. We are only concerned in the meantime with the defence rested on the right of the promoters under the Act. I may state at the outset, as a proposition admitting of no doubt, that the promoters of an undertaking under such a statute have no common law rights of possession or property at all. They can have no right of property except under the Act, and no right of possession, and in ascertaining whether they have vested themselves with either, we must attend strictly to the conditions imposed by the statute. We have here, in the first place, to deal with a special Act. Section 28 provides for the purchase by the company of the water-works, &c., belonging to the petitioner. Then there is a

provision for ascertaining the price to be paid by arbitration. And the special Act provides that the arbitration shall be proceeded with under the provisions of the Lands Clauses Act, so that the only difference between this and the Lands Clauses Act is that it is settled by the Act itself that a certain property shall change hands, and the arbitration is special, but is to be proceeded with under the general Act. The compensation being ascertained, the next step is under the 29th section of the special Act. "On payment of the compensation," Sir James Alexander "shall grant a conveyance of the said water-works to the company; and, on such conveyance being granted, the said water-works, for all the rights of the said Sir James Edward Alexander, or his heirs or successors therein, shall form part of the undertaking of the company, and shall be vested in, and may be held, used, and disposed of by the company for the purposes of this act." Under this section nothing can be done except on payment of the compensation; and, on payment, Sir James "shall grant a conveyance." That is imperative. I should be inclined to say that a tender of the compensation was sufficient. But then, supposing that the compensation is tendered, and that Sir James does not grant the conveyance, the company have no help from the special Act at all. It stops there, and gives them no farther power, and therefore they must go to the General Act. No doubt they might have an action against him, and compel him to grant the conveyance, and there might be grounds for adjudging the property, but that would be a cumbrous proceeding, and accordingly the promoters found it necessary to go to the Lands Clauses Act, which is incorporated with the special Act, and they say that they have, under the provisions of that Act, constituted in them a right to obtain possession of this property. It rather seems to me that if we sustained that plea we should be doing something inconsistent with the clauses of the Lands Clauses Act on which we went in the previous case. I should not be afraid to do that if I thought it right, but unfortunately I remain convinced that the ground of that judgment was sound, and sufficient not only to dispose of that point, but of this also. In construing the 89th section of the statute under which the promoters proceeded in their other case, we came to this conclusion, that the only case or cases in which the promoters might go to the Sheriff to ask an order for possession, were cases in which, according to the provisions of this or the special Act, they were authorised to take possession. Now, we considered what were these cases, and we could find only two, and I have not yet seen any other pointed out. It is said that there are other clauses which imply a right to take possession, but certainly there is no direct authority. In the 84th section we have the provisions as regards *interim* possession, and in the 76th as regards permanent possession. I know no other case. In the present case we have nothing to do with the 84th section, and that, therefore, may be thrown out of view. The only case in which there can, in this instance, be any authority given by the statute to take possession is under the 76th section, and I hold that under that section two things are necessary in order to give the company a title of possession. There can be no possession without a title, and the promoters must not only consign, but they must expede a notarial instrument in terms of the section. It is said that it must be a matter of indifference to the landowner whether a notarial instrument is expede or not, if he has got his price consigned. I cannot assent to that. The party may be in such a position as that he will not grant a title, because he is not satisfied, and he leaves them to make their title, and the statute is precise as to what is to be in it in order to make it valid. There are many points in which the owner has a material interest, and therefore it is not indifferent to him whether a notarial instrument is expede or not. But whether he has an interest or not, it is enough that the statute has so said that it is only by expeding that notarial instrument that the right shall vest and possession shall follow. The authority, therefore, obtained from the 76th section to enter into possession is conditional on the title being completed.

It is said, farther, that when the price has been ascertained and is consigned, it is only fair that the promoters should be put into possession, and that no one has any interest to prevent it. But it must be recollected that we are dealing with heritable estate, and it is one of the best ascertained rules of law that no one can take or maintain possession without a title. I do not mean a complete feudal title, because possession may he had under a temporary title, or a title of mere security, but there must be a title of some kind. There is no title that can belong to the promoters under this Act but a statutory title, and, therefore, though the statute may say, you shall not take posession until you have consigned, it would be rash to say that, as soon as you have done that, you may take possession. That only means that payment or consignation shall be one condition, but by no means the only one. I therefore go on the assumption that the price has been ascertained and consigned, and I care nothing about the reduction. I go entirely upon this, that the promoters have not got in their own person any statutory title of possession, and, without that, they have taken possession; and, therefore, the interdict must stand, unless they can show that they have got the consent of the proprietor. It would certainly be a curious result, that after it has been judicially determined by the Sheriff that these parties have not put themselves in a position under the Act to ask an order for possession, they should yet be allowed to take possession by recal of this interdict *via facti*. They can have no other conceivable object. They must suppose that the recal of this interlocutor will legally prevent Sir James Alexander from opposing their entry. But I only say that as illustrative of the general ground on which I proceed.

Lord Curriehill—I take the same view, and shall state my opinion in a single sentence. It having been decided in the former case that the promoters are not entitled to obtain possession by judicial authority, it appears to me to follow *a fortiori*, that they are not entitled to take possession, *brevi manu*, without judicial authority.

Lords Deas and Ardmillan concurred.
Agent for Advocators—A. J. Dickson, S.S.C.
Agents for Respondent—H. & A. Inglis, W.S.

Friday, January 17.

LORD ADVOCATE *v.* GORDON'S TRUSTEES AND TAILYOUR.

Teinds—Stipend—Locality—Onus—*Mensal Kirk.*

For more than a century the whole burden of