The defender appealed, and argued—The defender had only her own evidence to show that she had paid the sums sued for out of her own estate, and that was not sufficient proof to rebut the presumption that if a wife advanced money it was for the use of the spouses, and not as a creditor. The long delay in bringing the action was also against the pursuer's claim as good—*Annand's Trustees* v. *Annand*, February 6, 1869, 7 Macph. 526; *Fairbairn* v. *Fairbairn*, March 18, 1868, 6 Macph. 640; *Hutchison* v. *Hutchison's Trustees*, June 10, 1842, 4 D. 1399; February 1, 1843, 5 D. 469; *Tennent* v. *Tennent's Executor*, June 28, 1889, 16 R. 876; *Edward* v. *Cheyne*, March 12, 1888, 15 R. (H. of L.) 37.

The respondent argued—The pursuer was entitled to have a proof *prout de jure* in support of her averments, and had proved that she had paid the sums sued for out of her own estate. As regarded the delay in bringing the action, it was satisfactorily accounted for by the pursuer's expectation that she was to succeed to her husband's whole estate. It was proved that the money was paid to the various persons who claimed it as creditors, and the wife took the receipts in her own name, and that raised a presumption that the wife intended to make herself the creditor of the husband—Dickson on Evidence, p. 190.

At advising—

Lord Justice-Clerk—As regards the alleged advances made by the pursuer to her husband after marriage, the burden lies upon the pursuer to prove that she had advanced these sums to her now deceased husband out of her own estate, and that they had not been repaid by him, and I do not think that the evidence she has brought forward is sufficient to establish these two points. It is true that she produces receipts for money paid, taken in her own name, which might indicate that she had advanced the sums stated in these receipts on behalf of her husband, but then she can produce no evidence in support of these receipts except her own statement.

It is true that the Sheriff-Substitute states that he does not consider the pursuer to be an untruthful witness, but the real question is always whether the pursuer has been able to bring forward such an amount of proof that the Court can hold it to be sufficient, and I do not think the pursuer in this case has done so. I therefore think the Sheriff-Substitute is right in his views upon this part of the case.

Lord Young—I am of the same opinion. I have no doubt whatever with regard to the sums said to be paid by the wife after marriage that they are not debts against the husband's estate.

Lord Rutherfurd Clark—On the evidence which we have in the proof before us I am satisfied that with regard to the debts which the pursuer says her husband incurred in respect of advances made by her on his behalf after marriage, she has no proof whatever.

Lord Trayner—I am not quite prepared to say that the record does not show a relevant case for trial, but upon the evidence as it has been taken, I agree with your Lordships that there is no proof whatever that the parties treated the advances made by the pursuer on behalf of her husband as debts due to her, and which are payable out of his estate.

The Court recalled the interlocutor dated 20th November 1894: Found in fact and in law, in terms of the findings in fact and in law of the interlocutor of the Sheriff-Substitute, dated 24th July 1894: And assoilzied the defender from the conclusions of the action, &c.

Counsel for the Pursuer—Macfarlane—W. Thomson. Agent—Thomas M'Naught, S.S.C.

Counsel for the Defender — Dundas — Millar. Agent—John Forgan, Solicitor.

Friday, January 25.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

MARQUIS OF BREADALBANE *v.* WEST HIGHLAND RAILWAY COMPANY.

Railway—Compulsory Power to Take Lands—Right to Take Water—Right as Riparian Proprietor—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 16—*West Highland Railway Act* 1889, *sec.* 31, *sub-sec.* 2.

By sec. 16 of the Railway Clauses Consolidation Act of 1845 it is provided that the company may "for the purpose of constructing the railway" make drains or conduits into, through, or under any lands adjoining the railway, for the purpose of conveying water from or to the railway, and may do all other acts necessary for making, maintaining, and using the railway.

Sub-section 2 of sec. 31 of the West Highland Railway Act of 1889 provided that the company should be bound to make and maintain a station for passengers, goods, and cattle at Bridge of Orchy.

In order to obtain a supply of water for Bridge of Orchy Station, the West Highland Railway Company, after having constructed its line, gave notice to the proprietor of the neighbouring land that it was their intention to take under their compulsory powers a strip of land, lying within the limits of deviation, of sufficient breadth for a pipe-track from the station to a stream 225 yards distant.

In an action by the proprietor, the Court (*rev.* judgment of Lord Wellwood) *interdicted* the company from encroaching on the land in question, on the grounds (1) that the acquisition of the ground necessary for a pipe-track

to the stream would not entitle the company to take and use the water as a riparian proprietor; (2) in conformity with *The Queen* v. *Wycombe Railway Company*, L.R., 2 Q.B. 310, and *Pugh* v. *Golden Valley Railway Company*, L.R. 15 C.D. 330, that the powers given by section 16 of the Railway Clauses Consolidation Act were limited to works to be executed during the period and for the purpose of the construction of the railway; and (3) that, although the provision of sub-section 2 of section 31 of the company's private Act had been inserted for the benefit of the complainer, he was not thereby precluded from objecting to the company encroaching on his land with the view of obtaining a water supply for the station.

Opinion reserved by Lord M'Laren as to "whether a railway company can acquire a water right (being within the limits defined by the parliamentary plans) by giving notice of their intention to acquire such water right together with the land which is necessary to make the right effectual."

The West Highland Railway Company, having constructed their line, erected a tank at Bridge of Orchy station for the purpose of watering their engines and the cattle brought to that station. For the purpose of feeding the tank they proposed to make a reservoir, and to supply it with water brought by a pipe inserted into a stream at a distance of 225 yards from the station. Accordingly under their compulsory powers they gave notice of their intention to take land (within the limits of deviation) sufficient for the reservoir and for the pipe track, and proceeded to carry out the work.

The Marquis of Breadalbane, proprietor of the land and of the stream throughout its entire course, brought an action of suspension and interdict against the railway company to have them interdicted from encroaching on the land in question, and ordained to restore the ground to the state in which it was before their operations began.

The Railway Company stated that "the railway is rapidly approaching completion and the works in question are necessary for the convenience and safety of the public using said station at Bridge of Orchy," and explained that their line crossed the stream, from which at a point higher up they were proposing to take the water, a little beyond the station, and that they were proprietors of the ground on which the bridge stood.

The complainer pleaded—"(2) The operations complained of, and the taking of the water of the said burn and land for reservoirs and drains, are *ultra vires* of the respondents and without legal warrant or justification, and the respondents should be interdicted accordingly."

The respondents pleaded—"(1) The lands taken being delineated on the plans deposited and described in the book of reference, and being necessary for the completion of the railway, the respondents were entitled to enter upon the permanent possession of the same in terms of their Act. (2) The respondents having served notice to treat, and intimated that they will not only consign in security any compensation claimed, but also pay the compensation to be fixed by the arbiter appointed under their Act of Parliament, they are entitled to continue in possession of the ground in question and continue their operations thereon. (3) The respondents being now in the lawful and permanent possession of the said land are, as heritable proprietors, entitled to take and use the water of the burn for the purposes of their railway. (4) The respondents being riparian owners upon said burn, have right to use the water to a reasonable extent in the natural use and enjoyment of their property."

By section 16 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) it is provided that . . . "it shall be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works, viz., . . . they may make drains or conduits into, through, or under any lands adjoining the railway for the purpose of conveying water from or to the railway . . . and they may do all other acts necessary for making, maintaining, altering or repairing and using the railway."

Under sub-section 2 of section 31 of the West Highland Railway Act 1889 (which was inserted for the protection of the complainer), the railway company were bound to "make and maintain a station for passengers, goods, and cattle at Tyndrum, and another similar station at or near the Bridge of Orchy." The company were also bound to make all stations with water tanks, water supply, &c.

Upon 27th October 1894 the Lord Ordinary (WELLWOOD) pronounced the following interlocutor:—"Finds it admitted that the operations complained of are within the lines of deviation shown on the respondent's plan: Finds that under their private Act and the Railways Clauses Act the respondents are entitled to take land within the limits of deviation for the purpose of obtaining a water-supply for the station constructed at Bridge of Orchy: Finds it is admitted by the respondents that the abstraction by them of water from the stream in question must be made subject to regulation: Therefore, before answer, remits to Mr John Buchanan, C.E., Edinburgh, to examine the works complained of and the said stream, and to report how the abstraction of a supply of water for the purposes of the station at Bridge of Orchy will affect the stream, and what steps ought to be taken to regulate the abstraction of water, so as to cause as little injury as possible to the complainer, and grants leave to reclaim.

"*Opinion.*—The ground of suspension which bulked most largely when the note was first presented was that the respon-

dents were illegally encroaching upon ground belonging to the noble complainer beyond the limits of deviation delineated upon their plans. It is now admitted that that reason of suspension is not well founded, the ground upon which the operations complained of are being carried on being delineated upon the plans deposited and described in the book of reference.

"The remaining reason of suspension is that, granting this, the respondents are not entitled to take the ground because they are avowedly not taking it for the construction of the line, but in order to obtain a supply of water for the use of the railway station which they are about to construct near Bridge of Orchy.

"The complainer maintains that the compulsory powers conferred by the respondents' private Act and the Railways Clauses Act are confined to the acquisition of lands required for the construction of the line, and do not entitle a railway company to take lands in order to enable them to carry on their business. While I agree that the company must show that the acquisition of ground is necessary for the purposes of their line, and that they will not be entitled to take ground simply in order to save expense, I am of opinion that in the present case the operations contemplated — I speak generally and without reference to the details of the scheme—are necessary 'for making, maintaining, and using the railway,' and in particular incidental and necessary to the authority and obligation to make and maintain a station at Bridge of Orchy. In section 31, subsection 2, of the West Highland Railway Act 1889 there is the following provision—'The Company shall make and maintain a station for passengers, goods, and cattle at Tyndrum, and another similar station at or near the Bridge of Orchy.'

"Now, this and other provisions in the same section are expressly introduced for the protection of the complainer, and it would seem that the complainer is personally precluded from maintaining that the works contemplated are not necessary for the construction, maintenance, and use of the station. A station for passengers and cattle cannot be properly constructed, or at least it cannot be properly used without a water supply. Water is required not merely for watering the engines, but for cattle. A good deal was said in the course of the discussion as to what are and what are not primary purposes. This case does not in my opinion raise purely any question as to the rights of riparian proprietors in the water of a stream. But had it done so the use of water for cattle would undoubtedly have fallen within primary purposes; and even its use for engines might have been justified if it did not materially affect the flow of water in the stream.

"But, apart from the provisions of the private Act, the compulsory powers specified in the 16th section of the Railway Clauses Act would, I apprehend, be sufficient. The Company are entitled, not merely to take land for the construction of the line, and in constructing their line to alter the course of brooks, streams, canals, rivers, and so forth, but they are entitled to execute accommodation works in connection with the railway—for instance, to 'make drains or conduits into, through, or under any lands adjoining the railway for the purpose of conveying water from or to the railway,' and finally, they 'may do all other acts necessary for making, maintaining, altering or repairing, and using the railway.'

"Having regard to these provisions and those in the respondents' Act, I think that the respondents are entitled, within the limits of deviation, to take land which will give them access to a water supply, and subject to regulation to take from the stream the water they require. The respondents do not dispute that their use of the water in the stream must be subject to regulation; and I therefore think, before I give any final judgment, that a remit should be made to a man of skill to examine the works proposed and to report how the abstraction of the necessary supply of water will affect the stream, and by what means it can be best regulated so as to cause as little injury as possible to the complainer's interests in the water of the stream."

The complainer reclaimed, and argued—(1) The 16th section of the Railways Clauses Act was to be very rigidly construed. It did not give power to take lands compulsorily after the railway, as in this case, had been constructed. Railway companies were strictly confined to the powers given by the Act—*The Queen* v. *Wycombe Railway Company*, 1867, L.R., 2 Q.B. 310; *Pugh* v. *Golden Valley Railway Company*, 1880, L.R., 15 C.D. 330. If the respondents wanted to get this water they should have made provision by their special Act. (2) It was not competent to take "water" under a power to take "land," and indeed the railway company were not asserting any such right, but only a right to take water as being riparian proprietors on the banks of a stream. (3) In judging whether they were entitled to take land the purpose for which the land was sought to be taken must be considered. They were not entitled to take land for any purpose they chose; their purpose here for taking it did not justify such exercise of their compulsory powers. (4) They sought to abstract water as exercising the rights of a riparian owner. The land which abutted on the *ripa* was the mouth of a pipe. Such land could not require water; the claim was extravagant. What was really desired was to lead the water through the pipe for use on land which did not adjoin the stream. (5) Even if the respondents were riparian owners they could not use the water as was here attempted to be done, because (*a*) they could not use it on land not adjoining the stream; (*b*) they could not use it except for primary purposes, and even if watering cattle could be so classified, the watering of engines could not; (*c*) they could not abstract the water, with no intention of restoring it to the stream, for mercantile purposes, including consumption on locomotives miles away from the stream. (6)

Because the complainer had stipulated for the erection of a station here, he was not thereby forced to acquiesce in everything the railway company thought necessary for the completion of such a station. His position was not to be made worse by an article inserted for his benefit. It was sought to remove water from this stream to his prejudice as a riparian owner, and only to pay in compensation the value of the narrow strip of land taken. The respondents were not forced to do without water; they could obtain it by collecting rain water from wells on their property or by purchase.

Argued for the respondents—(1) The railway was not fully constructed until it had been put into a workable state. Water at a station was a necessity for the purposes of their undertaking. They had power to take this land under the 16th section of the Railways Clauses Act as being "necessary for making and maintaining the railway." It was for the railway company to judge what lands were necessary,—*Stockton & Darlington Railway Company* v. *Brown*, 1860, L.R., 9 (H. of L.) 246. (2) They were under compulsion, and that too at the complainer's instigation, to make a railway station here, and must accordingly be enabled to fulfil their obligation,—*Lord Beauchamp* v. *Great-Western Railway Company*, 1867, L.R., 3 Ch. App. 745. In the case of *The Earl of Sandwich* v. *Great-Northern Railway Company*, 1878, L.R., 10 C.D. 707, a railway company whose line, as here, crossed a stream were held entitled to abstract water from a point above the bridge for the supply of their station to a reasonable amount. That was all they asked for here. (4) As riparian proprietors they enjoyed the right which such proprietorship conferred. The small amount of land adjoining the stream could not be founded upon as against them; had they scheduled more they would have been told they did not require so much for their purpose. (5) If entitled to abstract water they could not be stopped because of the use to which they proposed to apply it. It was a use necessary for their undertaking and included the primary purposes of supplying water to those living at the station, to those frequenting the station, and to the cattle. It was not proposed to use it for houses unconnected with the railway.

At advising—

LORD PRESIDENT (whose opinion was read by Lord Adam)—At Bridge of Orchy station, on their recently constructed line, it appears that the respondents have no available supply of water for the purposes of their enterprise. What they propose to do in order to remedy this defect, and what is now in dispute, is to tap a stream in the complainer's property at a point some 225 yards from the station, and to conduct water from this to the station. A reservoir is to be constructed near the station, pipes conducting the water from the stream to the reservoir, and from the reservoir to the station; but the reservoir is a mere incident in the scheme of taking water from the stream to the station.

For this purpose, and for it only, the respondents propose to take compulsorily certain lands of the complainer. As the word "lands" sounds large and vague, it may be well to refer to the plans on which are indicated in red the lands taken. What is taken is simply so much of the bed of the stream and so much of the land between the stream and the station as is necessary to tap the water and take it by pipes to the station.

The respondents hold that they have no power to take water, or a right to water, compulsorily; and the case was argued upon that footing. They maintain that they have right to effect the same object by taking land, as they have done under these notices, and then, in virtue of the land so taken, asserting the rights of riparian proprietors to take and use the water of the stream. The riparian property, be it observed, consists of the land occupied by the pipe track, and the frontage is the pipe's mouth. It is not, and cannot be, more, for the company have of course no right to take more land than they require for the particular enterprise on hand, and the enterprise is to supply the station with water.

That the respondents would be entitled to take land for the pipe track and reservoir if they had an antecedent right to take the water from the stream is not the question, and need not be disputed. But they can point to no railway use of the land taken, except to get water; and as they (on their own statement) have no compulsory power to take water, it would be a singular result if their theory were sound.

That theory however seems to me to be a mere travesty of the law of riparian property. The property which uses this water is not the land taken under these notices, but the railway station (if indeed the feeding the engines with water to be consumed miles away from it can be said to be a use even by the station). The pipes which occupy the whole of the "riparian property" are not using the water, and it is not until the water reaches the station that it is used at all. Now, supposing the respondents were not a railway company, but the private owners of the ground on which their station stands; that they had a house on it; that they purchased from one of a number of riparian proprietors exactly the same land which they purport to have taken under these two notices; then, I think it would be impossible to hold that they thereby became entitled to abstract water from this stream for the use of the house at the station, as against a challenge by the riparian proprietor of the land immediately below the mouth of the pipe. Plainly stated, the contention of the respondents is simply this, that the owner of a non-riparian property can take water out of a stream for the uses of that property against the will of riparian proprietors interested, if only he can buy from another riparian proprietor land enough to insert a pipe for the abstraction of the water; and the irony of the argument is that the frontage occupied by the abstracting pipe

constitutes his title to make the abstraction. I consider this argument entirely untenable.

It has already been noted that the uses for which the water is required are not primary uses, or at least that they include what are not primary uses. I refer to what does not appear on record but was freely admitted in debate, that the watering of engines is one of the needs of the respondents. Whether, if they were *bona fide* riparian proprietors, the respondents would be entitled to take away water for this purpose (and of course not return it), is a question which does not separately arise in the view which I take of the case.

The respondents prayed in aid of their argument the fact that their railway crosses this same stream, and they own the land on which the bridge rests. This is at a different point from that at which the stream is tapped; and the circumstance does not seem to me to affect the argument.

The Lord Ordinary has relied upon two statutory provisions, the one contained in the respondents' special Act, and the other in the Railways Clauses Act.

I am unable to concur with his Lordship in thinking that the complainer is precluded from raising this question by the 2nd sub-section of section 31 of the West Highland Railway Act 1889. It is true that that provision is inserted for the protection of the complainer. But the enactment is merely that the respondents shall make and maintain a station for passenger and goods traffic at Bridge of Orchy; and I do not see how it is implied in this that the complainer is to submit to the application of the company's compulsory powers to obtaining a water supply, when (*ex concessis* of the respondents) they have in law no such application.

As regards the 16th section of the Railway Clauses Act the Lord Ordinary has not adverted in his opinion to the two English cases of *Wycombe* and *Pugh*. The meaning assigned to the section by the earlier of those cases limits its application to works executed during the period, and for the purpose of construction of the railway. That interpretation was approved in the subsequent case; and it was pointed out in the Court of Appeal that the decision of the Court of Exchequer in *Wycombe*, unquestioned then for 13 years, had an especial authority, as having presumably been treated as law by all concerned in the framing of subsequent railway Acts. The same observation applies now with the added weight of the decision in *Pugh* in 1880, and the years that have since elapsed. It seems to me that we cannot disregard those authorities and the reasons upon which they are based.

I am for recalling the Lord Ordinary's interlocutor. No question was raised as to the terms of the interdict, should we be against the argument of the respondents, and we must, I think, grant the prayer of the note.

LORD ADAM—I concur with that opinion.

LORD M'LAREN—I concur in the judgment proposed, and only desire to add a few words.

It is admitted by the respondents that they propose to acquire the land in dispute for the purposes of impounding a certain quantity of the water of a running stream, and bringing it in a pipe to their railway for consumption there.

The notice only describes the land proposed to be taken, and makes no reference to water, and I agree with the Lord President that the company have not the power of acquiring a water right by merely scheduling a small part of the *alveus* of a stream and a strip of land corresponding to a pipe track. Under the notice which has been given the only thing which can be valued and paid for is the *solum* of the land taken and severance damages. It is claimed on behalf of the Railway Company that by following out their notice and acquiring the land in question the company will, in the character of riparian proprietor, be entitled to use as much of the water as is necessary for the purposes of its undertaking. But if this claim be inadmissible then the company has no use for the land, and the proposed acquisition falls, because the land is not required for any legitimate purpose connected with the railway or the undertaking of the Railway Company.

I desire to reserve my opinion as to whether a railway company can acquire a water-right (being within the limits defined by the Parliamentary plans) by giving notice of their intention to acquire such water-right, together with the land which is necessary to make the right effectual. This question would seem to depend on whether the meaning of the expression "lands" as used in the Lands Clauses Consolidation Act, 1845, is wide enough to comprehend the case of a heritable right to the use of water. It may often be very important to a railway company that it should be able by compulsory purchase to acquire a right to water for its stations and engines, but as the question of power does not arise on the facts of the present case, I shall not offer an opinion upon it.

LORD KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and granted interdict as craved.

Counsel for the Complainer — Lord Adv. Balfour, Q.C. — A. S. D. Thomson. Agents—Davidson & Syme, W.S.

Counsel for the Respondents—D.-F. Sir Charles Pearson, Q.C.—N. J. Kennedy. Agents—Macrae, Flett, & Rennie, W.S.