

MARCH 30, 1855.

CALEDONIAN RAILWAY COMPANY, *Appellants*, v. GEORGE OGILVY, *Respondent*.

Railway—Compensation—Lands Clauses Act—Level crossing of Highway—Verdict bad in part—Actionable injury.—1. *O. was owner of land near a new railway, and part of his land was taken for the railway. The railway at a short distance from the entrance to his grounds traversed an important public highway on a level.*

HELD (reversing judgment), *that O. was not entitled to any compensation in respect of the level crossing, for he suffered from it no more damage in the eye of the law than any other passenger did; and, if there had been no railway act, he could not have raised an action against the company, any more than every other person could do.*

HELD FURTHER, *that as one sum was assessed for severance and for an item not subject to compensation, the verdict must be set aside in toto.*¹

The defender was proprietor of the estate of Cove, the lands of which do not lie contiguous, a portion of them being situated to the north of the turnpike road from Glasgow to Carlisle, and another portion, with the mansion house, being situated at a little distance southward from that road. These two portions are connected by a statute labour road, running direct between the turnpike road and the defender's private approach. There is no access or means of communication between the two portions, and none between the house and the turnpike road, but the statute labour road.

The pursuers, in terms of §§ 17 and 18 of the Lands Clauses Consolidation (Scotland) Act, served a notice upon the defender, intimating that their line would pass through his property, and that part of it would be required for the purposes of the railway, and further, that they were ready to treat and agree for the purchase of the portion required, and as to the amount of compensation to be paid for any damage which might be sustained by reason of the execution of the works authorized by their act.

The defender lodged a claim, which, among other items, contained the following:—"4th. For very material injury done to the place as a residence, and deterioration to the amenity and value of the house and policy by the railway crossing the approach to the lodge and gate on the level, immediately in front of, and within a few yards of, the gate, whereby the free and open communication with the high road, at a very short distance, is cut off, and all access prevented, without a constant liability to very great inconvenience, interruption, and delay. The impossibility of communication with the high road without crossing the railway, will render it also dangerous and alarming to ladies and others passing to and from the house, from the risk of the startling of horses when detained in a narrow road facing the barrier, by the passing and noise of the engines and trains, and this may also seriously injure the future sale of the property, or letting of the mansion and grounds as a residence."

The question of compensation went to trial under a notice given by the defender in terms of § 36 of the Lands Clauses Act.

The jury found, *inter alia*, that the sum to be paid to the defender on account of damage sustained by his estate of Cove, for severance and level crossing of the parish road, was £560.

The present was an action of reduction of the verdict as incompetent, on the ground that the land adjacent to the level crossing on both sides not being the property of the defender, he was not entitled to compensation in respect of any injury arising to his estate therefrom.

The defender *pleaded*, that under §§ 17, 19, 48, and 61 of the Lands Clauses (Scotland) Act, 8 Vict. c. 19, he was clearly entitled to claim compensation on account of the level crossing; and quoted *Scottish Central Railway Co. v. Cowan's Hospital*, 22 Sc. Jur. 442, as ruling the point.

The Court of Session sustained the defences and assoilzied the defender, thereby holding him entitled to the damage assessed by the jury.

The Caledonian Railway Co. appealed, pleading in their case, that,—“1. The verdict of the jury, in so far as it finds damages due in respect of the level crossing of the road, cannot be sustained, the respondent having no such interest in the matter as can entitle him to claim or receive compensation in respect of the formation of the crossing. 2. The appellants are entitled, by their Statute of Incorporation, to cross the road on the level; and as there is no condition attached to the exercise of the privilege which renders them liable to compensate parties who may complain of inconvenience, there is no foundation for the claim of damages. 3. The general statutes, applicable to the formation of railways, give no sanction to the respondent's claim.

¹ See previous reports 15 D. 410; 25 Sc. Jur. 241. S.C. 2 Macq. Ap. 229: 27 Sc. Jur. 351.

4. The views of the appellants are supported by the authorities, in so far as they bear upon the question.

The respondent maintained, that,—“ 1. The verdict of the jury was not *ultra vires*. The case was fully before them upon the evidence led by both parties, and the argument submitted to their consideration. The verdict cannot now be reduced or set aside.—*Tod and Others v. The Clyde Trustees*, 3 D. 586; *Scottish Central Railway Co. v. Cowan's Hospital*, 12 D. 999. 2. The Sheriff was competent to the adjudication of the case. The verdict was not *ultra vires* of the jury. The question tried was a question of fact; and the words of the statute, explanatory of a duty devolved upon a jury, and the questions to which their verdict must apply, directly include the claim submitted to them by the respondent, and the verdict is therefore good.

Sir F. Kelly, and *Rolt Q.C.*, for appellants.

Solicitor-General (Bethell), and *Anderson Q.C.*, for respondent.—As the authorities are fully considered in the judgment, it is unnecessary to state the arguments in detail. The following cases were referred to:—*R. v. Bristol Dock Commissioners*, 12 East, 429; *R. v. London Docks Company*, 5 A. & E. 163; *R. v. Eastern Counties Railway Co.*, 2 Rail. Cas. 736; *Smith v. London and North-Western Railway Co.*, 5 Rail. Cas. 716; *Gattke's case*, 6 Rail. Cas. 371; *South Staffordshire Railway Co. v. Hall*, *ibid.*, 389; *Spencer v. London and Birmingham Railway Co.*, 8 Sim. 193; *Soltau v. de Held*, 2 Sim., N.C. 133; *Sutton Harbour Co. v. Hitchens*, 1 De G. M. & G. 161; *Wilkes v. Hungerford Market Co.*, 2 Bing. N.C. 281; *Greasley v. Codling*, 2 Bing. 263; *Rose v. Miles*, 4 M. & S. 101; *Rose v. Groves*, 5 M. & G. 613; *Dobson v. Blackmore*, 9 Q.B. 991; *London and North-Western Railway Co. v. Bradley*, 6 Rail. Cas. 556; *R. v. Sheffield Railway Co.*, 11 A. & E. 196; *Corregal v. London and Blackwall Railway Co.*, 5 M. & G. 219; *London and Greenwich Railway Co.*, 2 A. & E. 678; Land Clauses Act, 8 Vict., c. 19; Railway Clauses Act, 8 and 9 Vict., c. 33.

LORD CHANCELLOR CRANWORTH.—My Lords, I should have been extremely sorry if, upon any point of equity, your Lordships should have felt yourselves precluded from expressing your opinion, and giving your judgment upon the main question, viz., the merits of this case, because the merits involve a question of very considerable importance. The question which is raised upon the merits here, is—whether a proprietor, who holds land adjoining a newly constructed railway, can, under the clauses of the general act, and the special acts, which give him a right of compensation in respect of any injurious effect upon his lands, claim from the company compensation, because, at a short distance from the entrance to his grounds, the railway traverses an important public road upon a level.

The map, which both parties here have referred to, and which we may take therefore as pretty accurate, representing the state of the ground, seems to demonstrate this—that at a short distance (whether of 49 yards or of 59 yards is immaterial) from his gate, the railway does traverse upon a level a public road, which is not the only approach, but the most common, and the best one, to his house. In respect of that which he considers as damage he claimed compensation, and the Sheriff's jury returned compensation for severance at another part of his lands, and the level crossing, £560.

Now, my Lords, the main question is—whether it was competent to the Sheriff to give any redress in respect of this alleged damage. I am clearly of opinion that no compensation can be claimed, or can be legitimately given.

These acts of parliament are, as unfortunately is too often the case, rather loosely worded, but the construction that is put upon this expression, “injuriously affected,” in the clauses in the act of parliament which give compensation for injuriously affecting lands, certainly does not entitle the owner of lands which he alleges to be injuriously affected to any compensation in respect of any act which, if done by the railway company without the authority of parliament, would not have entitled him to bring an action against them. I purposely guard myself by putting it in that way, because I am far from admitting that he would have a right of action in some cases, in which if the act of parliament had not passed, there might have been, not only an indictment, but a right of action. And the necessity of so guarding myself is made very apparent by one of the last cases quoted by Mr. Anderson, the case of *Greasley v. Codling*, 2 Bing. 263, which, if the law be applicable to a railway, would certainly entitle everybody who is stopped for a minute while the gates are shut to an action for damages, because it would be said, under the authority of that case, which, I think, is a very correct authority, that where an act is done, viz., the shutting of the gates without the authority of parliament, that would certainly give the parties a right of action. If, therefore, the act of parliament did not mean to exclude the right of compensation in some cases, in which, if the act of parliament had not passed, there would have been redress, every person who is stopped for a moment while the gates were shut would have been entitled to an action. It is perfectly clear that, in these acts of parliament, the legislature means to authorize these public companies, for the supposed convenience and advantage of the public, to do acts with regard to which they are not only relieved in respect of what they are doing from indictments at the instance of the public, or, speaking more properly, at the instance of the Crown; but they are also entitled to do them without being liable to redress to individuals. That

cannot be better illustrated than by the case which Mr. Anderson has put, that they are authorized to have a railway upon a crossing, having gates to prevent persons passing along the road at times when it would be dangerous, by reason of trains being near at hand. That necessarily, therefore, occasions a stoppage to persons which, if there were not an act of parliament, would entitle them to bring an action against the railway company. It is quite clear that the legislature meant to exclude any right of action in such a case as that. I think, therefore, that we cannot be overstating the effect of the act of parliament, when we say that it never leaves a right of compensation for damage when the party could not have had redress by an action, if that which is authorized to be done under the authority of the statute had been done without the authority of the statute.

Now, my Lords, that being the case, suppose that, without any act of parliament having been passed for making this railway, certain speculators had taken upon themselves to make a railway without the authority of an act of parliament, across a public road, and had erected gates, certainly the owner of the estate might, with respect to any detention, bring an action against the makers of the railway, and so, probably, *toties quoties*, he would have a greater right than other subjects of Her Majesty. But it would only be a multiplication of the same damage; it would not be any different damage;—for all attempts at arguing that this is a damage to the estate is a mere play upon words. It is no damage at all, except that the owner of that estate would oftener have a right of action, from time to time, than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it.

It appears to me therefore perfectly clear by the acts of parliament, and by the intention of the legislature, that there is no right of action whatever; that no right of action would have existed if the making of that railway had not been authorized by parliament; and that, consequently, no right of compensation exists, if that which has been done has been lawfully done; although the company would have been liable to make compensation, if what was done under the authority of the act of parliament had been done without the authority of the act of parliament.

My Lords, I consider this to be not only clear upon principle, but clear also upon the authority of the very numerous cases relating to this subject. When I say very numerous, the cases enunciating this principle are not indeed very numerous, and for this reason: I take it, that in the Courts of England it has been assumed that the principle is perfectly clear. It was so in the case of the *South Staffordshire Railway Company v. Hall*. It is also adverted to by Lord Truro in *Gatke's case*, 6 Rail. Cas. 371. That was a case of some railway in the city. The same principle was also expressly referred to by Lord Cottenham in the case of the *London and North-Western Railway v. Smith*, and the circumstance, that in many of those cases the Judges have expressed an opinion that there would probably be a right of compensation, not only is no argument in favour of the respondents, but it is an argument against them, because the grounds upon which the right of compensation in those cases has been put, are grounds upon which it has been in this case expressly excluded. In the case of the *South Staffordshire Railway Company v. Hall*, that was a railway traversing a private road between a public road and a house, interfering with the easement, which was possessed by the owner of that property. *Gatke's case*, I think, was something of the same sort. Then there was the case of *R. v. The Eastern Counties Railway Company*, 2 Rail. Cas. 736, where compensation was held to be legitimately claimable. That was a case in which the owner of the land having his land adjoining what was, before the passing of the act for making the railway, a public road with a gate, that let him out into the public road, was by the making of the railway deprived of that road, and his gate was a gate up in the air, so to say. It was of no use in the world to him, and therefore he was materially damaged. It was the same in a case that was before me, and I think Lord Truro also, of a tunnel which was being made close adjoining a public-house, where deposits of wine and beer were kept; the proprietors of the house were damaged by the making of the tunnel. That was a personal and private injury to the land, and consequently to the owner of the land.

Upon the merits of the case, therefore, I confess that I entertain no doubts whatever. I should have had more hesitation in moving your Lordships to decide at once against the decision of the Court of Session without hearing the reply, were it not that it is perfectly clear to my mind, that in the case now under your Lordships' consideration, the learned Judges, though apparently unanimous, were not really so, and that they acted in the way in which they did act, because a former case, viz., *Cowan's case*, bound them, very legitimately and rightly, I think, to decide in conformity with what had been decided before, Lord Cunninghame saying, that the only reason that he decided in the way that he did was, that his views, which had been very clearly expressed against the doctrine in *Cowan's case*, had been overruled, and that he felt himself bound to defer to the decision which was pronounced in that case. The learned Judges seem, I think, to have very much distrusted the accuracy of the former decision, but they held themselves bound by it. I must say that in the doubts which were expressed by Lord Cunninghame I entirely concur. I feel no hesitation in saying, that the view then taken was inconsistent with all the string of authorities, to which there is no exception whatever in this country, and which are founded upon principles as applicable to the law of Scotland as to the law of England.

My Lords, that would dispose of the case, were it not that two or three points of form have been raised with which it becomes necessary to deal, though there is nothing in them which precludes your Lordships from doing justice to the merits of the case. There have been three points raised. In the first place, it is said that this question is not open to your Lordships at all, for that, by the act of parliament, the decision of the Sheriff is made absolute and final, subject to no review whatever. Unquestionably the language of the 139th section of the Lands Clauses Consolidation Act may be applied to cases of this sort. It says, "such judgment shall in no case be subject to review by suspension or advocacy, or by reduction, upon any ground whatever." Now, my Lords, it is impossible that the legislature could have meant literally that nothing should ever enable you to question a judgment of this sort by the Sheriff. Suppose the Sheriff's judgment had been, that for the value of the land they assessed £100, and because the railway company had damaged a house they assessed £1000 more, that would be absurd. What jurisdiction had they to assess any value for the house? It would be clear that in that case they would be doing something *ultra vires*, and I never can believe that that clause can be meant to apply to cases where, on the face of the proceeding, the jury are doing something that they have no authority whatsoever to do. In the first place, it may be observed, that if this question is construed quite literally, it only applies to cases where there has been originally a proceeding before the Sheriff-substitute, and that proceeding has been taken by appeal before the Sheriff. But those are the only cases in which the judgment shall in no case be subject to review by suspension or advocacy, or by reduction, on any grounds whatever. I should, however, be loth to take so narrow a view as that, because I think, even in the case which I have supposed, if the directions of that clause had been strictly complied with, and there had been a proceeding first before the Sheriff-substitute, taken then before the Sheriff, and the Sheriff had made his judgment, if it appeared on the face of it that he was adjudicating upon something which he was no more called to adjudicate upon than any one of your Lordships, this section never could be said to have the effect of ousting the jurisdiction of some Court or other to set that matter right.

Then the next objection is this, that this error, assuming it to be an error, was acquiesced in. Now, my Lords, it is a very well known rule of the English Courts, and, I have no doubt, of Scotch Courts, and, I believe, of all Courts, that persons cannot give jurisdiction as it were, cannot enable parties to make judgments, only because they do not properly object in matters in which it is the duty of the Court itself to see that it has not jurisdiction. I do not look into all that passed before the Sheriff, for that is not properly before us; but upon looking at the proceedings which are before us, it is very doubtful in what mode this company could have taken an objection to the proceedings. For it is to be observed that the first claim is made in November 1845 by the respondent Mr. Ogilvy, in which he seeks compensation under five different heads. First, the value of his land; secondly, compensation for severance; thirdly, compensation for the injury done to what he calls the amenity of the property as a residence—that is a legitimate subject of compensation—residential injury is always considered in these cases;—fourthly, very material injury done by this level crossing; and, fifthly, injury done by works having the effect of debarring him from working a quarry. Under these five different heads of claim he demanded £2716. It was attempted to get that demand settled not by a jury, but by arbitration. How it was that arbitration went off we do not know, but no award was made, the matter dropped, and three years afterwards (I suppose the making of the railway was delayed a long time) a new claim is sent in, under which he simply claims £2500 sterling as compensation for the land taken, and for those different heads of damage. Now, if that was the only document upon which the parties were proceeding, there was nothing to distinguish what damage *ultra* the value of the land he was going for at all. But not to be too nice upon this point, let us suppose that to be coupled with the preceding claim of £2716, and that there was notice to the parties upon the face of the claim, that a portion of what he claimed was for this level crossing, in respect of which there was no right to compensation, what course was the company to take? Where a party was claiming the large sum of £2716, and in respect of £2400 of that he certainly is entitled to what he claims, if he has put the items right, it was an idle proceeding to say—I admit that you are entitled to compensation in respect of the £2400, but I say that you have no right to compensation in respect of the £300. It would all be properly discussed before the Sheriff, because it was his duty to have pointed out to the jury, that in respect of one of those five heads of demand they had no right to give compensation at all. If he had done that the matter would have been settled. If, by the course which he took, he added in any respect to the costs, that might afford a very legitimate ground for warranting the Sheriff (it would have been his province, or the province of any Court afterwards) to take care to set the matter right in point of costs, as far as could be done. When the witnesses were called, it made no difference asking a few more questions. There was no additional cost to be incurred in proving the level crossing. The whole matter was before the jury. Some more questions might have been asked, and it was the duty of the Sheriff to have pointed out to the jury, and to the parties, if necessary, that he had no power of directing the jury to assess any compensation in respect of one head of claim put forward.

My Lords, there is one other point of form that was insisted upon by Mr. Anderson, which is, that these proceedings were not so conducted as to enable the parties to raise this point. And his argument arises in this way:—Under one of the clauses of the act, viz., the clause which directs the finding of the verdict by the jury, it is expressly provided that the jury shall separately assess what they give for the value of the land, and what they give for compensation. That they have done. The jury find “that the sum to be paid by the companies to the said George Ogilvy, on account of damage sustained by his estate of Cove from the said company, is £360 for land and freestone,”—that is, for land, and the soil of the stone underneath—“and for severance and level crossing of the parish road, the sum of £560.” Now he was certainly entitled to some compensation for the severance of another bit of land at the left hand side; and Mr. Anderson’s argument is, that the railway company ought to have pointed out to the Sheriff, that the jury should assess how much they gave for severance damage, and how much they gave for injury by the level crossing. I do not think that the verdict would have been bad if it had split out into every separate head, but there is nothing in the act of parliament which imposes the duty upon the jury, or the Sheriff, or the parties, to make it so. They state distinctly, that for which they gave £560 sterling is “severance and level crossing.” It is a great misfortune that we are unable to say how much they gave for level crossing and how much for severance. If they had done that, then, undoubtedly, we should have been able to reduce the verdict *quoad* so much as they gave for level crossing, and to award the rest; but they do not do that. Therefore I do not think it is any matter that at all destroys the verdict, or disentitles them to have the question set right. It is certainly to be hoped that they will settle it among themselves without any proceedings before the Sheriff, or any other proceedings of any other character. But if that cannot be done, your Lordships have only to decide what is the legal right of those parties; and it appears to me to be perfectly clear that there is no matter of form standing in the way of our deciding that the Sheriff first, and the Court of Session afterwards, have fallen into an error in supposing that this level crossing was a subject for compensation at all; that it is a *damnum sine injuria*; that so the Sheriff ought to have told the jury that the verdict, upon the face of it, is *inter alia* a verdict which cannot stand, but which ought to be overturned; and that, consequently, the interlocutor of the Court of Session ought to be reversed.

LORD ST. LEONARDS.—My Lords, I entirely concur in the motion which my noble and learned friend has proposed to your Lordships, both upon the question of what may be called form, (but there is no doubt something of substance even in that,) and also upon the question of merits. As regards the question of form, the most material one is that which was first urged by Mr. Anderson, that the appellant might have had an action of suspension and interdict, and that in that case the question would have been decided before it had gone to a jury. Now, really that is only analogous to what has already been overruled in this country, for, in the case which has been referred to, Lord Cottenham, in the first instance, granted an injunction to stay the proceedings; whether it was a case in which the parties were entitled to compensation or not, I think nobody pretends now to maintain that that was a proper decision. Equity has no such jurisdiction. The act of parliament gives a remedy, and upon the act of parliament the question must be tried. It is quite clear that no equitable jurisdiction is required, for all that equity could do would be to substitute something else for the provisions of the act of parliament. The act of parliament has directed the compensation to be estimated in a particular way, and the law would give a right, if there was wrong in the proceeding, to correct the error; whereas all that equity could do would be to direct an action in the first instance, without any authority to do so, in order to try, in the first instance, that which the act of parliament has not required to be tried in the first instance, and which may never require to be tried at all. For, in most cases which go to a jury, the right would not be so much in dispute as the amount of the compensation, and no question would arise after the finding of the jury, which would require another proceeding. Now the opinion of Lord Cottenham has been clearly overruled; and I entirely agree with the authority of the cases in which that opinion has been overruled. I think the same principle applies to the injunction that is now made. It cannot be maintained, I think, by the provisions of the act referred to. And, as regards the general question, I think it is open to the Court of Session to correct any error into which the jury may have fallen, as regards an excess of their jurisdiction, just in the same way as, by a proper process in England, a similar error could be corrected in regard to compensation found here. The law is the same, only with reference to the different tribunals both in England and in Scotland, in regard to these cases.

My Lords, we then come to what is really the question intended to be brought before your Lordships’ House, although the case carries us so much further, and that is the question of merits. Now it is singular enough, that in this very case it appears, on looking at the evidence before the jury, and it is stated in the respondent’s case I think, that no witness was aware of any similar case except the case of *Cowan’s Hospital*—nobody knew of a case in Scotland, where there had been a successful attempt to recover damages of a like nature. Nobody disputes it in this country; and there is not one law applicable in this respect to Scotland, and another law applicable to England. The same law governs both countries; the same injury arises from the

same cause—whether it is on one side of the border or the other, is utterly indifferent; for there is the same law, although in different acts of parliament, with very slight variations, (only such as to meet the different circumstances of the two countries,) when applied to the same circumstances, with respect to railways, and the duties and the benefits arising or resulting therefrom.

My Lords, in England the universal opinion has been that no such remedy lies. If such remedy did lie, most unquestionably you would have had thousands of instances in which it would have been applied for, because, daily and hourly, men are sustaining damage from acts done under the authority of acts of parliament by railway companies. That is undeniable; but it is a damage authorized by act of parliament, and it is a general inconvenience which all the Queen's subjects are subjected to, and for which no particular remedy is pointed out.

My Lords, it is clear, upon general reasoning, and upon the general view of all men in the profession, both in Scotland and in England, that the question would not bear a moment's argument. Therefore we will look at the cases to see how far the authorities bear that out. Now, in the case of *Cowan's Hospital*, in Scotland, which was the foundation of the decision of the case now before your Lordships, the Court founded their decision simply upon this, that there was land taken, and therefore the party was further damaged by an act which otherwise would have affected everybody, and not that party more than others; or if it did affect him more than others, it was only a question of *quantum*, but the circumstance of the land being taken gave a jurisdiction, and there might be a compensation claimed for the particular crossing, or whatever it was. Now it is quite clear that that is a foundation, which cannot be relied upon here. It must be utterly indifferent to a case of this sort whether land be taken or not, as an abstract question, because it is quite settled, that there may be a damage, and compensation may be required by a party from whom no land is taken. If land be taken, it stands there separately by itself. For that there must be a separate assessment, a separate compensation, a separate price; but you may find compensation for severance; you may find upon your land even that for which you have had compensation—certain quantities cut out in the middle of your field; and you are entitled to compensation for it as so much land. You are entitled to compensation again, because there is a severance of two parts. But in respect of any other injury, unless it be an injury to the land, no claim can be founded on the circumstance that compensation is given for land.

In concluding my remarks upon the cases, I concur with what my noble and learned friend has said with respect to Lord Cunninghame's authority in the case in Scotland. I think that it is very much to be regretted, that the Court of Session did not adopt it; it is a well reasoned judgment, and certainly it goes upon the true ground upon which the judgment ought to have proceeded. I cannot myself read what fell from the learned Judge, in giving judgment in this case in the Court of Session, without feeling an intimate persuasion that they gave way simply to the decision which has been already pronounced, and that not one of them was satisfied with the grounds of that decision. But they seem to have been unwilling to reverse a decision so recently made, and it is manifest that they rather invited the appeal; at least one of the learned Judges certainly invited the appeal which is now before your Lordships.

Now, my Lords, as regards the authorities relating to this case, cited on the part of the respondents, and, therefore, in support of the decision of the Court of Session, they are very few indeed. The case of *R. v. Eastern Counties Railway Company*, 2 Rail. Cas. 736, was relied upon in Scotland, and is relied upon now at your Lordships' bar; but in that case there was an actual injury, I should say, to the lands; at all events, there was an injury to the owner of the land, which would give him an immediate right no doubt to compensation. From his land he had been enabled to step at once upon the road, which had been lowered by the company, and it had been so lowered that he lost his access to that road, unless he had new appliances in order to enable him to approach it. There was therefore a real injury; there was a ground of complaint there personal to himself, and which was not open to the rest of the world. It was a general complaint when he got to the road; when he got there he had to sustain an injury in common with all the rest of the Queen's subjects—that is to say, the road might be rendered a great deal less easy to travel upon than it was before it had been crossed. For that he would have no remedy; it is a common inconvenience; all are subject to it; and the power to commit that injury was given by act of parliament for the public benefit, and, therefore, the benefit which is received by the public from the railway is considered to be the only compensation to which the Queen's subjects in general are entitled, in respect of the damage caused at a particular spot over which the railway travelled, or in respect of which the road in that spot had been lowered. I consider, therefore, that that case in no respect authorizes the decision of the Court of Scotland in this case.

The other case which was referred to was that of *Wilkes v. The Hungerford Market Co.*, 2 Bing. N. C. 281, and that clearly has nothing to do with this question; because, in point of fact, in that case the ground upon which compensation was claimed by a shopkeeper, the access to whose shop had been cut off by an act of the company, under the act of parliament, inclosing the access, was, that they had unreasonably delayed the time of moving the board which

prevented the access to his shop. The compensation was not claimed in respect of barring up the access, which was authorized by the act of parliament, but the compensation was claimed in respect of the injury occasioned by the improper conduct of the company in the exercise of the powers given to them by the act of parliament; they ought to have opened the communication sooner than they did, and for that, and that alone, the compensation, I think, was obtained. He was enabled to recover compensation to the amount of a few shillings, by reason of the injury which was done him on account of the company having delayed the removal of the hoard for a few days. That case, therefore, has no bearing upon the question now before your Lordships.

My Lords, I will just refer to the cases in favour of the view that I am now submitting to your Lordships. Let us see what the circumstances are. Here there is no inconvenience which is not sustained by the whole of the Queen's subjects. There may be, there must be, in these cases, a question of more or less inconvenience. It may be that a man who has a couple of stalls alongside the road, may have ten times oftener to traverse the road than the owner of the finest mansion within a quarter of a mile of it, or even abutting upon it; and therefore it is impossible to estimate the quantum of inconvenience, unless it amount to a damage such as that to which I have referred in the first case, or to an unnecessary continuation of the damage to which I have referred in the second case. But in this case I can see nothing by which this gentleman would sustain damage beyond what everybody else sustains. His estate is not damaged. Before the jury it was insisted that he was actually entitled to damage in respect of the railway being near his property. That was a little too violent, and they do not appear to have acted upon it. But all the respondent's witnesses declared that no benefit accrued to his estate from having a railway near it. That seems rather a strong view of the case, because there are nuisances, no doubt, arising from having a railway near you; yet there are also some benefits attaching to it in consequence of the facility of travelling, and having it so near your own door. But I can see nothing which affects this gentleman's estate in respect of the crossing. That is a common inconvenience to everybody. The act of parliament, of course, it must be borne in mind, expressly authorizes the crossing on a level. Now, in passing that act of parliament, no man could shut his eyes to the unavoidable consequence of that kind of crossing. It is a very great inconvenience. Nobody has to sustain the inconvenience who does not feel it very much. It not only delays your progress, but, by the very circumstance of its being a level crossing, horses in carriages, and horses which men are riding, must necessarily be very carefully guarded, in order to prevent the alarm which all horses must inevitably feel from the rushing by, on a level, of a railway train. But there is no compensation to be had for that, and if there were, I ask, where are we to stop? I do not deny, that if any particular damage could have been shown to be sustained by this party, to which the rest of the Queen's subjects were not subjected, there might be then a demand, although I am not prepared to say what would be the nature of that demand, which would give such compensation. But here it is only a question of degree. It is a matter of opinion whether the estate is benefited or not by the contiguity of the railway, but he sustains no damage beyond what is sustained by other people; or it is only a question of the degree of inconvenience sustained by him, as compared with the inconvenience sustained by other people.

My Lords, the authorities on the other side appear to me to be perfectly conclusive. With respect to the case of *R. v. The Bristol Dock Company*, I cannot myself distinguish that case from the present case. There was a public river accessible to all men, the water in which might be used by all men, subject, no doubt, to certain conditions; but the water, speaking generally, might be used by all men. Any man could advance to that river and help himself to a pailful of the water or a cartful of the water. A person having a brewery within a certain distance diverted a sufficient portion of the water of the river for the purposes of his works. Then the Bristol Dock Company, under the authority of their act of parliament, executed certain works which contaminated the water and rendered it no longer fit for this man's use. He says—I sustain a particular damage from that circumstance, for the water which I used before, and had a right to use, has become so deteriorated, and of such quality, that I cannot any longer carry on my business. It was held that he had only a general right; that nobody had any particular personal right to the water; that it was common to all the King's subjects; and that, therefore, he was not entitled to recover upon that ground alone. Now, where is the difference between a public river and a public road? The rights of both are common. A public river is, in point of fact, a highway, and a public road is a highway. You use each according to its quality, and if you have only that common right which belongs to all men, you cannot claim compensation in regard to a damage to either the one or the other, which is authorized by an act of parliament, and if, in any such case, parliament ever did intend that compensation should be given, it is perfectly manifest that it would be given generally to all within a certain limit, because there must inevitably be damage to many, to a certain extent.

My Lords, the same principle was, in a later time, held in the case of *R. v. The London Docks Co.*, 5 Ad. & El. 163. There, it was a claim to a common road which was stopped up. That road was common to all, and it was held that no individual could maintain a right of compensation in respect of the damage done to him.

My Lords, I will now refer to the case of the *East and West India Docks*, and the *Birmingham Junction Railway Co. v. Gattke*, 6 Rail. Cas. 371. Lord Truro there lays down the same principle. I believe he went out of his way rather to declare that opinion. He says, speaking of the *East and West India Dock Co.*—"I think this case is quite distinguishable from the case of *The London and North Western Railway Co. v. Smith*, 5 Rail. Cas. 716, upon the following grounds:—In that case compensation was claimed, solely upon the ground of injurious affection, resulting from the pernicious stoppage of what, at the time of the Company's act, was a public highway. No damage or injury was sustained by the plaintiffs, but what, in a greater or less degree, applied to all the Queen's subjects; and the question was a question of law, which seems to approximate very nearly to the question decided in the case of *The King v. The Bristol Dock Co.*, in which case compensation was claimed by certain brewers who were in the habit of using the water of the Avon for brewing, by reason of the Dock Co. having rendered the water unfit for that purpose in the construction of their works. But the Court held that no such appropriation of the works had taken place as to give the claimants more right to complain than any other individual of the public who had been in the habit of getting water from the river. The complaint, in substance, was a public nuisance, for which an indictment would have been the only remedy, if the legislature had not authorized it to be done. In that case the injury complained of was common to the public, as it was also in the case of *The London and North Western Railway Co. v. Smith*, and it might reasonably be contended that the case of *The King v. The Bristol Dock Co.* was a direct decision against the validity of that claim." Therefore, I can find nothing, after looking very anxiously through the cases, to induce me to alter the opinion which I had previously formed. Having formed a very strong opinion upon this case, I was anxious to see whether there was anything which would bear against it in point of authority. I can find nothing that has the slightest tendency to lead me to a different opinion from that which I had formed upon the merits of this case. It appears, therefore, that all the authority is one way; and that all the general opinion of the profession is the same way; and too much weight, generally speaking, cannot be given by any Court of justice to what is fairly known to be the general opinion of the profession. It is scarcely possible that all men advising can go wrong, and I have hardly ever known a case, in which what has been deemed the general opinion of the profession has not ultimately been found to be the correct opinion. I think, therefore, that I must come to the same opinion, and state to your Lordships that the Court of Session miscarried in the decision at which they arrived.

My Lords, I am very anxious that there should be some stop put to these proceedings; and therefore, if it can now, by any suggestion that the House can make, be so arranged, that ought not to happen, which inevitably will happen, if a common order is made, viz. :—That the case do go back to the Court of Session, in order that a new litigation may be commenced in this matter, and the question be again referred to another jurisdiction, with all the consequences of such a proceeding. I should very much lament if that should take place; and, I think, if the parties on both sides are disposed to act reasonably, it cannot and ought not to take place. Now the Court below considered and found that the respondent in this case had recovered more than he was entitled to recover, and they gave him the costs. As far as I can judge, the sum that was given for the supposed damage by the level crossing must have been a very small sum. I should think it was so. If you can come to an agreement between yourselves as to what should be deemed the measure of damages given by the jury in respect of the level crossing, the question then would only arise in respect of the costs, because that sum would probably reduce the amount below that which was offered by the company, and then the respondent would not be entitled to the expenses which he obtained in the Court below. If you can agree upon what I shall venture now to suggest to you, it will be for the benefit of both parties; and I must say, it will also be for the interests of the administration of justice. It would be a sad thing if this case should go back to Scotland, in order that in such a trifling matter a new litigation should be commenced in the Court of Session, with a new direction for a trial by another jury, and go back again to the Court, and, perhaps, ultimately end with another appeal to this House. If you can agree upon the sum which was awarded by the jury in respect of the level crossing, and then it should be thought just that there should be no costs on either side, but that up to this time each party should bear his own costs, and that the sum, which should be considered to be the measure which the jury gave for the damage occasioned by the level crossing, should be struck off the amount sought to be obtained by this appeal, then I think the interests of both parties will be consulted, and the interests of justice will not have suffered.

Sir F. Kelly.—We differ about the sum which the jury actually meant to give in respect of the damage occasioned by the level crossing. We have an averment, which, however, is denied, but which we believe to be true, that the jury meant to give £60 for the severance, and £500 for the level crossing. If that be admitted, I should be perfectly content to consent to reform the verdict, and enter it exactly as if it had been pronounced according to law.

LORD ST. LEONARDS.—That is rather helping yourself to the lion's share.

Mr. Anderson.—I am informed that that is quite incorrect. It is not admitted. It is preposterous.

LORD ST. LEONARDS.—What do you say to the course that you should divide the sum? Let half of the sum be considered as the amount that should be properly awarded for severance, and let there be no costs below on either side, and no costs of this appeal.

Sir F. Kelly.—If it followed that we should be entitled to half the costs, supposing the law gives them to us, I should have no objection to that course. We feel satisfied of the fact that £60 only was given for severance.

LORD ST. LEONARDS.—You are not answering it as I put it. Are you willing to enter into an agreement on both sides to meet the justice of the case, in order to stop the litigation from Scotland which we see constantly in this House, and which calls for considerable reprobation, and there ought to be a check put upon it?

Sir F. Kelly.—What I am content to do is this. The verdict for the land actually taken was £360; that, I presume, neither party seeks to disturb; and the verdict for severance and level crossing was £560. Now, my Lord, I have no objection to halve that, and to let the verdict stand for £360, plus the half, which would be £280. That would make together an entire verdict for £640.

Mr. Anderson.—That is £200 less than they offered us before we went to the trial.

LORD ST. LEONARDS.—I recommend you, Mr Anderson, to accede to that proposal.

Mr. Anderson.—My client is not here.

LORD ST. LEONARDS.—You had better act for your client.

Mr. Anderson.—If it were put to me, it is a very unreasonable proposition on the part of my learned friend. Their offer before trial was £850.

Sir F. Kelly.—But we know that railway companies invariably offer more than they think just, because they know that there will be great costs incurred in the event of a trial, which must fall upon them.

LORD ST. LEONARDS.—I would recommend you, Sir F. Kelly, rather than this litigation should go on, to adhere to your original offer. That would prevent all difficulty, and no costs should be allowed.

Sir F. Kelly.—I cannot do that, because it will be introducing a precedent quite fatal to the interests of the railway companies, who always offer more than they think just, because they know that large costs will be incurred in the event of a trial, which must fall upon them.

Interlocutors reversed, and cause remitted with a declaration.

Appellants' Agents.—Hope, Oliphant, and Mackay, W.S.—*Respondent's Agents.*—Inglis and Inglis and Leslie, W.S.

MARCH 9, 1855.

THE NATIONAL EXCHANGE COMPANY OF GLASGOW, *Appellants*, v. PETER DREW and MATTHEW DICK, *Respondents*.

Company—Fraudulent Reports—Sale of Shares—Summons—Relevancy—Issue—Fraud—*A joint stock company having sued one of their share-holders for payment of advances made by the company as brokers to enable him to purchase more shares of the company's stock, he denied liability, on the ground that the company had induced him to transact by fraud, concealment, and misrepresentation as to the true state of their affairs.*

HELD (affirming judgment), *that this was a relevant defence*—1. *Because it alleged that the loan and the purchase were one transaction, and induced by the fraudulent reports of the company.* 2. *Because the fraudulent reports of the directors bound the company as between the company and third persons.*¹

The pursuers appealed, maintaining that the judgment of the Court of Session should be reversed—1. Because the respondents, while they admit the truth of the appellants' averments, at least to an extent supporting the conclusions of the action, have not relevantly averred facts, sufficient to obviate their legal effect. 2. Because they have made no allegations in point of fact to support, as relevant, either their first or second plea in law; and as regards their third plea, the alleged overcharge has been removed by the appellants' abandonment of the charge for commission, and restriction of the rate of interest. 3. Because the allegations of the respondents, so far as they shew any cause of complaint, relate to the conduct of individuals

¹ See previous reports 12 D. 950; 22 Sc. Jur. 417. S. C. 2 Macq. Ap. 103: 27 Sc. Jur. 356.