

the result to be done upon certain ascertained facts, was a matter competent to your Lordships to adjudicate upon by appeal. Lord Campbell says—"My Lords, clearly the scope of legislation upon this subject was, that the determination of facts should be final; but that still there should be the right for the protection of the parties, and for the uniformity of the law, to take the opinion of your Lordships upon any point of this sort (that is, any point of law) that might arise."

Now it does not matter whether the jury or the parties, or, I will even go the length of saying, the learned Judges, have chosen to call anything a matter of law. Their calling it by that name cannot make it matter of law. What was decided in this case was strictly matter of fact. It was matter of fact found by the Judges, in pursuance of a delegated authority given to them by the parties putting them in the place of the jury. And against that finding there can be no more jurisdiction in this House to entertain an appeal than there would have been, if, instead of having been decided by the Judges, it had been decided by a jury. Therefore I move your Lordships, that this appeal be dismissed as incompetent, and with costs.

Solicitor-General.—Your Lordships will not give any costs of this hearing. This hearing was directed at the request of the Appeal Committee, for the purpose of enabling the Appeal Committee to make the proper order. If you dismiss the appeal, therefore, you will dismiss it with costs as from the time when the matter came before the Appeal Committee, not including the costs of this hearing.

LORD CHANCELLOR.—I think we must dismiss it with costs. This was the opinion of the committee:—"Matter of respondents' petition as to incompetency, to be argued at the bar by one counsel of a side on an early day in next session. Appellants and respondents at liberty to lodge a printed case confined to matter of competency of appeal, if they shall be so advised."

Solicitor-General.—That is about lodging the case, but the Appeal Committee could not have dismissed it with costs.

Mr. Richardson (agent for respondents).—The petition prays that the appeal may be dismissed with costs.

Solicitor-General.—What the petition prays is an immaterial thing. The House here has been acting, as it were, merely for the purpose of assisting the Appeal Committee. You have not yet the appeal brought to be heard by the House. You will make the order now which would have been made by the Appeal Committee.

Mr. Richardson.—It would be very hard upon the parties to be deprived of the costs.

Solicitor-General.—Another reason for not giving the costs of this hearing is, that it is a matter of public concern.

LORD CHANCELLOR.—As a matter of form, the appeal is dismissed by the House as incompetent, and the matter of costs is referred to the Appeal Committee.

Appeal dismissed as incompetent, and the question of costs referred to the Appeal Committee.

Appellants' Agent, James Moore, S.S.C.—Respondents' Agents, Gibson-Craig, Dalziel and Brodie, W.S.

JUNE 16, 1856.

THE CALEDONIAN RAILWAY Co., and THE GLASGOW, GARNKIRK, AND COATBRIDGE RAILWAY Co., *Appellants*, v. MARK SPROT, *Respondent*.

Railway—Disposition—Sale—Reservation of Minerals—Support of Surface—Construction—*S.*, a proprietor, sold to a railway company a portion of his land contiguous to the line, reserving right to work the minerals, but the conveyance was made subject to the conditions of an act of parliament previously obtained by the company, which provided, that it should not be in the power of any proprietor reserving right to minerals to work them, without previous notice and security for damage to the line. It turned out, that the minerals could not be worked without danger to the line.

HELD (reversing judgment), That in his disposition *S.* by implication conveyed to the Co. the right to all necessary support of their line of railway, and he could not derogate from that conveyance by working the mines and removing that support.¹

An action of declarator and damages was raised at the instance of Mark Sprot, Esq. of Garnkirk, against the railway companies, in respect to certain minerals belonging to him under and adjacent to the Caledonian Railway.

¹ See previous report 16 D. 559, 955 : 26 Sc. Jur. 255. S.C. 2 Macq. Ap. 449; 28 Sc. Jur. 486.

On 12th December 1834 the pursuer entered into an agreement with what was then called the Garnkirk and Glasgow Railway Company, by which, for certain sums of money, amounting in all to £624 5s. 11½*d.* he sold and conveyed to them certain portions of the estate of Garnkirk, but "reserving always to me and my heirs and successors the whole mines and minerals, of whatsoever description, within the said lands hereby conveyed, and full power and liberty to us, or any person or persons authorized by us, to search for, work, win, and carry away the same, and to make aqueducts, levels, drains, roads, and others necessary for all or any of these purposes, but subject always to the provisions and conditions of the said acts of parliament in relation to the working of minerals for the protection and security of the said company, and the said railway and works and traffic thereon."

The provisions in the Garnkirk and Glasgow Act, 7 Geo. IV. c. 103, § 11, in the case of proprietors reserving their minerals, referred to in the above disposition, was—"Provided always further, nevertheless, that it shall on no account be lawful to, or in the power of, any such proprietor, to work, win, or away take any of the said minerals without giving previous good and sufficient security to the said company for all damages, interruption of traffic, and other injury which may thence in any way result to the said undertaking or the said company; and in the event of the said company and any such proprietor not agreeing in regard to the extent or sufficiency of such security, then the Judge Ordinary of the bounds shall regulate and determine thereupon, as to him shall appear just."

This Garnkirk and Glasgow Railway, which was at first merely a mineral line worked by horse power, was in 1844 extended and changed, by act of parliament, 7 & 8 Vict. c. 87, into the "Glasgow, Garnkirk, and Coatbridge Railway Company." Next year the new company was empowered to widen and improve the gauge of their rails by act 8 & 9 Vict. c. 31, and finally, in 1846, the whole line was sold to and merged in the Caledonian Railway Company by the act 9 & 10 Vict. c. 9.

In the first of the above recited acts, the 7 & 8 Vict. c. 87, there were inserted several clauses in regard to the minerals under or adjacent to the line. It was provided in § 84, to protect the railway, that "if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier, shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice, it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work or get the same."

And in § 85—"That if before the expiration of such thirty days, the company do not state their willingness to treat with such owner, lessee, or occupier, for the payment of such compensation, it shall be lawful for him to work the said mines, so that the same be done in manner proper and necessary for the beneficial working thereof: and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same shall be forthwith repaired or removed, as the case may require, by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier, the expense occasioned thereby, by action in any competent courts."

In the Caledonian Company Act are incorporated the general regulations as to mines and minerals in the Railway Clauses Consolidation (Scotland) Act, 8 and 9 Vict. c. 33, §§ 70, 71, 72, 3, 4, 5, 6, 7, and 8.

Since 1834 the pursuer discovered that there was a valuable field of fire clay in that part of his estate traversed by the railway, lying partly under the line of railway, as well as on both sides of it, and he proceeded to work the minerals very extensively, having, according to his averment, expended upon the works a sum of between £20,000 and £30,000.

In August 1848 he received a letter from the defender's agents intimating that the works carried on in the fire clay mines were endangering the safety of the railway, and calling upon him to find security to the company for damages, interruption of traffic, and other injury. To this there was appended a report by Mr. Robson, engineer, who stated that—"Directly under the railway the depth from the surface to the top of the fire clay bed does not exceed eighty feet, and the thickness of the clay being eight feet, it follows that the excavation or void will also be eight feet, except at those places where the roof has already sunk; and recommended—1. That if possible the railway company should stop any further working of the fire clay within sixty feet of the centre of the railway between the points A and B on the plan. 2. That the spot should be watched, and if partial sinking takes place, the rails should be raised and laid on strong longitudinal sleepers, resting on cross sleepers, and that these cross sleepers should be twenty-four feet long, so as to extend under, and some distance beyond both lines of rails. 3. That any future working of this clay to the west of A or east of B should only be permitted

if done by means of narrow mines, not exceeding eight feet in width, to be driven at right angles to and under the railway. These mines not to be closer to each other than thirty feet, and to have no cross mines or rooms between them, until they extend beyond the distance of sixty feet from the centre of the railway on each side ; but after passing these limits, the workings may be widened out to the usual dimensions and form."

The ground conveyed by the pursuer to the railway company did not comprehend the whole space mentioned in Mr. Robson's report, extending 60 feet on each side from the centre of the railway, between the points A and B on the plan, and within which the company's engineer has reported the fire clay cannot be worked without endangering the security of the railway.

In these circumstances the pursuer, on 13th September 1848, in terms of the 71st sect. of the Railway Clauses Act, 8 and 9 Vict. c. 33, served a notice on the secretary of the Caledonian Company, intimating his intention of working the minerals under and adjacent to the railway.

The company, however, declined to avail themselves of the option given by that statute of purchasing the minerals, or of paying compensation to the pursuer for leaving them unworked, and insisted on his finding caution for damages, &c., before proceeding.

The pursuer consequently raised the present action of declarator of his right to work the minerals both in the lands contiguous to and under the railway. The value of these minerals was estimated by him at £50,000. He likewise claimed damage for the loss sustained by the interruption of his workings since August 1848, estimating it at £10,000.

The Court of Session held that this was a *casus omissus*, and that the company were bound to purchase the minerals under the line of railway and adjacent thereto.

The railway company appealed against the judgment of the Court of Session, maintaining that it ought to be reversed, because, 1. The rights and obligations of parties, as fixed by the Statute of 1826, and the disposition of 1834, are inconsistent with the findings and interlocutors appealed from. According to a just view of these rights and obligations, the appellants were entitled to be secured against, and indemnified on account of, operations dangerous and injurious to the railway, whether these operations are carried on under or near it ; and the respondent was bound, before commencing operations on the minerals below the line, to find caution to indemnify the appellants against the consequences of these operations. 7 Geo. IV. c. 103 : *Samuel v. Edinburgh and Glasgow Railway*, 11 D. 968 : 13 D. 312. Bell's Principles, § 965. 2. The original rights and obligations of parties in regard to the minerals under and near the line were not affected by the statutes, special or general, passed subsequent to 1834. 9 and 10 Vict. c. 329, § 3 ; 7 and 8 Vict. c. 87. 3. Neither the contract, nor the rights and obligations under the contract, were rescinded or altered by reason of the increase of traffic on the line.

The respondent supported the judgment on the following grounds :—1. Because the matters remitted by the Court under their interlocutor of date 31st March 1853, to be reported upon, formed a proper and relevant subject of inquiry ; and because the information obtained under the report had a most important bearing upon the main question in dispute. 2. Because, under the transaction of 1834, viewed in conformity with the local statutes upon which it proceeded, the condition as to finding security was not intended nor calculated to destroy the reservation of the whole minerals, and the reservation formed a material part of the transaction ; and the respondent was entitled either to work his minerals so reserved, or to receive compensation for such part as the interests of the railway required to be left unworked. 3. Because the minerals in the lands of the respondent, situated on either side of the strip of ground sold by him to the railway company, did not fall within, nor were in any respect affected by, the transaction, or by local acts ; and because, in so far as the minerals were not regulated by the statutory provisions after mentioned, the respondent, at common law, was entitled to the unrestrained use and enjoyment, or at least, his use and enjoyment was only liable to be restrained within fair and reasonable limits, upon full compensation. 4. Because the questions at issue were conclusively regulated in favour of the respondent, not only by the mining clauses contained in the local act of 7 and 8 Vict. c. 87, but also, and more particularly, by the analogous and more complete provisions in the general act 8 and 9 Vict. c. 33, entitled, "The Railway Clauses Consolidation (Scotland) Act, 1845." Act 7 Geo. IV. c. 103, § 6 ; Act 7 Geo. IV. c. 103, §§ 26 and 27 ; First branch of the case—the subjacent minerals, 7 Geo. IV. c. 103, 26th May 1826 ; 7 and 8 Vict. c. 87, 17th July 1844 ; Clauses Act, 8 and 9 Vict. c. 33, 21st July 1845 ; Lord Fullerton's Note in *Murray v. Johnston*, 13 S. 119 ; Ersk. ii. 1, § 2 ; *Dunlop v. Robertson*, Hume's Dec. 515 ; *Robertson v. Strang*, 4 S. 6 ; 5 and 6 Vict. c. 55.

Sir F. Kelly Q.C., Rolt Q.C., and Anderson Q.C., for the appellants.—The act of 1826 empowered the owner of any lands taken "or prejudiced," to claim satisfaction for all damage to be sustained in or by the execution of the powers of that act, so that the respondent was entitled to include every possible kind of damage, actual or contingent, in his demand. It is a well known rule under acts of this kind, that the owner, in making his claim, must include everything in the shape of damage that can accrue to the end of time, and is not entitled to return, time after time, on some fresh and unforeseen damage emerging, and thus eke out his claim.—*R. v. Leeds and Selby Railway Co.*, 3 Ad. and Ell. 683. Landowners in such cases seldom err in including

too little. Since, therefore, the respondent here chose to reserve his property in the minerals beneath the line of railway, he ought to have made a claim for the damage he must needs suffer by being unable to work them without giving security. The conveyance, in granting the surface of the land for the purpose of a railway being constructed on it, necessarily conveyed also, by implication, a right of support from the subjacent and adjacent soil; besides, it expressly states that the property in the minerals, and the right to work them, are subject to the safety of the railway. It is a well settled principle, which has often been discussed of late in the English Courts, and is universal law, that when a party conveys his land for a particular purpose, he cannot by his acts derogate from that purpose. Thus, when the respondent disposed the surface of the land, in order that a railway might be constructed on it, he could not, by working his minerals, whether in the soil subjacent or adjacent, do anything to defeat the purpose for which the land was granted.—*Harris v. Ryding*, 5 M. & W. 60; *Hilton v. Earl Granville*, 5 Q.B. 701; *Jeffreys v. Williams*, 5 Exch. 792; *Humphries v. Brogden*, 12 Q.B. 739; *Smart v. Morton*, 5 E. & B. 30. So it is in Scotland.—Bell's Prin., § 670 (4th ed.); *Bald's Trustees v. Earl of Mar*, 16 D. 870. There was nothing in the subsequent acts of parliament which altered this relation of the parties.

Solicitor-General (Bethell), *R. Palmer* Q.C., and *A. Brown*, for the respondent.—The act of 1826 contemplated that the damage might be sustained from time to time, and that satisfaction might be demanded from time to time.—See § 89. It was the duty of the company to pay for all that was necessary to enable them to construct their railway, and to support it when made, and they cannot complain if they are now called upon to pay for the minerals which they knew they did not pay for in the first instance, probably because they thought they would not require the whole of the subjacent soil to support the railway. It is not denied that a conveyance of the surface of land generally carries with it an implied right of support from the subjacent soil; but it is otherwise when there is an express reservation of the soil below, for then the grantee of the surface takes his chance of the minerals being necessary to support the surface.

[LORD BROUGHAM.—You say, if I grant the surface of my land to you for the purpose of enabling you to construct a railway on it, and reserve to myself the minerals, I may go on working these so long as an inch thick of surface remains?]

Yes, we go that length. The one is as much entitled to the minerals as the other is to the surface. This seems to be taken for granted in *Hilton v. Earl Granville*, 5 Q.B. 701. If, however, the respondent is not entitled, under the original act and his conveyance, to demand compensation, he is entitled, under the General Railways Clauses Consolidation Act, which was incorporated with the other acts, and expressly empowers him to demand compensation.

Sir F. Kelly replied.—The General Railways Clauses Act cannot govern the rights of the parties, which must stand on the original act and the conveyance. The general act applied only to future local acts, and has no retrospective operation. If it were otherwise great mischief would be produced, for almost every railway made under previous local acts would have to be taken to pieces, in order to reconstruct the bridges and levels, &c., so as to correspond with the minute provisions enacted by the general act—which is absurd.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—This appeal arose out of an action which had been brought by the respondent against the appellants, the object of which was to compel them to purchase certain minerals belonging to him, situate under and near the line of their railway. Several acts of parliament came in question in this case—first, the original act 7 Geo. IV. c. 103, which is an act for making a railway from the Monkland and Kirkintilloch Railway by Garnkirk to Glasgow. Under that act there were the usual powers enabling the company to be incorporated for the purchase of lands; and pursuant to the powers given by that act on 12th December 1834, between eight and nine years after the passing of the act, the respondent sold to the company, in consideration of a sum of about £620, some land of his, over which the railway was to pass, reserving, however, the minerals. Then there passed some amending acts. Before that conveyance had been made two acts extending the powers of the company had passed, but they are not material to be considered. By the act of 1844 the name of the company was changed, and it was called at that time the Glasgow, Garnkirk, and Coatbridge Railway Co. There was then another act improving the gauge of the railway, and there passed on the 21st July 1845 the Scottish General Railway Act. In the same year an act was passed by which the Caledonian Railway Co. was incorporated, and then, in the year 1846, an act enabling the Caledonian Railway Co. to purchase the Glasgow, Garnkirk, and Coatbridge Railway.

The respondent having sold his land to the original company, but having reserved to himself the mines, was proceeding to work certain mines under and near the line of railway in the year 1848, when, upon the 17th August in that year, he received a notice from the company calling upon him to desist from what he was so proceeding to do. Having set forth the rights of the company, the summons state this:—"Under these circumstances, the pursuer proceeded with

the working of the fire clay and other minerals in his said lands of Garnkirk, in due and ordinary course, until he was interrupted by the said Caledonian Railway Co. : That, on or about the 17th August 1848, the agents for the company addressed a letter to the manager at the Garnkirk works, intimating that they had received a report from their engineer that the works then in the course of being carried on in the fire clay mines under the line of the Garnkirk Railway, at the Garnkirk brickworks, were of a nature to endanger the safety of the railway, and calling upon the proprietor of the minerals to find security to the company for all damages, interruption of traffic, and other injury which might result to the company, before any further workings were proceeded with." The summons then states what took place upon that ; but eventually, the appellants persisting that he had no right to work them, the respondent brought the action out of which the present appeal arose, in which, stating all these acts of parliament, and stating what had been done, he concludes thus :—"Therefore, it ought and should be found and declared, by decree of the Lords of our Council and Session, that the said Caledonian Railway Co., or the said Glasgow, Garnkirk, and Coatbridge Railway Co., or either of them, defenders, have no right of property in the minerals in the lands of Garnkirk, situated under and adjacent to the Glasgow, Garnkirk, and Coatbridge Railway, or any part thereof ; but that the property of the said minerals is still vested in and belongs to the pursuer, subject to any right of purchase or right to prevent the working thereof, on making compensation for the same, competent to the said defenders, or either of them, under the said acts of parliament." And further, "it ought and should be found and declared, by decree aforesaid, that the proviso or enactment in the 11th § of 7 Geo. IV. c. 103, whereby it is declared that it shall not be lawful to or in the power of any proprietor to whom satisfaction has been made, to work, win, or away take the said minerals, without giving previous security to the Glasgow and Garnkirk Railway Co., or their successors, for damages, interruption of traffic, and other injury resulting to the said company, and their said undertaking does not in any respect apply to the minerals in the lands adjacent to the railway belonging to the pursuer, which were not conveyed or included in the disposition granted by him to the railway company in 1834 ; and notwithstanding the proviso or enactment in the said statute, and the terms of the said disposition, the pursuer is entitled to obtain compensation from the defenders, or either of them, for all minerals under or adjacent to the line of railway which were not purchased by the railway company or their successors, and which the pursuer or his tenants are prevented from working by reason of the necessity of maintaining the railway in a state of security, or by reason of the restriction imposed upon him not to injure the railway : And further, it ought and should be found and declared, by decree foresaid, that the pursuer is entitled to obtain full compensation from the defenders, that is, the Caledonian Railway Co., and other companies, or either of them, for the whole minerals in the lands of Garnkirk not purchased by the railway company or their successors, and which cannot be wrought without danger to the railway and works, and that within the limits specified in the report of Mr. Robson, the engineer of the company, dated 3d August 1848, or as the same may be ascertained in the course of the process to follow hereon."

That being the summons, there was a condescence and a statement in answer ; and eventually, on the 8th March 1851, the Lord Ordinary pronounced an interlocutor assoilzieing the defenders, having come to the conclusion, that the respondent, by the sale to the defenders of his lands, although he reserved the minerals, had nevertheless precluded himself from working the minerals, either under or adjacent to the railway, so as to prejudice the railway. That decision of the Lord Ordinary was brought by way of reclaiming petition to the Court of Session, and they took this course :—"Before answer, and under express reservation of all pleas or questions competent to the parties under the record," they remitted the case to Mr. Leslie and Mr. Lonsdale, the one a civil engineer, and the other a mining engineer, "to examine the subjects, and to inquire and report, first, whether, having reference to the nature of the railway, which was made under the powers of the original acts, the minerals under the railway could have been worked with safety to the railway," and with reasonable prospect of advantage to the proprietor, subject to the obligation of fair caution, in terms of the original act ; and, second, whether, and in what respects, and to what extent, the alterations made in the uses and structure of the railway by or under the authority of the acts of 1844, 1845, and 1846, or any of them, materially affected the practicability of working the minerals. Those gentlemen made their report :—"That, having reference to the nature of the railway made under the powers of the original acts, the minerals could not have been worked with safety to the railway as they were in the habit of being worked ; but that fully one third or nearly one half of the fire clay could have been taken out from under, or for 60 feet on each side of, the centre of the railway, by single mines," and so on, which is not the ordinary way of working ; and, secondly, "that the railway being thus secured, it is of no consequence to the stowed mines or cased pillars how many or how frequent the trains are ;" and they added—"The reporters do not think that the increased traffic, or the alterations of the structure and uses of the railway, have materially affected the practicability of working the minerals under and adjacent to the railway." When that report was brought before the First Division of the Court of Session, they took a different view from that which had been

taken by the Lord Ordinary. They found that the consideration paid to the respondent did not include compensation for the loss of the minerals, and that he was entitled to work the minerals unless the company thought fit to purchase them. From that decision the present appeal was brought.

The respondent, by his conveyance, dated 12th December 1834, conveyed to the original Garnkirk Co. a portion of his land required for the line of the company, in consideration of a sum of money agreed on as a price, and then paid to him. The conveyance was expressly made for the purpose of the land conveyed being used as a railway. He, however, reserved all mines under the land so conveyed, with full liberty to win and work the minerals. Independently of any provisions contained in the act of parliament, the effect of that conveyance was to convey the land to be covered by the railway to the company, together with a right to all reasonable subjacent and adjacent support. A right to such support is a right necessarily connected with the subject matter of the grant. If the owners of a house were to convey the upper storey to a purchaser, reserving all below the upper storey, such purchaser would, on general principles, have a right to prevent the owner of the lower storeys from interfering with the walls and beams upon which the upper storey rests, so as to prevent them from affording proper support, so far, at all events, as to prevent a person who has granted a part of his land from so dealing with that which he retains as to cause what he has granted to sink or fall. How far such adjacent support must extend is a question which, in each particular case, will depend on its own special circumstances. If the line dividing that which is granted from that which is retained traverses a quarry of hard stone or marble, it may be, that no adjacent support at all is necessary. If, on the other hand, it traverses a bed of sand, a marsh, or a loose gravelly soil, it may be, that a considerable breadth of support is necessary to prevent the land granted from falling away upon the soil of what is retained. Again, if the surface of the land granted is merely a common meadow or a ploughed field, the necessity for support will probably be much less than if it were covered with buildings or trees; and it must be further observed, that all which a grantor can reasonably be considered to grant or warrant, is such measure of support subjacent and adjacent as is necessary for the land in its condition at the time of the grant, or in the state, for the purpose of putting it into which the grant is made. Thus, if I grant a meadow to another, retaining both the minerals under it and also the adjoining lands, I am bound so to work my mines and to dig my adjoining lands as not to cause the meadow to sink or fall over; but if I do this, and the grantee thinks fit to build a house on the edge of the land he has acquired, he cannot complain of my working or digging, if by reason of the additional weight he has put on the land, they cause his house to fall. If, indeed, the grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warrant of support subjacent and adjacent, as if the house had already existed.

Applying these principles to this case, it is clear that, by the effect of the conveyance of the 12th December 1834, the Garnkirk Co. acquired a right to the surface of the ground traversed by the railway, together with a right, as against the respondent, to such subjacent and adjacent support as was necessary for enabling them to maintain and work the railway. The conveyance is in these terms:—"I, Mark Sprot, Esq. of Garnkirk, considering that, in the year 1826, by act of parliament 7 Geo. IV. c. 100, entitled, &c., the Garnkirk and Glasgow Railway Co. was incorporated, and that it was agreed between me and the committee of proprietors of said railway, that the value of the land belonging to me to be occupied by said railway, as well as all damages done to my property, should be ascertained by David Leighton, then factor at Coltness: That the railway company having, in the year 1827, commenced making said railway" (and then there is a calculation of the interest, and certain other damages, making altogether £624, the original purchase money being only £379, and it proceeds thus): "and in consideration of the foresaid sum of £379, being the specific and agreed on value of the land hereby conveyed, I, the said Mark Sprot, do, by these presents, grant and convey to the said company of proprietors, but always for the said railway and works thereto belonging, and not otherwise, All and Whole that portion of my estate described, &c., declaring that I shall have full power to take into my own hands the slopes or banks on that portion of the line betwixt the parish road and the crossing of the Cumbernauld road, at or near Stepps, for the purpose of feuing or otherwise, under such conditions and restrictions always as shall not interfere with the due and regular operations of the said railway; I, the said Mark Sprot, and my foresaids, paying such annual value for said slopes and banks as may be fixed by two persons mutually chosen: And I hereby warrant this conveyance at all hands, and against all mortals, as law will; and declare that all feu, teind, and other parish and public burdens whatsoever, affecting the lands hereby conveyed, up to the term of Martinmas 1833, have been paid—my said disponees being obliged to pay whatever proportion of such burdens have fallen due since, or may hereafter fall due, and be held as applicable to said lands; reserving always to me, my heirs and successors, the whole powers and privileges of access to or crossing said railway and otherways, conferred by said recited acts on the landed proprietors whose lands are intersected; also always reserving to me and my heirs and successors, the whole mines and minerals, of whatever description, within the said lands hereby conveyed,

and full power and liberty to us, or any persons authorized by us, to search for, win, and carry away the same, and to make aqueducts," and so on. Subject to the rights thus given to the company, the respondent had, and retained a right to work the minerals under and adjoining the line, subject only, as to the minerals under the line, to the obligation of giving the security created by the first act to which I have referred.

Starting, then, from this proposition, the next question is—have the rights of each party been affected by the several acts of parliament relating to the railway. At the time when the conveyance was made in 1834 three acts had passed, viz., the original act 7 Geo. IV. c. 103, and two amending acts, viz., 7 and 8 Geo. IV. c. 88, and 11 Geo. IV. c. 125; the two latter, however, do not affect the present question, and therefore may be disregarded. The 11th section of the original act is that which relates to the conveyance of land to the company, the reservations of mines, and the restrictions in their working. It is this:—"And be it further enacted, that all and every body or bodies politic, corporate, or collegiate, trustees, and other person or persons herein before capacitated to sell or convey lands or other heritages through, in, or upon which the said railway, bridges, roads of communication, or other works, hereby authorized, shall be made, may accept and receive satisfaction for the value of such lands, &c.; but provided always, that notwithstanding anything herein contained, it shall be lawful and competent to any proprietor or proprietors whose lands are hereby authorized to be taken, to reserve and except from the bargain or sale to the said company, the whole of the minerals in the said lands, for and to his or her own proper use and behoof; and the said company shall have no right of property of or in such minerals, which any proprietor or proprietors may desire to be reserved as aforesaid; but provided always further, nevertheless, that it shall on no account be lawful to, or in the power of any such proprietor, to work, win, or away take any of the said minerals without giving previous good and sufficient security to the said company for all damages, interruption of traffic, and other injury, which may thence, in any way, result to the said undertaking or the said company; and in the event of the said company and any such proprietor not agreeing in regard to the extent or sufficiency of such security, then the Judge Ordinary of the bounds shall regulate and determine thereupon as to him shall appear just."

The first observation which occurs on this section is, that, though under its provisions and other clauses in the act, the respondent might have been compelled to sell the land in question to the company; yet, when, by arrangement between him and the company, it was settled what should be the price paid, and the conveyance is made accordingly, the effect of the transaction, so far as relates to the conveyance of the land and the rights acquired under it, must depend on the terms of the deed, subject only to the provision in the clauses regulating or restricting the right of working the mines. By virtue of the conveyance the company acquired by grant from Mr. Sprot an absolute right to the surface of the land; and, by implication, a further right to such subjacent and adjacent support as was necessary, taking into account the purpose to which the land was to be put. Mr. Sprot, on the other hand, retained his former right of working the mines, subject only to the rights which he had impliedly granted of subjacent and adjacent support, and subject also to the statutory restriction in the 11th clause, preventing him from working the mines under the land conveyed without first giving to the company good and sufficient security for all damage which might accrue to it from such workings. Such, certainly, would have been their rights if no further act of parliament had passed. If, while these original acts and no others were in force, Mr. Sprot had proceeded to work the mines, he might have been restrained from any working of the minerals, whether under the line of railway or under adjoining lands, which should interfere with the due support of the line, because, by so working, he would be acting in violation of his own implied grant or warranty of reasonable subjacent and adjacent support; and, further, he would have been bound, before he worked at all under the land conveyed to the railway, to give the security required by the statute.

Reliance was placed in the argument on the 89th section. It was argued that the inability to win the minerals by reason of the danger which would be thereby occasioned to the railway, was a damage to Mr. Sprot for which no remedy is provided by the act, and so was within the provisions of the 89th section. This section is this:—"That if, at any time or times hereafter, any person shall sustain any damage in his, her, or their lands, tenements, heritages, or property, by reason of the execution of any of the powers hereby given, and for which no remedy is herein before provided, then, and in every such case, the recompense or satisfaction for such damage shall, from time to time, be settled and ascertained in such manner as herein before directed in respect of any other recompense or satisfaction herein before mentioned." I think the argument arising out of that section is untenable. The damage complained of is a damage arising solely from the fact that the respondent, by his conveyance of 1834, impliedly bound himself to secure to the company adequate subjacent and adjacent support. He incurred that obligation by the mere fact of the conveyance. He was not bound to convey at all, till he had taken the steps pointed out by the statute for having it ascertained what was the sum which he ought to receive as the price of his conveyance, including consequential damage. In calcu-

lating that sum, the circumstance that he was to convey not merely the soil of the line upon which the railway was to be formed, but also, impliedly, a right in his disponees to have subjacent and adjacent support for the land disposed, must necessarily have been taken into account; and when, in afterwards proceeding to work the mines, he finds that he cannot win the minerals, because in so doing he would be interfering with the necessary support of the line of railway, he has no more right to complain than he would have had, if he had found, that to work the mines effectually it would be necessary to sink a shaft in some portion of the line of railway that is on the land actually conveyed. This conveyance operates to deprive him of his right to disturb the lateral and interior support, in the same way as it prevents him from interfering with the surface itself of the land conveyed. The 89th section, therefore, is inapplicable, because the damage of which the respondent complains is a damage arising not by reason of the execution by the company of the powers given to them by the act, but by reason of his having, by the conveyance of 1834, impliedly bound himself to secure to the company adequate support to the line of railway, or rather, negatively, not to interfere by his acts with such support.

This being so, the only further question is as to the effect of the subsequent acts of parliament. Do they or do they not alter the rights which, if no such acts had passed, the company would have possessed under the original act? I will refer to the several acts in the order of their dates. The first act which passed after the conveyance in December 1834, was that of 1 and 2 Vict. c. 60. This act did no more than enable the company to raise further sums of money, and make some amendments in the details of the former acts. It in no respect touched the question as to the rights of the respondent and of the company in respect of the mines. The next act was that passed in 1844, viz., 7 and 8 Vict. c. 87. By that act, after reciting that the railway authorized by the former acts had been completed and opened to the public, and had proved of great public and local advantage, and further reciting that its utility would be increased if the company were authorized to make two extensions of the railway, it is enacted that the former acts shall be in force for carrying the purpose of that act into execution. The name of the railway is then changed, the act providing, that it shall thereafter be called the Glasgow, Garnkirk, and Coatbridge Railway, this new name having been adopted with reference to the extension of the line then already made or in progress. The usual powers are then given for enabling the company to purchase lands, and exercise the necessary works for the two new branch lines; and among the provisions relative to the mode in which the works are to be executed are five clauses, having for their object the regulating of the working under or contiguous to the lines. Those clauses are numbered 84 to 88. The 84th section says, that, "for the purpose of protecting the railway and works from danger to be apprehended from the working of any mines either under or closely adjoining the railway, be it enacted, that if the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within 40 yards therefrom, be desirous of working the same, such owner, lessee, or occupier, shall give to the company notice in writing of his intention so to do 30 days before the commencement of working; and upon the receipt of such notice, it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company and such owner do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation." By the 85th clause it is enacted, that if the company be unwilling to purchase, the owner may work the mines. Then, by the 86th section, in order to prevent the mines being worked in such a way as to damage the railway, it is enacted that the railway company may enter and inspect the mines, after giving 24 hours notice in writing; and powers are given to enable them to make proper supports, if supports are wanted, and to make mining communications.

The object of these clauses may be stated to be, *first*, to compel all owners of mines near the railway to give notice to the company before they begin to work them, and to enable the company, if they think fit, to prevent such working by purchasing the mines from the owner, or rather by compensating him for his loss in not working them; and, *secondly*, to compel the owner of the mines, if the company do not purchase, to work them so as not to damage the railway by improper working; and the act then gives powers to the company enabling them to ascertain that no improper workings are in progress. With reference to these enactments it was contended on the part of the appellants, that they did not apply to the original railway, but only to the new extension lines authorized by the act in which the clauses are found. The respondent, on the other hand, argued that the enactments are general, and applicable to the whole railway, including as well the original as the branch lines. In the view which I take of this case, it is immaterial which of these constructions is correct, for, assuming the respondent to be right, and that these clauses apply to the whole line, and so to the mines of the respondent under and contiguous to the railway, still they cannot interfere with the pre-existing rights of the company, which they had acquired ten years before this last act became law. Under the deed of 1834 the

company had acquired by purchase a right, as against the appellant, to have adjacent and subjacent support to their railway. The effect of the mining clauses in the act of 1844 was not to deprive the company of the right they had thus purchased, but to prevent the respondent from working his mines without first giving the option of stopping the workings by compensating the respondent, when they refuse to exercise that option. The respondent has the same right of working his mines which he had before, that is, a right to work them, not interfering with the support of the railway. It is true the 85th sect. enacts, that if the company do not exercise the option given by the act, the mine owner may work his mines in the manner proper and necessary to the beneficial working thereof; but all this must have reference to the existing rights of the mine owner and of the company. The legislature certainly did not intend to give to the mine owner, as against the company, rights which he had previously sold to them; and when the act of 1844 passed, the respondent had no right to work his mine in any way which would interfere with the security of the railway. So also as to the clause in § 11 of the original act, whereby the owner of the reserved mines under the land conveyed is restrained from working at all until he has given security to the company. I see nothing in the act 1844 to prejudice that right. The mining clauses in that act must all be read with reference to the rights of the mine owner as they existed when the act passed.

The only other act affecting the railway which passed previously to the General Railway Clauses Consolidation Act, was a short act which received the royal assent on 30th June 1845, the 8 and 9 Vict. c. 31, whereby the company was empowered to alter the gauge of the railway, but it did not affect the question of mines.

Three weeks after the passing of that act, that is, on the 21st July 1845, the General Scotch Railway Consolidation Act, 8 and 9 Vict. c. 83, received the royal assent. The provisions of that act relative to the working of mines, are nearly the same with those contained in the local act of 1844, to which I have already adverted. It is immaterial to consider them in detail. In fact, they were inapplicable to the rights of the parties under prior acts, the general act being expressly confined to acts to be afterwards passed. Ten days after the passing of the General Scotch Act, that is, on the 31st July 1845, the Caledonian Railway Co. obtained their act, the 8 and 9 Vict. c. 162. The general act was incorporated in the Caledonian Act, and would therefore regulate the mode in which mines under or contiguous to that line of railway should be dealt with.

The only other act affecting the question now under discussion is the act of 1846, under which the Glasgow, Garnkirk, and Coatbridge Railway was sold to, and became incorporated with, the Caledonian Railway. By that act, the 9 and 10 Vict. c. 329, it was enacted, that the Glasgow, Garnkirk, and Coatbridge Railway, with all its lands, powers, and privileges, with the benefit of all contracts relating thereto, should, on the execution of a deed of conveyance under the seal of the said company, which said conveyance has since been duly executed, be vested in and belong to the Caledonian Company for their absolute benefit. The effect of this was merely to put the Caledonian Company in the place of the former company, whose interest they purchased, so that whatever had been the right of the Glasgow, Garnkirk, and Coatbridge Co., in relation to the respondent, became, after the passing of this latter act, the right of the Caledonian Company.

It appears, therefore, from an examination of all these acts, that the rights acquired by the original company, by virtue of the conveyance of 12th December 1834, remained unaffected up to the time of their final transfer to the Caledonian Company; and as the respondent rests his claim to relief on the ground, that he is entitled, by virtue of the reservation of mines contained in his conveyance of 1834, to work those mines adjoining the railway without regard to the question, whether, by so doing, he will be damaging the necessary support of the railway, and that the company can only prevent his doing so by purchasing the mines, I have only to add, having already explained the grounds on which I conceive this view to be incorrect, that I think the Lord Ordinary was right, when he sustained the defences and assoilzied the defenders. I am aware that I adopt the view of the Lord Ordinary in opposition to the opinion of the First Division of the Court of Session, who concurred in reversing his decision. Those able Judges seem to me to have overlooked, or not to have given due weight to, the effect of the conveyance of 1834. If I am right in saying, that by that conveyance the respondent conveyed to the company not only the land to be covered by the railway, but also, by implication, the right to all necessary support, then he cannot, by reason of his having reserved the mines, derogate from his own conveyance by removing that support. In reserving mines, he must be understood to have reserved them so far only as he could work them consistently with the grant he had made to the company. The Judges of the Court below have overlooked this principle, and in so doing have been led into an erroneous conclusion.

The subject of the right of the owners of the surface to adequate subjacent and adjacent support, has on several occasions been discussed in the English Courts. The principles which there governed the decisions were not derived from any peculiarities of the English law, but rested on grounds common to the Scotch, and, as I believe, to every other system of jurisprudence. They were considered in the case of *Harris v. Ryding*, 5 M. & W. 60, and very fully

developed in the judgment of the Court of Queen's Bench, delivered by Lord Campbell in the case of *Humphries v. Brogden*, 12 Q. B. 739.

It may be proper that I should notice an argument relied on to some extent, namely, that the railway originally contemplated was not one on which the traffic would be equal to that which now exists, so that the support contemplated could not have been so great as that which is now required. To that, I think, there are two answers:—First, when the respondent granted his land for the avowed purpose of enabling the disponees to make a railway, without any limitation as to its nature, I think he must be understood to have warranted proper support, however the railway might be used, or to whatever purpose it might be applied; and, secondly, the gentlemen, to whom the Court of Session referred this very question, expressly say that neither increased traffic, nor the alteration of the structure or uses of the railway, have materially affected the practicability of working the minerals.

Although this judgment, and the reasons I have given for it, are my own, they are to be considered likewise as those of my noble and learned friend LORD BROUGHAM, to whom I communicated the judgment, and who has authorized me to express his entire concurrence with it.¹

Interlocutor of the First Division of the Court of Session reversed—Reclaiming Note against the interlocutor of the Lord Ordinary refused, with expenses—Interlocutor of the Lord Ordinary affirmed, and cause remitted.

Appellants' Solicitors, Hope, Oliphant, and Mackay.—Respondent's Solicitor, Thomas Sprot.

JUNE 19, 1856.

THE CALEDONIAN AND DUMBARTONSHIRE JUNCTION RAILWAY CO.,
Appellants, v. PETER WALKER and Others, and THE HELENSBURGH HARBOUR COMMISSIONERS, and Sir JAMES COLQUHOUN, Bart., Respondents.

Railway—Agreement—Provisional Committee—Implement—*The magistrates of a burgh entered into an agreement with the provisional committee for the formation of a railway company to bring the railway to the harbour of the burgh, and to execute other stipulations in regard to the harbour. The company were incorporated by statute, but they failed to form the line.*

HELD (reversing judgment), *That the company were not bound by the agreement made by the provisional committee with the burgh.*

A provisional committee are not the agents of the company afterwards formed by their exertions, and those, who contract with such committee, must take their remedy against the committee men and not against the company, especially where the committee men professed to bind the company to do a thing not authorized by their act of parliament.²

In February and March 1846, a deed of agreement was executed between the provost, magistrates, and councillors of the burgh of Helensburgh, with the special advice and consent of Sir James Colquhoun, the superior of that burgh, of the first part, and three gentlemen named as "three and a quorum of the committee of management of the Caledonian and Dumbartonshire Junction Railway Company, and, as such, duly authorized to enter into these presents on behalf of the said committee of management, in terms of a minute of meeting of said committee, of date _____, on the second part." The deed bore—That the first party, with the consent of the superior of the burgh, in so far as they had right to do so, had agreed to approve, and did approve, of the Caledonian and Dumbartonshire Junction Railway Company extending a line of railway from Dumbarton to Helensburgh, terminating in the lot of ground lying north of Princes Street of Helensburgh. *Second*, the first party agreed, so far as they were interested, "not to object to the said second party laying rails from the said terminus across Princes Street," &c. (also that a sum of £3000 was to be advanced by the company for the making of the harbour).

¹ In cases where a disponee has taken a disposition of building land, reserving to the grantor the minerals, and relieving the latter of all liability for working the same, the House has held that the working of the minerals will not be restrained, though it cause the destruction of the house built on the land disposed. See *post* vol. 2, *Buchanan v. Andrew*; & L. R. 2 Sc. Ap. 286.

² See previous report 15 D. 148; 25 Sc. Jur. 106. S. C. 2 Macq. Ap. 391: 28 Sc. Jur. 493.