

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.

Sixth, The said first party became bound, in their corporate and individual capacity, by petitions to parliament or otherwise, to farther the object of the said Caledonian and Dumbartonshire Railway Company: For which causes, and on the other part, the said second party, acting for, and as duly authorized by, the said Caledonian and Dumbartonshire Railway Company and their committee, bind and oblige the said company to advance and make payment to the said first party of the whole costs, charges, and expenses, already incurred in the proposed extension of said quay and harbour, by procuring plans, surveys, or otherwise, or that may be incurred in relation thereto, or in procuring the whole plans for said quay and harbour, together with the expenses incurred, or to be incurred, in applying for and procuring the act of parliament above mentioned, for liberty to erect the same, the amount of which, however, shall form, and by the said act of parliament be declared, a debt upon the quay or quays and jetties to be erected, and the dues or revenues thereof, and bear interest till liquidated in manner before mentioned.

Thereafter the magistrates of Helensburgh applied for and obtained an act of parliament, 9 Vict. c. 16, (14th May 1846,) entitled, "An act for improving and maintaining the port and harbour of Helensburgh, in the county of Dumbarton," which enacted, "that the provost, bailies, treasurer, and councillors of the foresaid burgh of Helensburgh, and their successors in office for the time being, shall be trustees for carrying this act into execution." The harbour of Helensburgh, and the pier, quay, and other works therewith connected, were vested in the trustees so appointed; and they were given power to improve and maintain the harbour, and to levy dues at, and apply the same for the purposes of, the harbour.

In the same session of parliament in which the pursuers obtained their act, the promoters of the Caledonian and Dumbartonshire Railway obtained the act under which the defenders were incorporated, viz. the Caledonian and Dumbartonshire Junction Railway Act, 26th June 1850, 9 and 10 Vict. c. 81, entitled, "An act for making a railway from Glasgow to Dumbarton and Loch Lomond, with branches to Helensburgh and other places." One of the lines thereby authorized, was "a branch from the said main line from a point near the town of Dumbarton to the town of Helensburgh."

On the preamble of the defenders' bill being found proved, a memorandum of agreement between the magistrates of Helensburgh and the committee of management was executed, on 5th May 1846, in the following terms:—"As the preamble of the said bill has been proved, and as the bill is being reported to the House with consent of the said magistrates, it is hereby provided and agreed, that the whole stipulations and provisions contained in the deed of agreement between the parties, of date the 7th day of February and subsequent dates, shall remain and be binding on the parties thereto, and on the said railway company, as fully as if each particular thereof had been inserted and enacted in the bill, anything therein contained notwithstanding."

The defenders did not act upon the powers conferred by their statute for the formation of the branch line to Helensburgh, and refused to implement the stipulations of the deed of agreement. The pursuers then raised the present action, concluding to have it found and declared that the agreement was—"binding and obligatory in all its clauses, conditions, and obligations, upon the said Caledonian and Dumbartonshire Junction Railway Company, and the said directors of the said railway company."

The Court of Session held the agreement to be binding on the company.

The judgment of the Court of Session was appealed against on the following grounds:—
1. Because the parties, at whose instance the action is raised, have no right or title to sue the appellants upon the agreement libelled for declarator and implement. 2. The judgments upon the merits are erroneous, and ought to be reversed, because the agreement thereby declared to be binding upon the railway company is unauthorized by the company's statutes, and beyond the scope of the company's powers. *Monklands Railway Co. v. Glasgow, Airdrie, &c., Junction Railway Co.*, 11 D. 1395; *Balfour's Trustees v. Edinburgh and Northern Railway Co.*, 10 D. 1240. The obligations undertaken in favour of the Magistrates of Helensburgh are not binding on the appellants, because the conditions stipulated in consideration thereof have not been fulfilled by the magistrates, and because the respondents are not in a condition to fulfil them. 1 Bell Com. 691-2 and 716; 3 Ersk. iii. 86.

The respondents maintained that the judgment was correct, because, 1. The agreement was validly entered into. *Hawkes v. Eastern Counties Rail. Co. &c.*, 7 Rail. Cas. 188. 2. The respondents were in a situation to give full implement of all the conditions stipulated on their part in favour of the appellants.

Solicitor-General (Bethell), and *R. Palmer Q.C.*, for the appellants.—The Court below professed in this case to proceed on the authority of certain recent decisions in the Court of Chancery, which, we contend, are contrary to principle, and ought to be overruled. The substance of the agreement here between the projectors of the company and the harbour trustees was, that the company should, at whatever expense, construct a harbour, which was noways necessary to the making of the line of railway; and all the security or benefit they were to get was a mortgage over the harbour to the extent of £3000. This was a unilateral agreement, all the benefit being on one side, and it is not a fit contract to be enforced. There was no stipulation,

that the contract was to be incorporated into the act of parliament, and it was not so incorporated. As the act stands, therefore, the company would be acting *ultra vires*, if they attempted to make a harbour. The act gives no authority to apply the funds to any other purpose than making the specific railway described by the plans. The act is, in fact, the charter of the company, defining their powers, and the mode in which they can legally employ the funds entrusted to them. The projectors of the undertaking can, in no sense, be designated as agents of the future incorporated company; and it is quite plain that the company could not be bound by every contract the projectors chose to enter into. It was true Lord Cottenham held in several cases, that if the company, after its incorporation, took the benefit of the agreement entered into by the projectors, they were bound to carry out the contract. It would be found, however, that, in all those cases this further condition existed, viz., that the contract in question was such as it would have been within the powers of the incorporated company to make themselves, in the first instance, if the company had then existed. The only case where these two conditions seemed not to exist was *Hawkes v. The Eastern Counties Rail. Co.*; but that case is now under appeal.¹ Here, however, there can be no doubt that the incorporated company have no power under their act to make this harbour, and therefore those authorities do not apply to this case. Those authorities, however, went too far, and are irreconcilable with strict principle. The true rule which ought now to be laid down is, that no contract entered into by the projectors should be held binding unless there are special provisions in the act of parliament ratifying it; and in no other way can the innocent shareholders be protected against fraud. The authorities referred to were—*Edwards v. Grand Junction Rail. Co.* 1 Rail. Cas. 173; *Stanley v. Birkenhead and Chester Rail. Co.* 1 Rail. Cas. 58; *Simpson v. Lord Howden*, *Ibid.* 347; *Lord Petre v. Eastern Counties Rail. Co.* *Ibid.* 462.—See also as to contracts *ultra vires*, *Coleman v. South-Eastern Rail. Co.* 10 Beav. 1; *Salomons v. Laing*, 12 Beav. 339; *Webb v. Direct London and Portsmouth Rail. Co.* 1 De G. M. & G. 521; *Lord James Stuart v. London and North-Western Rail. Co.* 1 De G. M. & G. 721. As to a company annexing collateral undertakings, *Stevens v. South Devon Rail. Co.* 13 Beav. 48; *Att.-Gen. v. Corporation of Norwich*, 21 L. J. 139 Ch.; *Mayor of Norwich v. Norfolk Rail. Co.* 4 Ell. & Bl. 397; *Gage v. Newmarket Rail. Co.* 18 Q. B. 457; *Att.-Gen. v. Eastlake*, 17 Eng. Jur. 801; *Macgregor v. Dover and Deal Rail. Co.* 18 Q. B. 618; *Goody v. Colchester Rail. Co.* 17 Beav. 132; *East Anglian Rail. Co. v. Eastern Counties Rail. Co.* 11 C. B. 811.

Sir F. Kelly Q.C., and *Anderson Q.C.*, for the respondents.—The appellants here cannot say that they had no benefit from this agreement, for they thereby purchased the goodwill of the burgh, which might otherwise have favoured a rival line; and, for withdrawing the opposition of the burgh to their bill, they might have otherwise been made to pay a price. It is well settled, that if a landowner oppose a railway bill in parliament, and consent to withdraw his opposition in consideration of a sum of money or what is equivalent thereto, the contract is valid, and can be enforced against the incorporated company though no specific clauses are inserted in the act. Moreover, by the law of Scotland, a consideration is not necessary to make such an agreement binding. The validity of such agreements has been established by the series of cases, which the appellants contend are unsound in point of principle. Those cases, however, were well considered and have been accepted as law by all the Judges of law and equity. It may be true that, after a company is once incorporated, it is illegal for it to divert its funds to other undertakings than what the act sanctions; but it is quite different where a contract is made by the projectors of a company, in the view of obtaining an act of parliament, with individuals who are in a position to oppose the bill in parliament, which bill might never pass into law except in consequence of such contract being made. The projectors must of necessity enter into such contracts, and, if they are necessary preliminaries to the existence of the company, then it seems sound law and sound sense, that such company should come into existence *cum onere*, and bound to carry out the agreements in good faith. This contract is not illegal in itself; and, being fair, it ought to be enforced.

[LORD CHANCELLOR.—Assume that courts of equity have held that the projectors act, as it were, as anticipative agents of the company in cases where the projectors have bound the company to pay a certain sum of money for the price of land to be taken. If, however, instead of agreeing to pay a sum of money, the projectors agreed that the company would build a church or a bridge, or, as in this case, a harbour, has it ever been held by a court of equity, that such contract must be specifically performed? In short, has a court of equity ever decreed specific performance of a contract, except a contract to pay a sum of money for land to be used for the railway?]

It can make no difference whatever, if the consideration is good, whether it consisted in paying money or in executing work—money, or money's worth. If a railway is projected to pass a gentleman's house, he may say, "I'll oppose your bill in parliament, unless you build a wall of a

¹ *Note.*—The case of *The Eastern Counties Rail. Co. v. Hawkes*, stood in the list of the House of Lords for hearing when the present case was argued; and the judgment in this case stood over till that case was argued and decided.—See the report, 5 H. L. Cas. 331.

certain height between the railway and my property, or pay me a sum of £1000, and I will build the wall myself." If the company were to say, "We will build the wall," it is the same thing in substance as paying the money; and if the opposition of the landowner is withdrawn on the faith of, and in consideration of, the wall being built, the contract is equally valid.

[LORD BROUGHAM.—Is it not immaterial on what ground the opposition of a landowner was withdrawn, so far at least as the obtaining of the bill is concerned? Parliament, strictly speaking, looks to the public good alone in passing an act requiring a certain railway to be made, and does not concern itself with what bargains may have been made between the parties. It can scarcely be assumed, therefore, that the bill passes, because a particular landowner withdrew his opposition.]

In theory, no doubt, the legislature must be taken to do its duty in looking to the public good alone; still, all that a Court will look to is the contract between the parties. The Courts have established the principle, that the withdrawal of a landowner's opposition is a good consideration for a contract of the future company to pay a certain price for his land. The same principle must apply here. If there were no means of enforcing contracts made by projectors against the future company, the grossest frauds would be committed on individuals; and therefore the doctrine developed by Lord Cottenham, which is founded in sound sense, and is in harmony with the prior authorities, should be confirmed by the highest tribunal.

Sir R. Bethell replied.—The argument of the other side resolves itself into this, that, whether the company when incorporated could have entered into the contract or not, if the contract be for the benefit of the company, the company ought to be bound by it. In some cases, where the company expressly ratify and adopt the contract of the projectors, and it is within the powers of the company when incorporated, there might be no harm in this doctrine; but when the incorporated company expressly repudiate the contract, there is no sound principle for holding them liable. To do so is a fraud on the shareholders, who pay their money on the faith that the funds of the company are to be appropriated in the mode pointed out by the statute, and in no other. On the other hand, no harm is done to those who entered into such contracts with the projectors, for they are bound to know that such projectors have no power to bind the future company; and by entering into a contract whereby the projectors profess to bind the company, they lend themselves to the fraud. Every person dealing with a party in a fiduciary position is bound to know what such party is competent to do. The most monstrous frauds have been committed on shareholders by these contracts entered into by the promoters, as they are too often improvident, and only tend to squander away and anticipate the funds of the company. The doctrine developed by Lord Cottenham is at variance with law and equity, and the authority of *The Vauxhall Bridge Co. v. Spencer*, 2 Madd. 356, on which he professed to proceed, in no way warrants his conclusions. The only excuse for such a doctrine obtaining a footing is, that the law of railway companies was in its infancy at the time of Lord Cottenham's first decision. Now that the Courts of Common Law have restored the sound principle, that such companies are strictly tied down by their act of parliament to apply their funds in the way there pointed out, and no other, the doctrine of Lord Cottenham should be repudiated and overruled.

*Cur. adv. vult.*¹

LORD CHANCELLOR CRANWORTH.—This was an appeal against an interlocutor of the Court of Session, the effect of which was to declare the appellants liable to contribute the funds or a large portion of the funds, necessary for constructing and enlarging the pier and harbour at Helensburgh.

Early in the year 1846, an agreement was entered into between the then Provost, Bailies, and Councillors of the burgh of Helensburgh, of the one part, and Gibson Stott, Mark Sprot, and Andrew Buchanan Yuille, being a quorum of the then projected Caledonian and Dumbartonshire Junction Railway Co., of the other part, by which the first party agreed to afford to the then projected railway company, if they should obtain their act, certain facilities enabling them to carry a branch line through some of the streets of the town of Helensburgh up to the harbour and quay, which the authorities of the town then proposed to form, and for enabling them to make which they were then about to apply to parliament. They further agreed, by petitioning parliament or otherwise, to promote the objects of the proposed railway company. On the other hand, the quorum acting for the committee of management of the then projected railway company, agreed that the company should advance and pay to the first party all the costs then already incurred in getting plans for the projected harbour and quay, and the expenses to be incurred in obtaining an act of parliament for liberty to construct the same—such costs and expenses to be charged in favour of the railway company on the said quay, and on the dues payable therein; and further, they agreed that the said company should advance and pay all the

¹ This case was argued in February 1855, and the decision delayed for the reasons stated at the end of the judgment.

expense of making the quay and harbour, of which they should be entitled to receive back the sum of £3000, but no more.

In conformity with the terms of this agreement the Magistrates of Helensburgh applied for and obtained an act of parliament, 9 Vict. c. 16, entitled, "An act for improving and maintaining the port and harbour of Helensburgh, in the county of Dumbarton." This act received the royal assent on the 14th May 1846. By its provisions the Provost, Bailies, Treasurer, and Councillors of the burgh, were made trustees for carrying the act into execution, and the then harbour, pier, quay, and other works connected therewith, were vested in the trustees, and powers were given enabling them to carry into effect the projected improvements.

On the 26th day of the following month of June, the Caledonian and Dumbartonshire Junction Railway Act received the royal assent. By that act the company, now appellants, and who were defenders below, were incorporated for the purpose of making and maintaining the line of railway and several branch railways, one of such branches being a branch from Dumbarton to Helensburgh.

The harbour trustees, from time to time, called on the railway company to perform the agreement so entered into by the three gentlemen acting for the committee of management. This the company declined to do, and the present action was accordingly instituted in the Court of Session.

The summons states the desire of the Magistrates of Helensburgh to have a pier. It states the agreement that had been entered into between them and the company, that the company should advance the money for making the pier, and that the £3000 advanced by them should be secured by a charge upon the pier and harbour. The summons then states that the harbour company first, and the railway company afterwards, obtained their acts of parliament, and then various applications were made by the pursuers, that is, the Helensburgh Harbour Trustees, to the directors of the Caledonian and Dumbartonshire Railway Co., with a view to their implementing the obligations under which they had come, and certain proposals were made for settling the question, but eventually they came to nothing. And then the summons concludes in these terms:—"Therefore it ought to be found and declared by a decree of the Lords of Session, that the agreement entered into between the Provost, Bailies, and Councillors of the burgh of Helensburgh, on the first part, and the said committee of management of the said Caledonian and Dumbartonshire Railway Co., on the second part, has been from the date thereof, and is now, binding and obligatory in all its clauses, conditions and obligations, upon the said Caledonian and Dumbartonshire Junction Railway Co., and the said directors of the said railway company, defenders: And the said Caledonian and Dumbartonshire Junction Railway Co., defenders, ought and should be decerned and ordained, by decree foresaid, to implement, perform, and fulfil all the conditions and obligations come under by them by the said original agreement, and especially, and without prejudice to the said generality, they ought and should be decerned and ordained to advance and make payment to the said pursuers of the whole costs, charges and expenses already incurred in the proposed extension of the said quay and harbour, by procuring plans, surveys, or otherwise, or that may be incurred in relation thereto, or in procuring the whole plans for the said quay and harbour, and also that they should pay all the costs, charges, and expenses that they might incur in making it." And "that the sum so to be advanced and paid by the said defenders, as the costs, charges, and expenses in extending and erecting the foresaid quay or quays, and jetty or jetties, shall, to the extent of £3000, but no further, bear interest in manner provided in the agreement, and form a real burden on the quays."

These being the terms of the agreement which was entered into, the important question raised in this case is—whether the defenders (now appellants) can be compelled to perform the engagement entered into by the committee of management on behalf of the projected company, before it had actually come into existence?

On behalf of the respondents it was argued, that, though the agreement in question was not entered into by the appellants themselves, that is, by the railway company, yet it was entered into by a committee of management formed for the object of obtaining the act of parliament by which the appellants were afterwards incorporated, and so that, on principle as well as on authority, the appellants are bound to implement what the committee had so undertaken to do.

Suppose this question not to be settled by the authority of previous decisions, I cannot think that the proposition thus put forward by the pursuers below can be supported. It proceeds on the ground that the committee of management ought to be treated in the nature of agents for the company, which owes its existence to their exertions, and that when the company came into being, it was from its very birth (so to say) bound to fulfil the contracts by which its projectors had stipulated that it should be bound.

This reasoning rests on the assumption, that a railway company, when established by parliament, is in substance, though not in form, a body succeeding to the rights and coming into the place of the projectors. On no other hypothesis can such a company be bound by engagements, to which it was not a party. It therefore becomes necessary to consider whether this is a true view of the

relative positions of a company established by the legislature, and of the persons, whether called a committee of management or provisional committee, or a body of projectors who have applied to and obtained from parliament the act constituting the company.

When such a body apply for an act of incorporation, what they ask of the legislature is not an act incorporating and giving powers to those only who are applying—not necessarily even incorporating and giving powers to any of them—but an act incorporating all persons who may be willing to subscribe the specified sums, and so to become shareholders in the company. If the legislature accedes to such an application, the act, when passed, becomes the charter of the company, prescribing its duties and declaring its rights, and all persons becoming shareholders have a right to consider that they are entitled to all the benefits held out to them by the act, and liable to no obligations beyond those which are there indicated. If this be not the true principle, the legislature might be making itself ancillary to serious injury. When a capitalist, believing in the probable success of any particular project sanctioned by the legislature, is satisfied with the terms of the incorporation embodied in the act, he reasonably advances his money on the faith of those terms, and if the project turns out a failure, he has no right to complain. The speculation was one, as to the prudence of which he had the means of judging, and no injustice is done if in the result he sustains a loss.

But surely the case is very different, if, behind the terms of incorporation expressed in the act, there are others of which the public have no notice, but which are to be held equally binding on the shareholders, as if they had formed part of the charter of incorporation. If such secret or unexpressed terms are to be held equally binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation. The principle on which all railway acts, and acts of a similar character, proceed, is to specify the sum to be raised, and the shares into which the funds of the company are to be divided, to incorporate the shareholders, and to prescribe the objects to which the funds are to be applied. It is inconsistent with the policy of such acts to hold, that there can be any other terms binding on those who subscribe their money beyond what appears on the face of the act itself.

Not only is such a doctrine calculated to occasion injury to shareholders, but it may often be a fraud, or, at all events, a surprise on the legislature. The statutory powers are given on the faith of the terms apparent on the act itself. It may well be, that the additional terms, if communicated to parliament, would have prevented the passing of the act at all.

Special terms as to particular cases or particular persons, are often made the subject of special clauses, and then neither the legislature nor any person taking shares can complain. The whole truth is disclosed. The legislature sanctions the special provision, and the shareholder purchases his shares with full notice of the exceptional enactment. I know that it is said to be a common practice, sanctioned by committees of both houses, when these bills are before them, not to insist on the insertion of these special clauses, at the instance of persons alleging grounds for their introduction, if agreements between the promoters and the persons asking for the special clauses are entered into, whereby the promoters engage that the company, when incorporated, shall give to those who are asking for special enactments the same benefit as if there were clauses in the bill to the effect asked for. That may be. Of the propriety of such a practice I am not bound to say anything. But the question is—what is the effect of such arrangements? Do they bind the future company, or only those who enter into the agreement? I need hardly say, that the practice of committees cannot alter the law of the land; and I confess I can discover no principle, legal or equitable, whereby such contracts can be held to be obligatory on the company.

And here I must remark, that I cannot accede to the argument, that the distinction between the company and those who may, previously to its formation, have entered into contracts purporting to bind it, is one of a technical nature, or calculated to occasion substantial injustice to any one. The suggestion, that the distinction is one of a technical nature, proceeds on the fallacy, that the company are substantially the same persons as the projectors, only embodied in a new form. This is not so. Probably, though not certainly, the projectors may be among the shareholders; but the great bulk of the shareholders will always be persons, who have taken shares on the faith of the act after it has passed, or in its progress through parliament, and who know nothing of what is not apparent on the face of the act.

In holding that the company is a body different from its projectors in substance as well as in form, I am acting on what is the mere truth; and no injustice can arise to those who have dealt with the projectors, for against them, and all under whose authority they acted, there will be a clear right of action, if the company does not fulfil the engagements which they have contracted that it shall perform; and that is surely all which those who have dealt with the projectors can claim as their right.

For these reasons, I am of opinion that, on principle, there is no ground for holding, that a company is bound by those who obtained its act of incorporation, unless those engagements are embodied in the terms of the act itself.

It remains, however, to be considered, how far this question, whatever may be my opinion of its merits, has been settled by authority. The three cases mainly relied on in support of the

doctrine contended for by the respondents, who were pursuers below, namely, that a railway company, after it has obtained its act of incorporation, is bound by the contracts of those by whom the act was obtained, are those of *Edwards v. The Grand Junction Railway Co.*, *Stanley v. The Chester and Birkenhead Railway Co.*, and *Lord Petre v. The Eastern Counties Railway Co.* In the first of these cases, that is, *Edwards v. The Grand Junction Railway Co.*, the plaintiffs were trustees of a turnpike road which the proposed railway was to cross. While the project for establishing the railway was in progress, the plaintiffs entered into a negotiation with its promoters for settling the manner in which the railway should be made to traverse the road, and clauses were prepared for that purpose, to be introduced into the act. These clauses were agreed to, but as the bill was then in the House of Lords, and it was desirable to prevent delay, the trustees agreed to dispense with the necessity of getting these clauses inserted in the bill, on receiving from the promoters an undertaking that the trustees of the road should be in the same situation, as if the clauses had formed part of the act. Such an undertaking was given, and signed by the authorized agent of the promoters. It bore date the 18th April 1833, and was, according to the report (1 Rail. Cas. 179), in the following terms:—"I, the undersigned John Moss, do undertake to execute an agreement to the effect of these clauses, so soon as the same is prepared, and to get the same confirmed under the seal of the company intended to be incorporated, so soon as circumstances will permit. This agreement being made on the express understanding, that there shall not be any opposition to the bill now in parliament, either by the trustees of the river from Liverpool to Warrington, or the mortgagees of the tolls of the road; and this agreement is to be void on my delivering to the road trustees or their clerk the engagement of the intended company to the said effect." Then there was a memorandum signed by the other party, who contracted for the trustees. On this assurance the trustees assented to the passing of the act, which accordingly became law. The railway company afterwards proceeded with their works, and in so doing they proposed to make the road across the railway not of the width or in the manner contemplated by the clauses which had been agreed on, but of a narrower width, though of a width which, but for the agreement in question, would have been a proper width, being authorized by the terms of the act. The trustees of the road thereupon filed their bill for the purpose of having it declared, that the agreement of the 18th April was binding on the company, and that they might be decreed to perform the same, and to execute a proper deed conformable thereto, and that they might be restrained by injunction from proceeding with the road then in course of formation, or with any other road not in accordance with the terms agreed on. A motion was made for an injunction in the terms of the prayer, which was granted by the Vice-Chancellor, and afterwards confirmed on appeal by Lord Cottenham. That very learned Judge, in his judgment says, (p. 197)—"The railway company contend, that they, being now a corporation, are not bound by any thing which may have passed, or by any contract which may have been entered into by the projectors of the railway before the act of incorporation. If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subject to the power of these incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the company cannot be sued upon the contract, and that Mr. Moss entered into a personal contract, undertaking to procure from the company when incorporated a similar contract. It cannot be denied that the act of Mr. Moss was the act of the projectors of the railway. It was therefore the agreement of the parties seeking an act of incorporation, that when incorporated certain acts should be done. The question is not—whether there be any legal binding contract at law, but whether this Court will permit the company to use the powers under the act in direct opposition to the arrangement with the trustees before the act, and upon the faith of which they were permitted to obtain such powers. If the company and the projectors cannot be identified, still it is clear, that the company have acceded to, and are now in possession of, all that the projectors had before. They are entitled to all their rights, and subject to their liabilities. If any one individual had projected such a scheme, and in prosecution of it had entered into an arrangement, and then had assigned all his interest in it to another, there could be no legal obligation by those who had dealt with the original projector and such purchaser, but in this Court it would be otherwise. So, here, as the company stand in the place of the projectors, they cannot repudiate the arrangement, into which such projectors have entered. In their corporate capacity they cannot use the powers given by parliament to such projectors, and refuse to comply with those terms upon the faith of which all opposition to their obtaining such powers was withheld."

In reasoning on this and other cases decided by Lord Cottenham it has been contended, that his judgments went no further than to decide, that, if the incorporated company took the benefit of the contracts entered into by third persons with the promoters, they (the company) must at the same time perform the obligations binding on the promoters. I cannot reconcile such a supposition either with what fell from him in that case or with the decision itself. The language which I have quoted seems to me to shew clearly, that he carried his views much further. He says expressly that the company are entitled to all the rights and subject to the liabilities of the

projectors. He assumes that the company stand in the place of the projectors, and treats the powers of the act as powers given by parliament to the projectors; and the injunction restrains the company from exercising a power which they possessed independently of any contract with the road trustees, because such an exercise would be at variance with the contract between the trustees and the projectors. The judgment further proceeds on the assumption, that the forbearing to oppose the bill was a consideration moving from the trustees to the company, and not solely to the projectors. It is therefore plain, that, according to Lord Cottenham's view of the law, the company when incorporated cannot exercise its powers in violation of contracts entered into by its projectors before the incorporation.

The next case, *Stanley v. The Chester and Birkenhead Railway Co.*, was of this nature:—Two rival lines were projected, and the promoters of one of them agreed to give Sir Thomas Stanley £20,000 for about 14 acres of his land, and in consideration of that agreement he withdrew all opposition. This line, however, was afterwards abandoned in favour of the rival line, the projectors of which agreed, amongst other things, to take on themselves all the contracts of the abandoned line, including, of course, that for the purchase of Sir Thomas Stanley's land. The projectors of the rival line then obtained their act. The company incorporated under the act refused to perform the contract entered into by the projectors of the other line with Sir Thomas Stanley. He filed his bill for a specific performance of the contract to purchase his land at £20,000. To this bill the company demurred, but the Vice-Chancellor, and afterwards Lord Cottenham, overruled the demurrer, holding that the plaintiff was entitled to the relief he sought. This could only have been because it was considered, that the rival company, when incorporated, became bound to fulfil the engagements entered into by the projectors of the other line.

The third case, that of *Lord Petre v. The Eastern Counties Railway Co.*, was decided on similar grounds. There certain persons were applying to parliament for an act enabling them to make a railway, which would, if a particular line was adopted, traverse the plaintiff's park. He agreed to withdraw all opposition on receiving a deed, executed by six of the projectors, whereby they covenanted, that, if the act should pass, and the company should carry their line across the plaintiff's land, then the company would pay to the plaintiff £20,000 for the value of the land taken, and £100,000 for injury done to the rest of his estate; and further, that within three weeks after the passing of the act the company should, by instrument under their common seal, ratify and confirm the deed then executed by the said six projectors, so as to bind the company. In consideration of these covenants the plaintiff agreed, that he would withdraw his opposition to the bill. The bill passed, but the company refused to execute any deed or to pay the £120,000, and proceeded to take, by the intervention of a jury, the land they required, and which crossed the plaintiff's park. Upon this Lord Petre filed his bill, praying that the company might be decreed to execute the necessary deed of confirmation, and might be restrained from entering on the land, or causing its value to be assessed by a jury. The Lord Chancellor (Lord Cottenham) granted an injunction *ex parte*, restraining the company from proceeding to take the land under the powers of the act. A motion was afterwards made before the Vice-Chancellor to dissolve the injunction, but it was refused with costs, and the company paid the £120,000.

In this, as in the other cases, Lord Cottenham clearly considered, that the company was bound by the contract of the promoters. The case is a very strong one, because the bill contained a statement, that the payment of the £120,000 would so reduce the funds of the company as to make it impossible for them to complete their line, and yet Lord Cottenham considered, that Lord Petre had a right, as against the company, to insist on the contract entered into by the six projectors, although the company refused to confirm it by deed under their seal.

In one of these cases Lord Cottenham referred to the case of *The Vauxhall Bridge Co. v. Lord Spencer*, 2 Mad. 356; Jacob 64, as in some degree sustaining his views of the law on this subject. That case was in substance as follows:—Certain persons proposed to make a bridge over the Thames at Vauxhall, and for that purpose to obtain the necessary powers from parliament. The proprietors of Battersea Bridge, thinking that the proposed new bridge might operate prejudicially to them, threatened to oppose the passing of the bill through parliament. In order to buy off their opposition, certain of the subscribers to the proposed new bridge executed a bond to the trustees for the owners of Battersea Bridge, whereby they bound themselves to pay to the trustees a sum of £5000 in case the act should be obtained, which sum should be invested by the trustees in the three per cents., in trust, if the bridge should be made, to pay over the funds to the owners of Battersea Bridge, by way of compensation for the loss they might sustain from the erection of the new bridge; but if the new bridge should not be made, then to transfer the funds to the company incorporated by the act. The act was passed, and the obligors in the bond paid over out of the funds of the company the stipulated sum of £5000 to the trustees named on behalf the Battersea Bridge proprietors, and they duly invested the amount in three per cents. The Vauxhall Bridge having been completed, the Vauxhall Bridge Co. filed their bill against the proprietors of Battersea Bridge, alleging that the arrangement entered into for the purpose of inducing them to withdraw their opposition to the passing of the bill was void, as being against the policy of the law, and therefore praying that the bonds might be cancelled and

the stock transferred to them. To this bill there was a general demurrer, but it was overruled by Sir Thomas Plumer. The cause then proceeded to a hearing, and on the hearing Sir J. Leach, considering the only question to be, whether the arrangement was void on grounds of public policy, ordered the bill to be retained for a year, with liberty for the obligees in the bond to bring an action at law in which the whole question would properly be tried. That course was approved by Lord Eldon, but the matter was afterwards settled by arrangement. When this case is examined, it is plain that it affords no countenance for the doctrine on which Lord Cottenham acted in the cases I have referred to. In the *Vauxhall Bridge case* there was no attempt to make any one liable on the bond except the obligors, and the only question was as to the validity of the engagement itself. It is true that the £5000 was in fact advanced out of the funds of the company, but that arrangement did not form any part of the contract with the Battersea Bridge proprietors, who looked only to the persons with whom they contracted. The decision, therefore, may be disregarded as not bearing on the present question.

The result is, that, in the three cases to which I have referred, Lord Cottenham acted on the principle, that a company incorporated by act of parliament is or may be bound by the previous contracts of those by whom the act of incorporation has been obtained. I have stated my reason for thinking, that such a doctrine rests on no sound principle, and may lead, as in *Lord Petre's case* I think it did lead, to great injustice. And if, therefore, the case now to be decided was in all respects similar to the three cases I have referred to, what I should have to decide would be, whether I should advise your Lordships to adhere to the precedents established by Lord Cottenham, on the ground that it is unsafe to act against a series of decisions, even though they may appear not to rest on any solid foundation, or to depart from them, and to adopt what I consider a juster and more correct principle.

I am, however, relieved from the necessity of coming to any positive decision on this point, because I think the present case is distinguishable from those decided by Lord Cottenham, and so, that even if those authorities are to be held binding, still they do not govern the present case. In all the cases before Lord Cottenham, the contracts which he held to be binding on the company were contracts to do things warranted by the terms of the acts of incorporation. In the case of *Edwards v. The Grand Junction Railway Co.*, Lord Cottenham expressly points out, that the making of the road of the width stipulated by the contract was within the powers of the act, and in both the other cases the purchase of the land for the purposes of the railway was already authorized by the legislature. The question in those cases was not, whether the company had authority to make the road or to purchase the land, but whether they were making the road or purchasing the land in the mode and on the terms, by which they were bound to make the one and to purchase the other. But here, what the projectors of the railway contracted to do, and what the interlocutors appealed from oblige the appellants to do, is to apply the funds raised under legislative authority for the purpose of the railway, to an object foreign from that of the railway, namely, the construction of a pier and harbour at Helensburgh. It is in vain to say, that such an application of the funds might, if the projected branch line from Dumbarton to Helensburgh had been made, have been beneficial to the railway company. It is a sufficient answer to such a suggestion, that it is not the purpose for which the shareholders subscribed their money, and there are numerous authorities both in England and in Scotland, to shew, that such a diversion of the funds from their statutable destination cannot be permitted. Any shareholder in a railway company may, by legal proceedings, prevent its directors from applying its funds to a purpose not authorized by the act of incorporation; and it is inconsistent with such a principle to hold, that the company can be compelled, even in pursuance of the contracts of its own directors, and much more in pursuance of engagements entered into by its projectors before it had any existence, to do that which it can only do by being guilty of a breach of duty towards the shareholders. It is not necessary to refer to authorities in support of this proposition. They have in the course of the last 20 years been very numerous both in England and in Scotland.

In coming to the opinion which I have thus expressed, I differ from the conclusion at which the Court below arrived. The Judges, before whom the case was brought, as well the Lord Ordinary as the four Judges of the First Division, all proceed on the principle, following the English authorities, that a company may be bound by the engagements entered into before its formation by those who procured the act of incorporation, provided the engagement was to do an act within its competency; and, secondly, that the agreement to make or contribute to the making of the pier and harbour was an act within the powers of the railway company. Now, with all respect to the very learned Judges who decided the case, I think it is clear, both on principle and on authority, that, even if they were right on the first point, they certainly miscarried on the second. The Lord President was evidently distrustful of his own judgment on this point. He says—"There it was that my difficulty arose on the question of competency. My difficulty was as to the harbour trustees placing the railway committee under the obligation to make the harbour. This comes very nearly to a company coming into existence to make, not a railway merely, but a railway and a harbour also. However, I have come to be of opinion,

that there was no incompetency in the matter, though I think it certainly comes very close upon incompetency." And Lord Fullerton says—"There seems no ground for taking the case out of the rule of the English cases." And similar opinions are expressed by the other learned Judges. But, my Lords, I must take leave to say, that the English cases do not warrant the doctrine relied on. It is not enough to shew, that the proposed application of the funds will be beneficial to the company. That can only be matter of opinion. The question is not, whether it will be beneficial, but whether it will be beneficial in the mode sanctioned by the act. If the branch line had been carried to Helensburgh, the construction of a pier and harbour there would probably have been useful to the railway company, by increasing the facilities for their traffic; but there is nothing in the railway act which authorizes such a mode of dealing with the money of the shareholders.

In *Coleman v. The Eastern Counties Rail. Co.*, 10 Beav. 1, the directors were applying part of their funds towards the establishment of a steam-packet company at Harwich, as being a speculation very much calculated to benefit the railway company, by causing a great increase of their traffic. Lord Langdale, however, held, that the directors, in so applying the funds, were acting *ultra vires*; and he would not listen to any argument founded on the supposed benefit to the railway company.

There have been many decisions resting on the same ground; and they seem to me clearly to govern the present case. Indeed the facts here forcibly illustrate the expediency of the rule, which holds an incorporated company to a strict compliance with the terms of the act of incorporation in the application of its funds. The formation of a good harbour and pier at Helensburgh might, though beyond the scope of their powers, have been of essential use to the railway company, if, in pursuance of the authority given in the act, they had made a branch line to Helensburgh. In fact, however, this has not been done, so that the company has no interest in the construction of the pier and harbour, and the application of its funds, in the mode insisted on by the respondents, would be a loss to the shareholders, without any possible compensation.

I am therefore of opinion, that, even supposing the law to be, (and in this respect the law of England and Scotland is the same,) that, in respect of contracts entered into by projectors of a company, that the company, when formed, shall do acts within the scope of their powers in a particular mode or on specified terms, the company is bound, still, that doctrine does not apply here, where the act to be done was not an act, for the effecting of which the company, when established, could lawfully devote its funds.

This case was argued early in the last session of parliament, and I regret that the final decision should have been so long delayed. But it was postponed because it was suggested, that two other cases in your Lordships' paper would probably turn on the same, or nearly the same, principles.

The first of these, *The Eastern Counties Rail. Co. v. Hawkes*, 5 H.L. Cas. 331, was heard and disposed of in the last session. But that case proceeded on grounds clearly distinguishable from those on which the decision here will turn. There, a railway company already incorporated by act of parliament, being desirous of extending its line, entered into a contract with a landowner to purchase from him a piece of land necessary for the extended line; but the contract was to be of no force, unless the legislature should give the company authority to make the proposed extension. This authority was afterwards given by the legislature. The company was authorized to extend its line, and, for that purpose, to raise additional money by the creation of new shares, to be deemed part of its original capital. When this act was passed the extended line was as much within the scope and objects of the incorporation as the original line, and the purchase was made in pursuance of a contract by the company itself, and not by persons standing towards the company merely in the relation of projectors or promoters. That case, therefore, is inapplicable to the present, where the question is, whether the company can be compelled to perform a contract entered into, not by itself, but by those through whose exertions it obtained its existence, and where the contract is a contract to do what the legislature has not authorized it to do.

The other case was that of *Preston v. The Liverpool, Manchester, and Newcastle on Tyne Railway Co.*, 5 H. L. C. 605, heard in the present session, on appeal from a decree of the Master of the Rolls, dismissing the plaintiff's bill. In that case, before the defendants had obtained their act of incorporation, two of the gentlemen engaged in attempting to obtain the act agreed with the plaintiff, amongst other things, that, if the company obtained their act, they would pay him £10,000 for all land required by the company, and also £4000 for residential injury. The act passed, but the company eventually abandoned the undertaking, and consequently no land was taken nor was any residential injury occasioned. The plaintiff filed his bill, praying that the company might be decreed specifically to perform the contract entered into by the projectors, and to pay to him the two sums of £10,000 and £4000. But the Master of the Rolls held, that, looking at the whole of the agreement, there was no contract to take land, or to pay money if land was not taken: that, according to the true meaning of the parties, it was not intended, if no land was required by the company, that there should be any obligation to pay the money;

and his Honour accordingly dismissed the bill. The decision was then brought by way of appeal to this House, and it was heard at your Lordships' bar in the present session. Your Lordships concurred in the view of the Master of the Rolls, and so dismissed the appeal.

These cases evidently afford no authority to guide your Lordships in that now under consideration, which must be decided on other grounds. I have already stated that I think the decision of the Court of Session must be reversed. Its effect is to compel the appellants to do an act which they have no authority to do, in performance of a contract entered into, not by themselves, but by others who had no authority to bind them.

I shall therefore move your Lordships to reverse the interlocutors below, and to assoilzie the defenders.

Solicitor-General.—My Lords, the expenses in this case, that have been paid by the defenders in the Court below, will be returned?

LORD CHANCELLOR.—Yes.

Mr. Anderson.—My Lords, I submit to your Lordships that, considering the state of the authorities upon which the Court below acted, there should be no costs.

LORD CHANCELLOR.—Mr. Anderson, I have thought of this very much. I think if I had decided upon a case exactly similar to those before Lord Cottenham, I should have come to that conclusion; but, though I have intimated my opinion upon those authorities, I think they do not govern this case, and it appears to me that the Court of Session also very much doubted it.

Mr. Anderson.—My Lord, a great portion of the expense was incurred in arguing this branch of the case. There were two branches of the case. The Court of Session was bound by the authorities, although this House is not bound by them.

LORD CHANCELLOR.—If this case had come within the case of *Edwards v. The Grand Junction Railway Co.*, I should have adopted that view, but I am of opinion that the expenses in the Court of Session must be returned.

I ought to state, that I have been in communication with LORD BROUGHAM upon the subject, and from the first we both took the same view, and having reduced into writing what I have now read, I sent it to him, and he has desired me to express his full and entire concurrence in the whole. The reason why we could not give judgment before was—that we had been led to suppose (and, from my own recollection of the case, I thought it was so,) that the case of *Preston v. The Liverpool, &c. Railway Co.* would involve the same question, but it certainly went off upon a totally different ground.

Interlocutors reversed—Defenders below assoilzied, and expenses ordered to be returned, and cause remitted.

Appellants' Agent, Thomas Sprot.—Respondents' Agent, Tawse and Bonar.

JULY 15, 1856.

The Honourable Mrs. JANE LESLIE CUMING, *Appellant*, v. Mrs. JANE DOUGLAS BOSWELL, *Respondent*.

Et è contra.

Trust Settlement—Substitute—Conditional Institute—Construction—*A*, whose only child, a son, had predeceased him, leaving a son and several daughters, executed a mortis causâ settlement, by which he conveyed his whole property to trustees, directing them, after payment of debts, to invest the residue for the benefit of *G*, his grandson, and the heirs of *G*'s body, till he or they should attain majority, when they were to denude in his or their favour, and failing *G* or his issue, the residue was to pertain to any posthumous son of the truster's son, (who never existed,) on his or the heirs of his body attaining majority; and failing him without lawful issue, to the truster's granddaughters, equally among them. By a codicil, the truster declared, that failing heirs male of his son's body, and the succession opening to the heirs female of his body, the residue, instead of pertaining to his granddaughters equally, should pertain to the eldest heir female—the eldest heir female always succeeding without division. *G*, the grandson, survived the truster, afterwards attained majority, and died intestate without issue, the trustees never having denuded in his favour.

HELD (affirming judgment), That the trust estate had not vested absolutely in *G*, and that his eldest sister succeeded to it, and not the heirs at law of *G*.

Trust Settlement—Fee and Liferent—Accumulation—Bonus—*A* party, by mortis causâ settlement, conveyed his whole property to trustees, directing them, after payment of debts and