

the premises, not having in his mind any expectation, that there would be a sale by auction during the short period which the old tenancy had yet to run. He was under a misapprehension; he applied that condition which was present to his own mind, as if it had been also present to the mind of the tenant, that there should be no sale by auction. But a condition of that kind, under the circumstances, must be recognized as such by both parties; and if the party who wishes to make that condition has not made it plain enough to the other party, then I do not think the condition is established. It is in fact the consent of both parties that is required. It would have been very easy to make it clear. And Mr. Edmond being a *solicitor*, and an *Aberdeen solicitor*, I am surprised he did not make it very clear on the face of the writing, that auctions should not take place on the premises. But he has not done so; and I think he has therefore erred in that respect. On the whole I entirely concur in the conclusion of my noble and learned friends.

Interlocutors complained of reversed, and the Reclaiming Note of the respondent against the interlocutor of the Lord Ordinary refused with expenses.

Appellant's Agents, W. Officer, S.S.C.; J. Dodds, Westminster.—*Respondent's Agents*, Hill, Reid, and Drummond, W.S.; W. Robertson, Westminster.

JUNE 30, 1870.

THE CITY OF GLASGOW UNION RAILWAY COMPANY, *Appellants*, v. ROBERT HUNTER, *Respondent*.

Lands Clauses Consolidation Act—Injurious Affecting Property—Noise and Smoke—Execution of Works—*A railway company took for their railway the back part of a plot of ground consisting of outhouses, but did not take the front part on which a dwelling house was built, and there was no necessary connexion between the front and back part of the property except the contiguity, and the fact of the whole belonging to one person.*

HELD (reversing judgment), *That according to Brand's case, L. R. 4 H. L. C. 171, the owner cannot claim compensation for injury from noise or smoke, whether part of his land be taken or not.*

Lands Clauses Act—Damage to Lands—Feu Duty—Compulsory Sale—*In assessing the price to be paid for taking land belonging to H., subject to feu duty payable to A., the jury added to the price ten per cent. for compulsory purchase, and this ten per cent. was calculated on the whole value of land, inclusive of feu duty.*

HELD (affirming judgment), *The verdict of the jury could not be disturbed.*¹

This was an appeal from a judgment of the First Division of the Court of Session. The action was raised by the City of Glasgow Railway Company to reduce and set aside a verdict of the jury assessing the sum payable to Mr. Robert Hunter, spirit merchant, the proprietor of houses and shops in Eglinton Street, Glasgow. The railway company required to take part of Hunter's property, consisting of back ground, together with some temporary erections thereon standing, behind his houses and shops in Eglinton Street. The railway did not come nearer than twenty eight yards to the back of Eglinton Street, and did not go towards the front of the street. Mr. Hunter claimed a sum for damage done to the value of the houses in Eglinton Street, owing to the noise and other inconveniences of having the railway so close to the houses. A claim having been made before a Sheriff, the jury assessed the damages as follows:—

“For the property to be taken,	£1205	4	0
For old materials thereon,	65	0	0
	£1270	4	0
For the compulsory purchase thereof at ten per cent.,	127	0	0
	£1397	4	0
Less value of the feu duty at twenty years' purchase,	639	0	0
	£758	4	0
For damage to the pursuer's (the present defender's) remaining property, caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway,	392	0	0
	Total,	£1150	4 0”

¹ See previous report 7 Macph. 408: 41 Sc. Jur. 229. S. C. L. R. 2 Sc. Ap. 160: 8 Macph. H. L. 156: 42 Sc. Jur. 430.

The company contended, that this finding of the jury was *ultra vires*, and null and void in two respects—first, because the jury gave a sum of ten per cent. for the compulsory purchase; and secondly, because they gave a sum for damage caused by noise, smoke, and other consequences of the railway. The defender contended, that the jury acted legally in introducing such items of damage. The Lord Ordinary (Lord Mure) held, that the jury were wrong in giving ten per cent. as compensation for the compulsory purchase, but that the other items were right. The First Division recalled the Lord Ordinary's interlocutor, and held, that the verdict of the jury was right in all the items. The company then appealed to the House of Lords.

Sir R. Palmer Q.C., and *H. Lloyd Q.C.*, for the appellants.—The interlocutors are wrong, because the verdict awards damages in respect of an injury which does not entitle the respondent to compensation. At the time the judgment of the Court below was pronounced, the House had not decided the case of *Hammersmith Railway Company v. Brand*, L. R. 4 App. C. 171, whereby it was finally settled, that noise and vibration were not grounds for compensation, because they are not caused by the execution of the works, but are merely the necessary consequences of working the railway after the works have been executed. Again, the item "railway bridge across the street" is not a ground for compensation, for no greater damage is done to the respondent than to the rest of the public—*Caledonian Railway Company v. Ogilvy*, 2 Macq. App. C. 229, *ante*, p. 474; *Ricket v. Metropolitan Railway Company*, L. R. 2 Eng. Ap. 175. Another item of the verdict is wrong, namely, the sum of ten per cent. upon the value of the feu duty, such feu duty not belonging to the respondent. The ten per cent., if at all, should have been calculated on the fee simple value after deducting the feu duty, in other words, on £1270 4s., less £639, or £631. The item, however, was altogether inadmissible, even in the latter view. The verdict, therefore, must be set aside.

Lord Advocate (Young), *Mellish Q.C.*, and *Macdonald*, for the respondent.—The jury were entitled to give damages for the grounds stated. It is true the case of *Brand v. Hammersmith Railway Company* has since been decided, and shews, that vibration and noise are not subjects for compensation. But that was a case where the company took no part of the claimant's lands, whereas here part of his lands are taken, and it is for the damage to the remaining lands that the claim is made—*Re Stockport Railway Company*, 33 L. J., Q. B. 251. This makes all the difference, and there is no authority to the contrary as to this point, though the same point is involved in a case of *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 3 Exch. 328, now pending in this House. The case comes within the letter and spirit of the compensation clauses. The item as to railway bridge across the street is correct, for it may include obstruction to lights, which is admittedly a good ground for claiming compensation. As to the ten per cent. for the compulsory purchase, that is merely a mode by which the jury, in their own minds, arrived at their estimate of the quantum of price, and the Court cannot review their finding.

LORD CHANCELLOR HATHERLEY.—My Lords, in this case the appellants were pursuers in an action of reduction with reference to a verdict given by a jury who assessed the amount of compensation to be paid for certain property taken from the defender in the action, who is the respondent in the present appeal, both as to the value of the property itself, and as to the amount of damage done to the remaining property. The jury found that verdict in a very definite form, specifying the several heads under which they awarded compensation. And in consequence of their having so specified those heads, the question arises upon two points of that finding, the one with reference to their finding a certain sum of ten per cent. upon the value of the property so taken compulsorily, which is said to include ten per cent. assessed upon a higher amount than that of the property actually taken, inasmuch as the ten per cent. is assessed upon the whole intrinsic value of the property *per se*, the property itself being subject to a feu duty which is afterwards deducted, and properly deducted, by the jury from their estimate of the compensation. The question upon that part of the case is this,—Whether the jury have not erred in assessing the ten per cent. upon the whole property as it stood, including the feu duty; and whether it should not have been assessed on the value less the feu duty?

The second question is one which has of late been frequently brought to the attention of the Courts, and especially also has been the subject of consideration in your Lordships' House. Are the jury right in assessing "for damages to the then pursuers" (the defenders in the present action, that is to say, the respondents in the present appeal)—I will read it as the respondents describe it—"the remaining property, caused by the noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway, £392"?

As regards the first point as to the ten per cent., the case stands thus: The jury find their verdict in this form—"For the property to be taken, £1205." Now, in reality, the property taken was not of the value of £1205, as regards Mr. Hunter. The whole house and property might be of that value, but Mr. Hunter's interest in it was not of that value; because the jury afterwards very properly deduct "less value of the feu duty at twenty years' purchase, £639." That is deducted by the jury, as properly it should be, from the amount of the compensation to be paid for the property taken; but the whole is done in this form, going back to what I first read:—

“For the property to be taken, £1205 4s. ; for old materials thereon, £65: the amount of those two sums added together is £1270 4s.” Then, “For the compulsory purchase thereof,” (that would be the whole property there enumerated, irrespective of the deduction afterwards made of feu duty,) “at ten per cent., £127, less value of the feu duty at twenty years’ purchase, £639.” So that, in truth, although the property taken is property, from the compensation for which is to be deducted the feu duty at twenty years’ purchase, and, therefore, I should have thought, that in ordinary parlance the value of the property taken would have been £1205 minus £639, they do not deduct the £639 ; they take the ten per cent. for compulsory purchase on the £1205, plus the £65, and they put it down at £127.

I confess it appears to me, that, on the face of the verdict, the jury have shewn, that they have taken the ten per cent. upon a sum larger than that which, upon their own principles, they were bound to compute it upon ; because their own principles are, that they assess ten per cent. upon what is compulsorily purchased ; and if they had had to assess the feu duty separately for the owner of the feu duty, they would, I suppose, have done the same thing in respect of the compulsory purchase of his feu duty, and have given him another ten per cent. upon the £639 which they found to be the value of the feu duty. I therefore think, that the ten per cent. was improperly assessed, and therefore, to the extent of the ten per cent. upon the £639, a deduction should, in my judgment, be made in that respect, as to which particular I concur in the opinion of the Lord Ordinary, although it was not the opinion of the Court of Session. However, as I believe, that your Lordships will be found to be equally divided upon this point, the effect will be, that the judgment will stand as delivered by the Court of Session, and not as delivered by the Lord Ordinary.

Then, as regards the second point, with respect to the amount allowed by the jury for damage to the respondent’s remaining property, that point rests really, as it appears to me, upon a decision, and is completely covered by a decision. It is not unimportant to observe, that when the decision was given in the Court below upon this matter, *Brand’s case* had not been determined by your Lordships. *Brand’s case*, in fact, is relied upon by the learned Judges as an authority for the view they took. As the case then stood, it would be, to some extent at all events, an authority for the position taken up by the learned Judges. But now I take the result of the decision in *Ricket’s case* and in *Brand’s case* to come to this : In the first place, no claim can be made in respect of damage for which the claimant would not have had an action, in case the Railway Act had never been passed. If it was a damage in respect of which he might have claimed in an action of his own individually, and not a case in which he could have interfered only by way of indictment in order to prevent a nuisance, then he is not entitled under the clauses in the general Railway Acts to compensation. That is one point that has been settled. The other point that had been settled, and which was settled in *Brand’s case*, is this, that the damage done must be damage done in the execution of the works, and not damage done afterwards when the railway is finally completed, and in the exercise of the powers vested in the railway company by the general Acts, the Railway Clauses Acts, and their special Act.

The only difference between this case and that of *Brand* is this, that in this case the compensation for damage is claimed by Mr. Hunter under a different section from that section under which it was claimed in *Brand’s case*. The section under which it is claimed here is the 48th section of the Scottish Act, and the 68th in our English Act. In that section in the Lands Clauses Act, the words are not exactly identical with those used in the section in the Railway Clauses Act. It is stated very clearly in the judgment of the Lord President, and I will refer to that judgment. The Lord President says, “By the 17th section of the Lands Clauses Act it is provided, that, where the promoters of an undertaking require to purchase lands otherwise than by agreement, they shall give notice of their intention to take the lands, and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works.” So far it would be identical with the clause in *Brand’s case*. “Again, by § 19 it is provided, that if the parties fail to agree as to the amount of compensation to be paid by the promoters of the undertaking for the interest in such lands belonging to such party, or for any damage that may be sustained by him by reason of the execution of the works.” There, again, the language is the same. But now there is a different form in the 48th section to which I have referred. When the jury deliver their verdict, they are directed to deliver their verdict by a majority of their number separately for the sum of money to be paid for the purchase of the lands required for the works, and for the sum of money to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands, by reason of severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands “by the exercise of the powers of this or the special Act.” There, it will be observed, the language is somewhat different. It is not any longer “by the execution of the works,” but by “the exercise of the powers of this Act or of the special Act.” But in substance it appears to me, that there can be no difference whatever in the meaning of the Legislature in these two cases, because it is to be observed, that

this clause occurs in the Lands Clauses Act. I am simply stating what is the proper mode of valuing the compensation to be paid to a landowner. There is no ground for supposing that the Legislature intended by the Lands Clauses Act, in pointing out the mode of assessing the valuation, to give any compensation for any further or other injury than that which is occasioned by the operation of the Railway Clauses Act, and the works authorized by the special Act, or that they intended in any way to extend the remedy in this particular case to something beyond the execution of the works, namely, the exercise of the powers of the Act after the works had been executed. There is no reason *à priori* to suppose that any such intention could be anticipated in an Act which simply deals with the proprietary rights of the landowner, and the mode of ascertaining his rights. I think we are bound to read those words, "the exercise of the powers of the Act," exactly in the same way as they are read in *Brand's case*, as meaning "the execution of the works," and that no further compensation was intended to be given than for that damage which might be occasioned by the execution of the works.

That being so, we find, that in this lump sum, or slump sum, as it is called I think in Scotland, awarded by the jury to the respondent of £392, there is included injury by noise of trains and smoke as well as other items which are there specified. Now, the noise of trains and smoke would clearly fall, I apprehend, within the principle of *Brand's case*, and clearly the parties would not be entitled to any assessment in respect thereof. The question, as to whether or not the injury done to the party's property was an injury for which there might have been an action if the Act had not then passed, is a question that hardly arises as regards the specific damages which are here averred, because they do not arise in any way by virtue of the execution of the works, and the party does not therefore come under the head of being injuriously affected by the exercise of the powers contained in the special Act. He is entitled to compensation on account of those evils which occurred, and arose after the execution of the works authorized by the Act.

There is another difficulty undoubtedly arising under the same head, which is perhaps only another way of putting the argument in *Brand's case*, that these anticipated damages for noise of trains and for smoke, which will accrue hereafter, do not appear to be the proper subjects of an estimate for compensation before they happen. They might very well be the proper subjects of an interdict when they were happening or were expected to happen, and the party desired that they should not be continued. But as they are matters which may or may not be continued for a longer or for a shorter time, one does not see how it can be right and proper, that this compensation should be given for those anticipated evils, the character of which could not be fully or fairly ascertained beforehand. As it regards a case of damage actually done to the property of the owner such as that which occurred in the case before Mr. Justice Crompton in the case of the *Stockport Railway Co.*, one understands something better how that point may be put. But I do not think it necessary to make any further comment upon that case, because independently of the principles there maintained, it seems to me, that there is enough here to say that, consistently with *Brand's case*, the verdict cannot be sustained. But Mr. Justice Crompton put the case there upon this: the damage actually and immediately done to the property by the necessity of providing immediately a greater amount of insurance in respect of the possible detriment that might accrue from trains passing, and the consequent risk of fire. I do not think it necessary to say any more upon that case, nor, for the same reason, do I think it necessary to pursue the inquiry which was raised by the counsel for the respondent, the Lord Advocate in his argument, viz. whether or not the case was not distinguishable, according to the principle of the *Stockport Railway case*, by this circumstance, that the owner might have had an action against the company if the Act had not passed, not indeed on account of the particular things here mentioned, but because the particular evils here referred to could not have been achieved without a trespass upon his property which would at once have given him a right of action. I confess that seems to me rather a subtle reasoning upon the subject, but I do not think it touches the principle determined in *Brand's case*, viz. that these matters here included in the verdict were matters not occasioned by the execution of the works.

That being the case, it remains to be considered what is to be done if there be any one thing, in respect of which this slump sum might have been awarded separately if the amount had been separately assessed. With regard to that I confess I have had considerable difficulty. The finding is for damage caused by "railway bridge across the street," amongst other things. Now, the railway bridge across the street may have been considered a cause of damage in one of two ways. It may have been considered a cause of damage in respect of obstruction to the street. Or it may have been considered a cause of damage in respect of obstruction of light to the windows of the property, and it appears also that there was evidence before the jury with respect to damage done by the obstruction of light, and regard being had to the close proximity of the bridge to the remaining property, which was not purchased, belonging to the respondent, it is impossible to say, the jury not having found any specific finding upon the subject, but having found it in a very singular way only in the words "railway bridge across the street, smoke and

general nuisance," that their finding may not have included damage properly assessable in respect of free access of light and air to the windows of the remaining property. The difficulty then arises, where the whole damage to the property is put into one slump sum, part of which the Court considers to have been improperly assessed. Supposing there had been very considerable real injury of an important amount done to a portion of the property mixed up altogether in the assessment of damages with other matters, in respect of which no damages ought to have been assessed, the question is, whether the person seeking compensation should be deprived, by the mistake of the jury, of compensation altogether for damages done, for which he ought to be compensated. I apprehend the only course to be taken upon that point is to reduce, as it appears we must, the judgment which has been obtained in respect of this sum of £392, in the same manner as the Lord Ordinary expressed it in the course he took when he reduced the verdict by ten per cent. In doing that, the only way of doing justice between the parties would be by some declaration, that such reduction shall be without prejudice to such compensation as the respondent might be entitled to claim in respect of injury done by the railway bridge to his lights, or words to that effect.

On the whole, therefore, it appears to me, that the interlocutor of the Court below must be to a certain extent varied. I should propose to vary it as to the sum of £392 in exactly the same form as the Lord Ordinary has done. With regard to the ten per cent., I should myself like to vary it also to the extent of deducting the ten per cent. on the £639, but I think, in the variation so made in the interlocutor, it should be said, that it is to be understood, that this variation is without prejudice to any claim which the respondent might be advised to make in respect of the real damage done to his lights by the railway bridge.

LORD CHELMSFORD.—My Lords, upon the argument of this appeal the learned counsel for the respondent admitted (as they were compelled to do) that this case must be governed by the decision in the *Hammersmith and City Railway Co. v. Brand and Wife*, (4 L. R. H. L. 171,) unless they could distinguish the two cases. The distinction which they relied upon was, that in the case decided by this House, no part of the land of the party claiming compensation was taken by the Company; whereas in the present case a portion of the land of the respondent was acquired and used for the purpose of the railway. This they contended brought them within the principle of the decision of Mr. Justice Crompton *in re Stockport Railway Co.* (33 L. J., Q. B. 251). It is to be observed, that the Court of Session were not called upon to consider whether this distinction was well founded or not, as, when the case was before them, the appeal in the *Hammersmith and City Railway Co.* and *Brand* had not been heard, and as the question then stood, the decisions were favourable to the respondent.

Even if the *Stockport Railway case* should be taken to have been rightly decided, it is distinguishable from the present case in an important particular, which appears to me to prevent its application. The head of claim which was questioned in that case was founded upon a probable injury to the premises (consisting of a cotton mill) by reason of the risk of fire in consequence of the proximity of the railway. This danger would of course be occasioned not by the construction of the railway itself, but by sparks emitted from the locomotives in the course of running the trains over that part of the line. Mr. Justice Crompton said, "Where the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say it is by the Act of Parliament, and the Act of Parliament only, that you have done the acts which have caused the damage." If I had to express an opinion upon the correctness of his decision, I should be disposed to say with Baron Bramwell in the case of *Duke of Buccleuch v. The Metropolitan Board of Works*, (3 L. R. Exch. 328,) "It does seem strange that the taking of a piece of a man's land should let him in to prove all sorts of damages for which he could not otherwise recover." But the claim in this case does not arise out of anything done on the land taken, nor in respect of any property of the respondent connected with the land so taken, but from the construction of a railway bridge over the land of another person, no connexion existing between the front part of the respondent's premises in respect of which compensation for damage has been given and the back part, over a small portion of which the railway is made. These different parts of the respondent's property are not otherwise connected than by their both being held under one title.

This, however, according to the argument of the learned counsel for the respondent, is sufficient to let in every description of claim for compensation for anything which deteriorates the value of any part of the property. Mr. Mellish went the length of arguing, that the respondent was entitled to whatever amount of compensation a willing vendor would require from a purchaser of part of his land for any injury which might accrue to the rest of his property. But a willing vendor may make his own terms with a purchaser, and what he can do of his own unfettered will can be no criterion of what he is entitled to claim under an Act of Parliament which compels him to part with his land, and at the same time limits and defines the nature and extent of the compensation which he is to receive.

As no part of the property of the respondent has been injured by anything done on his land over which the railway runs, his right to compensation for damages appears to me to be precisely

the same as if none of his land had been taken by the company. The case of the *Hammersmith, etc., Railway Co. v. Brand*, therefore, conclusively establishes, that the claim for compensation "for damage caused by noise of trains and smoke," ought not to have been entertained by the jury. If there was an obstruction of light and air to the premises caused by the neighbourhood of the bridge, it would have been an injury which would have entitled him to compensation. But assuming, that there was a right to compensation under this head of claim, it is so undistinguishably mixed up with other matters not within the competency of the jury, that, according to the case of the *Caledonian Railway Co. v. Ogilvy*, (2 Macq. App. 229, ante, p. 474), the verdict in this respect cannot be maintained.

Besides relying upon the distinction between this case and that of the *Hammersmith, etc., Railway Co. v. Brand*, which I have examined, the learned counsel for the respondent argued that the clauses of the Scotch Act, which are applicable to this case, are open to different considerations from those upon which the decision of the House in the former case turned. If the Railway Clauses (Scotland) Act is to govern this case, then it is impossible to distinguish the two cases, for the § 6 and 16 of the Scotch Act are identical with the § 6 and 16 of the English Act, upon which the *Hammersmith, etc., Railway Co. v. Brand* was decided.

But it is argued for the respondent, that as some of his land is taken by the company, the Lands Clauses (Scotland) Act, and not the Railway Clauses Act, must be referred to, in order to determine his right to compensation. I have already expressed my opinion, that as the damage for which he claims is not caused by anything done upon the land taken, his case must be dealt with as if no part of his land had been used for the railway. But I will consider his claim with reference to the Lands Clauses Act.

The two sections of that Act which were principally referred to are the 17th and 48th. The 17th section directs, that the promoters of an undertaking requiring to purchase any lands shall give notice to all persons interested in such lands, that they are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of execution of the works.

It seems to me, that it would be a very forced construction of the words, "by reason of the execution of the works," to extend them to damage caused by the use of the railway. Every such damage may in a certain sense be said to have been sustained by reason of the execution of the works, as it could not have happened if the railway had not been made. But the reasonable interpretation of the words appear to me to confine them to damage occasioned by the works themselves whether directly or consequentially, and not by any after use of them.

The 48th section relates to the proceedings before the jury summoned to assess the compensation to the owners of lands for the value of the lands, and for the damage sustained by them. It merely prescribes the mode in which the verdict is to be delivered, and does not enlarge or alter the extent or nature of the compensation to which the owner of the lands taken for the railway, or injuriously affected by it, is entitled. It directs, that where the inquiry before a jury shall relate to the value of lands to be purchased, and also compensation claimed for injury done or to be done to the lands held therewith, the jury shall deliver their verdict "separately for the sum to be paid for the purchase of the lands, and for the sum to be paid by way of compensation for the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act or any Act incorporated therewith."

Even if this section, by the words "injury done or to be done," gives a right to claim compensation for damage caused by the use of the railway, (which, for the reason already given, I think it cannot,) it would not be applicable to this case, as the injury for which compensation is to be made must be done to lands held with the lands purchased by the railway. That cannot mean lands held under the same title, but such as are afterwards mentioned in this section, viz. lands severed from the lands purchased, and injuriously affected by the exercise of the powers of the Act. These words, "exercise of the powers of the Act," appear to me to have the same meaning as the words "execution of the works in the 17th section," and neither of them appear to me to confer a right to recover for damages, which arise (if at all), not from the works of the railway, but from its use afterwards. The verdict of the jury, therefore, with respect to the noise of the trains, and smoke, cannot be supported.

It was pointed out in the course of the argument for the appellant, that it was not competent to the jury to make the damage arising from the smoke of the engines an element of compensation, as by the 107th section of the Railway Clauses (Scotland) Act, every locomotive steam engine to be used on the railway must be constructed on the principle of consuming its own smoke.

The Legislature, therefore, having given no power to the promoters to annoy the occupiers of neighbouring property with smoke, an injury from this cause is not the subject of compensation, but a ground of action.

I agree with my noble and learned friend on the woolsack, that the verdict is also wrong with respect to the finding as to the ten per cent. However inaccurate or illogical the jury may have been in stating the figures, if, in addition to the value of the lands, they had given a gross sum

which they had stated to be ten per cent. for compulsory purchase, and it appeared upon calculation, that the percentage must have been estimated upon the entire value of the property, without deduction of the feu duty, the Court could not have disturbed the verdict. But when they themselves, without leaving us to the necessity of calculation to ascertain the fact, tell us that they have given the claimant ten per cent., not on his own property taken by the company, but upon the property of another person, I should be sorry to think that this plain and palpable error must be allowed to pass without correction. The Lord President says, "The Court is not entitled to meddle with the verdict of the jury unless they have done something plainly illegal. But where the duty of a jury is confined to giving compensation for the value of a person's property, and they give him a sum beyond that, explaining that they have arrived at that sum by an estimate upon the value of another person's property, I cannot doubt that this injustice done to the party who is to pay the compensation is *ultra vires*, and therefore plainly illegal." My two noble and learned friends differ in this view, and therefore, according to the rule of the House, this part of the verdict must stand.

The appeal, with this exception, must be disposed of according to the mode pointed out by my noble and learned friend on the woolsack.

LORD WESTBURY.—My Lords, I will first say a word on the subject of the ten per cent. The opinions of my noble and learned friends appear to me to proceed on their reading into the verdict of the jury certain expressions which they assume to be implied therein, and from that implication which, with great respect, I say they thus gratuitously make, they deduce the inference, that the jury have exceeded their authority. Now there is no room, in my view of the case, for any such implication. The jury found first the value of the entirety of the property, and then they have added for the compulsory purchase thereof at ten per cent. That plainly is, they add ten per cent. to the preceding sum as a compensation for the compulsory purchase. Now the mistake, if I may respectfully call it so, which I apprehend my noble and learned friends have made is this, that they assume the words "at ten per cent." to mean at ten per cent. upon the amount of value of the pursuer's ownership. There is no warrant for any such implication. There is no warrant for doing more than the jury have done, namely, to add a sum which they have arrived at by putting ten per cent. upon the £1270, which they themselves have found. We are not to assume, unless they have told us so expressly, that they meant to give ten per cent. upon the value of the property, minus the feu duty. They have said no such thing. Therefore I entirely agree with the Lord President that we are not entitled to meddle with their verdict unless they have done something plainly illegal. They have not done that, unless you read what they have said with the gratuitous addition which I have already mentioned. But that I apprehend you are not entitled to do.

Now, with regard to the rest of the case, I must confess, that I always approach the determination of these cases with very great reluctance, and though upon a mere technical ground, I shall concur with my noble and learned friends in their conclusion, yet it is necessary, in justice to what I have already said in former cases, that I should shew, that I do not in the smallest degree depart from the principles which were then laid down.

I take it, that the decisions have introduced into this subject two vicious and erroneous conclusions, the one, first, by my Lord Campbell, when he decided that the words "injuriously affected" would have no operation, except that they gave a remedy for such particular injury only as could have been actionable before the company had acquired statutory powers. I have already stated at length in other cases the conclusion I have arrived at on the Statute, that taking it altogether, the word "injuriously" did not mean wrongfully in the sense of illegally, but that it meant only damnously or prejudicially. To that conclusion I still adhere. Another vice or error was introduced, I think, when we decided, that the particular loss sustained by the inhabitants of a house, in respect of things done by the company, which did not touch the house, but most materially affected the comfort of the inhabitants thereof, and their enjoyment of the property, was not an injury. I think that was highly erroneous, for the test undoubtedly is this, Does the thing done detract from the marketable value of the premises? If the inhabitants of the house are exposed by the thing done to perpetual inconvenience, that inconvenience diminishes most sensibly the value of the premises, and in that sense it is an injury done to the premises, and a deterioration of the value thereof. I lament again that in *Brand's case* the word "construction" which occurs in the introductory heading of the clause was held to mean the execution of the works alone. Undoubtedly, I could not have concurred in that view. It seems to me to have had the effect of depriving parties of compensation for clear injury, to which they were most justly entitled.

With these limitations, I concur in this, that what is the result of the legitimate user of the railway cannot be made the subject of a claim of compensation after the railway has been made. Whatever is done by the company in pursuance of their powers, and done without neglect and without an excess of their authority, is a legitimate consequence of the statutory enactments, and must not be considered as doing injury to any one.

Now with these general limitations, let us see what is the effect of the decisions and the law

upon this particular verdict. I concur very much with the respondent's counsel, that where a part only of certain premises is taken, the residue being left to the owner, all the inconvenience sustained by the owner of the residue in consequence of the user made by the railway company of that which is taken, is a legitimate subject for consideration, when a jury is directed to address itself to valuing the property so taken, and is also a legitimate subject of consideration when a jury is directed to consider what is the damage resulting from the severance of that property. Because in estimating the damage done by severance, that is, the loss that will be sustained by the owner of that which is left, by the use intended to be made of that which is taken, the manner, in which it will bear on the occupation and enjoyment of that which is left, may be most legitimately considered. The technical difficulty I have is this, that in the form, in which the jury have given their verdict, they have given one entire sum for a variety of things as if they were *per se* separately legitimate subjects of claim, whereas they were not entitled to consider them *separatim et per se* as lawful subjects of claim, but they were entitled to consider them only in connection with the other two subjects of their inquiry, namely, the value of the property taken, and the loss sustained by that portion of the property which is left by reason of the severance from it, and the use of that which is taken. The difficulty, therefore, that I find is, that the jury have attributed one entire sum to a variety of grounds which, as I have already observed, *separatim*, cannot, in my opinion, be made a subject of distinct separate individual claims. I find here, that £392 is attributed to damage to the pursuer's remaining property caused by the noise of trains. That of necessity must be something occurring after the completion of the railway, and attendant on the user of the railway, but which in that individual form could not be regarded as a head of damage for which compensation could be claimed. "Railway bridge across the street." Now that is left in a very indefinite form. Whether it was brought forward as a head of injury by reason of the obstruction of the lights of the house and shop that were left in the possession of the pursuer, or whether it was on some other ground, I cannot say. If it was the former, namely, the obstruction of light and air, I should say undoubtedly it was a legitimate head of claim. Then again smoke, in what way that is to bear, it is impossible to ascertain. "General nuisance and deterioration of the tenement" are still more indefinite and uncertain. If I could agree with the Lord President, that the accumulation of words means only in law damage by severance, I should say that we could not quarrel with it, or enter into any analysis of it, or set aside any part of it. But I cannot agree with him that that is the effect of this specific enumeration. I find, therefore, a sum of money attributed to a number of alleged causes of loss and damage, some of which may, but others cannot by possibility, be brought forward separately and distinctly as heads of compensation under these statutes.

I think, therefore, that we have no alternative but to affirm the judgment of the Court of Session by reason of our being equally balanced, and by reason of the general maxim, *semper presumitur pro negante*, and, with regard to this £392, to reduce the verdict of the jury *quoad* that sum, but without prejudice to any claim which the pursuer may be advised to make for compensation in respect of damage resulting from the railway bridge across the street, by reason of obstruction to light or air. It would be very unfortunate indeed, if, by setting aside this verdict in consequence of the looseness and uncertainty attending the form of expression, we were to deprive the pursuer of any substantial and well founded heads of compensation included in the general description, but to which no particular sum appears to have been assigned. On these grounds, with the exception of the ten per cent., I concur in the conclusion arrived at by my noble and learned friends.

LORD COLONSAY.—My Lords, I concur in the opinion last expressed. I think that this sum of ten per cent. is stated by the jury very plainly in their verdict as an addition to the total sum of £1270 assessed by them in respect of the property taken. And I think we cannot disturb that part of the verdict.

In regard to the other part of the verdict, as to which it is thought necessary to disturb it, I feel, that there is a considerable difficulty upon some of the points involved. The Court had not then before them the judgment of this House in the case of *The Hammersmith Railway Co. v. Brand*, and therefore having before them the *case of Brand* as it originally stood, and not the alteration of the judgment by this House, the Court very naturally proceeded to give effect to the law as it had been laid down at that time.

Now, in the *case of Brand* I certainly did rest my judgment somewhat, and not a little, upon this circumstance, that I did not think, that the claimant in that case was entitled to the position of a person claiming under the Lands Clauses Act, because that Act had reference only to parties who claim a right of property, or an interest in property taken. If you look through all the clauses of the Act, you will find, I think, that Mr. Brand was not in that predicament. Then it appeared to me, that the clauses of the Railway Act did not support the claim for compensation which he made. I concur, therefore, in the view upon which the judgment that was pronounced in this case proceeded, that this party was not entitled to compensation for mere noise and smoke. And the other cases go to that too. But in regard to the obstruction of light, I think it very clear that the part of the property which has been taken may be considered as a separate tenement

from the part that is left; and that the owners would be entitled to compensation as being injuriously affected in that respect. I therefore think we cannot preclude him from having justice done to him, and having redress for the injury.

I have had considerable doubts as to the remaining part of the item, the general nuisance and deterioration of the tenement, as to whether that might or might not comprehend matters for compensation, or in respect of which compensation can competently be claimed. But in the vague way in which it is here expressed, I cannot hold that we can sustain it. It is too general, and not very intelligible in itself. Therefore I concur in the judgment proposed, altering the interlocutors of the Court of Session as regards the last item of £392, with the exception of reserving the right of the pursuer to claim for injury done by the railway bridge, and I concur in thinking, that the ten per cent. ought to be deducted as the jury deducted it.

LORD CHANCELLOR.—My Lords, inasmuch as we are equally divided in opinion, the interlocutor complained of will not be reversed, but we all agree that the interlocutor shall be varied. And it will run thus:—"That the interlocutor complained of be varied by finding that the verdict of the jury, so far as it awards the sum of £392 for damage to the respondent's remaining property caused by noise of trains, railway bridge across the street, smoke, and general nuisance, and deterioration of the tenement next the railway, is *ultra vires* and inept, and therefore reduce it to that extent, and find, that the respondent is not entitled to enforce the verdict, and the interlocutors following thereupon, except under deduction of the said sum of £392, but without prejudice to such claim as the respondent may be advised to make in respect of the damage done to his tenement by the Railway Bridge by obstruction of light and air."

Appellants' Agents, MacGrigor, Stevenson, and Fleming, Glasgow; Murray, Beith, and Murray, W.S; Martin and Leslie, Westminster.—*Respondent's Agents*, Campbell and Smith, S.S.C.; William Robertson, Westminster.

JULY 8, 1870.

The LORD ADVOCATE, *Appellant*, v. THE GOVERNORS OF DONALDSON'S HOSPITAL, *Respondents*.

Teinds—Valuation of 1636—Extract—Register—Custody of Document—Evidence—*An extract valuation recorded under the Statute 1707, c. 9, purported to be signed by the Clerk Depute to J., the Clerk of Register and Keeper of the Register, and stated, that in 1636 the teinds of the lands of W. were worth eight chalders victual, and that this was a just extract of the valuation as contained in the principal register thereof.*

HELD (affirming judgment), *That this must be taken to be an authentic valuation, the document being found in the proper custody, and the officers named having filled those offices described in the document.*

This was an appeal from a decision of the First Division of the Court of Session as Commissioners of Teinds. A summons of augmentation, modification, and locality was raised by the Rev. Wm. Mearns, minister of the united parishes of Kinneff and Caterline. The Court of Teinds modified a stipend of 18 chalders, half meal, half barley, with £8 16s. 8d. for communion elements; and in the course of preparing a locality, the question was raised whether the teinds of Wester Barras, in the parish of Kinneff, belonging to the Governors of Donaldson's Hospital, had or had not been valued. This turned on the proper effect to be given to the following document:—"At Edinburgh, the 3d day of February 1636, the lands of Wester Barras, pertaining to Sir John Douglas, are worth, and may pay in stock and teind, parsonage and vicarage, eight chalders victual. This is the just extract of the valuation of the foresaid lands, as is contained in the principal register thereof. Extracted by me, Thomas Murray, Advocate Clerk Depute to Sir Archibald Johnston of Warriston, Knight, Clerk of Register and Keeper of the said registers.—THOMAS MURRAY." This document was only recorded by the Court of Session in 1792, under the authority of an Act of Parliament, passed in 1707, for supplying the loss of certain records of the Court of Teinds, by the registration of any authentic extracts from such records which might be presented to the Court of Session. On behalf of the Lord Advocate, acting for the Commissioners of Woods and Forests, it was objected, that the above was not

¹ See previous report 4 Macph. 1096; 39 Sc. Jur. 627. S. C. 8 Macph. H. L. 136; 42 Sc. Jur. 435.