and the same shall be recovered in an action." The legislature has, by the power belonging to it, enacted, that if the company do not follow the course that is there pointed out, they shall be conclusively bound to pay the sum which has been demanded. They have the opportunity of having a jury summoned, and a fair compensation assessed by the jury; if they do not do that, the legislature says the price to be paid shall be the amount that the landowner has demanded.

In this case, my Lords, the facts are clear; the demand was lawfully made on the 12th of June; the course has not been adopted by the company, of presenting a petition in the manner therein required,—that is, giving the notice and making a counter-offer; and they are therefore bound to pay this sum; and notwithstanding I very anxiously pressed both the Solicitor-General and Mr. Moncreiff as to how the price was to be ascertained, they were quite unable to shew how it was to be ascertained if not in this mode. The arbitration might have gone off,—there would be no longer any arbitration; and unless the Sheriff had the power, which at one time was contended for, of repealing the act of parliament, and allowing a fresh notice to be given, there is no mode in which a jury could be summoned which could ascertain the price.

That being so, as the price has been demanded by the landowner, the company not doing what they are required to do, I think they are bound to pay that price. I am therefore of opinion on the second appeal, as well as on the first, that the interlocutors appealed from must be affirmed.

Interlocutors affirmed with costs.

First Division.—Lord Robertson, Ordinary.—T. W. Webster, *Appellants' Solicitor.*—Richardson, Loch, and Maclaurin, *Respondent's Solicitors.*

APRIL 19, 1852.

SIR WINDHAM CARMICHAEL ANSTRUTHER, *Appellant*, *v.* THE EAST OF FIFE RAILWAY COMPANY, *Respondents.*

Railway—Presumed Contract—Compelling to make Railway—Interdict—Title and Interest—*A railway company, while soliciting their bill before parliament, agreed with A, a landowner on their proposed line, in return for his support, to refer all his claims against them to a certain arbiter. The bill passed, having had A's support; but after several years, no step having been taken to make the railway, the shareholders resolved that the directors should proceed to dissolve the company, and to have the deposits returned, when A applied for an interdict to prevent the directors from doing so, and from violating their agreement with him, or doing anything prejudicial to his interests.*

HELD (affirming judgment), *that there was no sufficient ground for granting interdict, as the circumstances did not amount to a special contract.*

Opinion, *A mere landowner, as such, has no right to compel a railway company, who have taken no step towards executing the works, to go on and make the railway.*

Process—Appeal—Interdict—*If an interdict refused by the Court of Session be too large, the House of Lords will not cut down such interdict for the mere purpose of maintaining an appeal.*[1]

In 1845, a company was formed for the purpose of constructing a line of railway in Fifeshire, to be called the East of Fife Railway, and, in its proposed course, it was contemplated to intersect a portion of the estate held by the appellant as heir of entail. After some communications with the promoters of the undertaking as to compensation, &c., the appellant gave his consent to the project. The Secretary of the company wrote and offered to refer the appellant's claims to an arbiter. The appellant accepted of the terms offered, and an act of parliament was passed, in July 1846, incorporating the railway company. The 22nd section of the act referred to that part of the line passing through the appellant's property. The lands were to be purchased within three years, and the works were to be completed in seven years.

On May 9, 1849, the secretary of the company informed the appellant's agent that the railway would not be proceeded with. In the record, the respondents admitted the intention, according to resolutions of the shareholders, to abandon the undertaking, and to apply to parliament for an act to dissolve the company.

The appellant, who was not a shareholder, presented an application, in the above circumstances, to the Court of Session, praying their Lordships to interdict the directors from taking steps to dissolve the company, and from violating the contract made with him.

The First Division refused the interdict. The present appeal was then brought.

Rolt Q.C., and *Powell*, for appellant.—1. The position a landed proprietor on the proposed

[1] See previous report 12 D. 127; 22 Sc. Jur. 3. S. C. 1 Macq. 98: 24 Sc. Jur. 419.

line of railway holds, entitles him to compel the company to go on and make the railway.—*R.* v. *Eastern Co. R. Co.* 10 Ad. and Ell. 531. A landowner can be in no worse position in this respect than a shareholder; and the principle is, that it is for the public advantage, as well as private interests, that the railway should be made. 1. Here there was also a special contract. The appellant withdrew his opposition, and forbore to give his support to other schemes, on the faith that this railway would be made; and he was entitled to enforce the performance of that agreement.—*Edwards* v. *Grand Junction Co.*, 1 Myl. and Cr. 650; *Stanley* v. *Chester and Birkenhead Co.* 9 Sim. 264. If, therefore, on both these grounds, the appellant can compel the railway to be made, all that is necessary to ground an application for interdict, is to shew, that the company intend so to deal with the funds, as to render it impossible to carry out the scheme. This was sufficiently alleged in the condescendence, and not being denied, it is to be held admitted. The record was never closed; and as we were never allowed to answer the defenders' statement of facts, their statement goes for nothing,—and what of ours was not denied, is to be held proved. We do not wish to interdict the respondents from going to parliament to dissolve the company, which we admit we cannot do.—*Heathcot* v. *North Staffordshire R. Co.* 20 L. J. (Ch.) 82. This is not implied in the prayer of our interdict, but if it is, we are willing to limit the interdict so far.

[LORD CHANCELLOR.—Have you brought your action of declarator, and what has become of it?]

Yes, and the defenders have been assoilzied; but that judgment may be appealed from.

[LORD CHANCELLOR.—Can you shew me a single case where equity has interfered to compel the execution of a railway, when no step has been taken to carry out the work?]

Perhaps not.

Bethell Q.C., and *Mundell*, for respondents, were not heard.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case, your Lordships are asked to decide the most important questions of law that can arise, if they could be maintained upon this interlocutor. What is prayed for is a general interdict, at the very period when, in an action of declarator, the right has been denied by the Court below—the absolute right upon which this very interdict must be founded, and upon which it must issue, upon the assumption that the right will be established; and that not now being before your Lordships' House, you are asked to set up that interdict, which has been recalled in effect by the Court in Scotland.

Now, my Lords, the case is of this nature :—There being a common railway act of parliament, having nothing peculiar about it, the appellant, who is a large landed proprietor, appears to have interfered with, or to have mixed himself up with, the company in his character of a landed proprietor. Before the passing of the act, there was an agreement, as it is called, depending upon two letters, the binding nature of which, (and the terms of which would require great consideration before they could be executed as an agreement,) but the effect of which is, that all Sir W. Anstruther claims in respect of his property, which may be taken or may not be taken, and his claims for services rendered to the company towards obtaining the act of parliament, are to be referred to arbitration. There is not the slightest proof that any attempt has been made to carry that alleged agreement into effect; and then, as the company has in point of fact failed—for there has not been a single act done towards the execution of any of the works, the company having failed to carry its purpose into execution—Sir W. Anstruther institutes a proceeding in Scotland in order to obtain an interdict. He means to bring an action of declarator to have his rights declared, but he desires in the first instance this interdict. Now, my Lords, supposing such an interdict to be obtained, it would be one of the most important matters that could possibly come before your Lordships. It has never been established that a mere landowner, as such, can come and ask that a company not having taken a single step towards the execution of an intended project—and I speak now of a railway—shall be compelled to execute that railway. However, upon that I give no opinion, because if that is to be decided, it is a point of so much importance, that it must be decided by a different course of proceeding from that which is before your Lordships' House.

Now, my Lords, as regards the agreement, it is impossible that there can be any interdict as to this agreement—it is to be referred to arbitration; and before you can take any step to enforce an interdict as regards that agreement, it must have been shewn that the reference to arbitration has failed—that the arbitrator has been desired to act, but no step has been taken. The case is perfectly naked in that respect. There is no foundation for saying that any step has been taken towards the execution of the contract. And what is it that is asked of your Lordships? First of all, it is perfectly clear that the terms in which the interdict is prayed for, would include that act of parliament. It is admitted that a person standing in the situation in which the appellant stands, (because he is not a shareholder,) is not a person with whom a contract has been specifically made—he is a person who may be damaged, or who may be benefited by the act to be done, but he is not a person, upon the point upon which I am now addressing your Lordships, who has any contract entered into with him; and what is asked of your Lordships is this, that you will prevent the company from going to parliament, which gave the power, and asking parliament to put an end to this proprietary, as the project may turn out to be mischievous instead of beneficial.

Now, my Lords, if a party has any right to oppose such an act, he is at perfect liberty to go before the House and be heard, upon the ground of his interest, if he have any; but is it possible that an interdict can be granted in that respect? Then it is said, you may qualify the interdict—that is to say, you may cut off three-fourths of that which is asked, and grant something, simply for the purpose of this appeal. But I am sure that your Lordships will not allow parties to withdraw a part of that which they ask, and which is the material part of it, and then to fall back upon something which is comparatively unimportant, simply for the purpose of maintaining an appeal before your Lordships' House.

My Lords, I think it is perfectly clear that, upon the first point laid, your Lordships would never be advised to decide that point, it being a point in doubt, upon a pleading like that before your Lordships. Upon the point of a decree against the act of parliament, I think that is out of the question. Then comes what has been much insisted upon at the bar, namely, the prayer that the company may be restrained from paying back to the shareholders the money they have paid them. What possible right, my Lords, can this landowner have to interfere with the money of the shareholders as between themselves? If the money is wrongfully paid back to them, they will, if they are liable, still be liable to every action of right which exists now in the appellant.

But he has no right to these specific funds. They could be paid without his interference in either one way or the other; and I think, my Lords, that a more mischievous thing could not be imagined, than that any mere landholder should be able to come to your Lordships' House seeking to interfere with the manner in which the money of the shareholders must be appropriated (for it amounts to that if the money is to be paid back). If this large prayer were granted, it would be sufficient to interfere with the actual arrangements of the company with regard to their own money.

My Lords, no such interdict ever was granted, and I believe no such interdict ever will be granted. The action of declarator has failed—the appellant has failed in that action, and I hope he will not be advised to bring it to your Lordships' House. If he should do such a thing, it will be considered then in a shape to enable your Lordships to give a clear opinion upon the point of law; but as the matter stands, I think, my Lords, that it is quite impossible to maintain this appeal, and therefore I propose to your Lordships that it be dismissed with costs.

Interlocutors affirmed with costs.

First Division.—Surr and Gribble, *Appellant's Solicitors.*—Connell and Hope, *Respondents' Solicitors.*

MAY 7, 1852.

HENRY ARNOT and ROBERT CHISHOLME, *Appellants*, *v.* JOHN BROWN and WILLIAM COMMON, *Respondents.*

Process—Personal Bar—Acquiescence—Suspension and Interdict—Nuisance—Closing Record—Withdrawing Case from Jury—Judicature and Jury Court Statutes—*A. obtained interim-interdict against B's using a building for a candle manufactory. B. asked and obtained leave of the Court to make two experiments, to shew that, by his mode of working, there was no nuisance. The record was then prepared, but never closed or authenticated by the Lord Ordinary. A remit was also made to the Issue-Clerks, but the Court, instead of sending the proposed issues to trial, appointed a scientific person to report upon a third experiment; and then, on a report favourable to the work, "of consent recalled the interim interdict," allowed the manufactory to be carried on in the mode observed at the third experiment, and repelled the reasons of suspension and interdict.*

HELD *that after the interlocutor "of consent recalling the interdict," A. was barred from objecting, that as the record had never been closed, and the case withdrawn from jury trial, the judgments of the Court of Session were incompetently pronounced.* Opinions.—1. *Procedure by way of suspension and interdict to prevent a nuisance from being established, is not one of the enumerated cases exclusively appropriated for jury trial by* 6 *Geo.* IV. *c.* 120, § 28. 2. *Though an issue has been adjusted for trial in a case not among the enumerated cases of the statute, the Court may nevertheless recall their order, and dispose of the case otherwise than by sending it to a jury.* 3. *The objection, that the record has not been signed and closed by the Lord Ordinary is fatal if the case is sent to jury trial; otherwise, the irregularity may be waived.*[1]

The respondent Brown was proprietor of premises situated on the Abbey-Hill, Edinburgh, which he let to the other respondent, Common, for a candle manufactory. Before Common had

[1] See previous reports 9 D. 497: 10 D. 95: 19 Sc. Jur. 193: 20 Sc. Jur. 17. S. C. 1 Macq. Ap. 229: 24 Sc. Jur. 421.