Wigan. She must prove both of these circumstances,—not only, that he had intended to change his domicile, but that he actually changed his domicile. I cannot myself conceive a case in which it could happen, that a man might be said to have intended to abandon his former domicile unless he had quitted the place where he resided, and ceased to reside there. If he still kept a residence in that place, with the intention of residing there indefinitely at any time when he chose to reside there, I cannot conceive, that in such a case as that (though I do not deny that such a case might happen) he could have abandoned his former domicile. I confess I have difficulty in conceiving that case, although my noble and learned friend on the woolsack, and my noble and learned friend who last addressed your Lordships, conceived, that there might be such a case. But that is not the nature of the present case, because here the burden of proof lying upon the appellant to prove the fact of the change of domicile, he has failed in that proof; he has not made out, that the party both intended to quit Wigan, and did actually abandon his former domicile. I consider the simple fact (without going into the other circumstances of the case) of his retaining his house in Standish Gate, connected with the keeping of an establishment of servants there, is a proof, that he had not actually abandoned the domicile which he unquestionably had. On that account, therefore, without entering into the other circumstances of the case, although there are some circumstances rather tending to shew, that he meant to make his residence in Scotland, I think it is clear, that he certainly had not abandoned his English domicile, and therefore was not capable of acquiring a domicile for the purpose of succession in Scotland; for, until his English domicile was abandoned both in intention and in fact, he could not acquire a new domicile in Scotland. Upon that short ground I think this case must be decided; and though the Court of Session considered this a case of some difficulty, I must own that, looking at the simple fact that has to be established and made out, it does not appear to me to be one of much difficulty. The proof which lies upon the appellant has not been made out to my satisfaction, and I think therefore, that the interlocutor ought to be affirmed.

LORD KINGSDOWN.—My Lords, I quite agree in the opinions which have been expressed by my noble and learned friends. We must be satisfied, in order to advise the reversal of this judgment, that the opinion of the Court below was wrong. So far from being of that opinion, I am quite satisfied they came to a right conclusion,—that there never was a dissolution of the link which connected Mr. M'Clure with Wigan so long as his wife lived. So far as a change of residence took place, it certainly was not in consequence of any intention to change his domicile. He was anxious to obtain a residence in the country, near Wigan, for the sake of his wife, with whom the air of the town did not agree, and he endeavoured unsuccessfully to obtain several residences in the immediate neighbourhood of Wigan, which, so far as appears in this case, were quite of sufficient magnitude and importance to equal the villa which he obtained and furnished in Scotland; and being unable to acquire either of those residences, he removed to Scotland for his wife's health. He still, however, retained his connexion with Wigan; and the probability is, that, as long as his wife lived, he desired to retain his connexion with Wigan, and to keep his domicile in England. When his wife died, that tie was dissolved, and in all probability he intended to remove his domicile to Scotland; but there is no proof that he did actually abandon his domicile at Wigan and remove it to Scotland.

Interlocutor affirmed, and appeal dismissed with costs.

For Appellant, Dodds and Greig, Solicitors, London; Malcolm Macgregor, S.S.C., Edinburgh.—*For Respondent*, Maitland and Graham, Solicitors, London; John Galletly, S.S.C., Edinburgh; T. and J. M'Gowan, Solicitors, Dumfries.

MARCH 23, 1860.

THE CALEDONIAN RAILWAY COMPANY, *Appellants*, *v.* SIR NORMAN MACDONALD LOCKHART, BART., and Others, *Respondents*.

Arbitration—Decree Arbitral—Railway—Submission following the Statute—Lands and Railways Clauses Acts—Res Judicata—1. *The proprietor of an entailed estate entered into a submission to a single arbiter, with a railway company, in regard to price of lands, intersectional damage, access and accommodation works, and, generally, as to all questions between the parties. It narrated the Lands Clauses Act, and provided that the arbiter should conduct the proceedings in strict conformity with the regulations of that act, and of the acts* 8 *and* 9 *Vict. c.* 17 *and* 33,

power being given to pronounce interim awards. Several prorogations took place by consent, and an interim decree arbitral was pronounced about two years after the date of the submission, and a final award some time thereafter. In the interval between these awards the proprietor died. The company brought the awards under reduction, on the ground that, if statutory, the submission expired by no award being given within three months, in terms of the 35th section of the Lands Clauses Act; that if at common law, it had expired by the death of one of the parties:

HELD (affirming judgment), *That it was a submission at common law, voluntarily importing certain of the regulations of the statutory submission, and reasons of reduction* repelled.

2. *There having been a suspension and interdict, at the instance of the company, against the same parties, for the purpose of stopping the arbitration on the same grounds, and in which the note had been refused by the Inner House,* HELD, *that it was not* res judicata.

An arbiter has an implied power to consult a man of skill.[1]

The Caledonian Railway passes through the lands of Carnwath, which belonged to the late Norman Macdonald Lockhart, father of the defender. The pursuers having declined to pay the amount of compensation required by him, a submission was entered into, in 1846, to Professor Low, as sole arbiter, which provided as follows :—

"That is to say, the said parties considering, that by the Lands Clauses Consolidation (Scotland) Act, 1845, &c. And considering, that the said Caledonian Railway Company have intimated their intention to enter upon, take, and use, certain parts or portions of the lands specified in the schedule attached to the foresaid first recited act, belonging to the said Sir Norman Macdonald Lockhart, and that the said Caledonian Railway Company and the said Sir Norman Macdonald Lockhart have agreed to enter into the arbitration under written, for the purpose of ascertaining the compensation to which the said Sir Norman Macdonald Lockhart shall be entitled for the same: Therefore, the said Caledonian Railway Company and the said Sir Norman Macdonald Lockhart have submitted and referred, and hereby submit and refer, to the amicable decision, final sentence, and decreet arbitral of David Low, Professor of Agriculture in the University of Edinburgh, as sole arbiter mutually chosen by the said parties, all claims for the value of the said lands and others to be taken, &c. Declaring hereby, that the said arbiter shall conduct the proceedings to follow hereon, and determine the matters hereby submitted to him, in strict conformity with the rules and regulations under the provisions and conditions specified in the foresaid acts, and of the act 8 and 9 Vict. c. 17, &c."

The arbiter having accepted of the arbitration, several prorogations took place, with the consent of the agents for the parties, expressed in letters to the arbiter, dated at various times between 20th May and 5th October 1846. On the 6th November 1846 a minute was subscribed by Sir Norman Lockhart on the one hand, and Mr. Rankine, treasurer of the railway company, homologating and adopting previous prorogations granted by their agents respectively.

The arbiter afterwards subscribed three successive minutes prorogating the submission, on the narrative that the parties had empowered him to do so indefinitely, and that it had become necessary to do so. These minutes were dated the 4th November 1847, the 31st October 1848, and the 17th October 1849, and in each case the period was prorogated "to the day of next."

On the 22d January 1848 the arbiter pronounced an interim decree arbitral, decerning *inter alia* for an interim payment of £6000, on account of the value of land, and intersectional and other damage, to be lodged in bank till a final decree arbitral should be pronounced, with interest until lodged, deducting from the interest £166, being the landlord's proportion of sums due to tenants for crop 1846, paid to them by the company. The arbiter further determined certain annual deductions and abatements in favour of the tenants, in conformity with findings pronounced by him in another submission between the tenants and the company, and also found the company liable to Sir Norman in £183, as price of wood taken, and pronounced a great variety of findings in reference to accesses and other accommodation works to be executed by the company upon the estate. He reserved the claims of the proprietor on account of injury from the company carrying their works across the valley of the Clyde; of injury to supply of water to the mansion house; and ordained the parties to implement the interim award, under the penalty contained in the submission.

The interim decree was pronounced without objection by the pursuers, and after a great amount of evidence and investigation, and notes indicating the views of the arbiter.

On 9th May 1849 Sir Norman Lockhart died. His representatives proposed to sist themselves, and the company brought a suspension and interdict against the arbiter proceeding further, on the ground that the submission, if under the statute, was invalid, because not brought to an end within the statutory period of three months; and, on the other hand, if it was a submission at common law, it fell by the death of one of the parties. The note of suspension was refused by

[1] See previous reports 19 D. 527; 29 Sc. Jur. 261. S. C. 3 Macq. Ap. 808: 32 Sc. Jur. 468.

Lord Fullerton, the Lord Ordinary on the Bills, and his judgment was adhered to by the Court.—(See 22 Sc. Jur. 89.)

The arbiter then proceeded to take further evidence, and he pronounced his final decree arbitral on the 20th June 1850, awarding an additional sum of £3761 against the company, for the value of land and intersectional and other damage.

This was followed by other findings in regard to wood taken by the company; injury to supply of water to the mansion house; certain additional accommodation works; the expense of the submission; conveyance of the lands to the company, free of incumbrances, &c.; and confirming the interim award, in so far as not now modified.

The company raised the present action, concluding for reduction of the interim decree arbitral and the final decree arbitral above mentioned.

The defenders pleaded, that the judgment in the suspension and interdict was *res judicata;* and, generally, that nothing was averred by the pursuers relevant to support a challenge of the awards in question.

The plea of *res judicata*, however, was practically disposed of by an interlocutor of 25th May 1855.—(See 27 Sc. Jur. 389.)

The Court of Session repelled the reasons of reduction, and assoilzied the defenders.

The Railway Company appealed, pleading, in their *printed case*, that—1. The decrees arbitral sought to be set aside were null, in respect that at the date of the awards there was no arbitration under which the arbiter could act, it having come to an end, either by the lapse of the statutory period of three months, without any award having been issued, or by the death of Sir Norman Macdonald Lockhart, one of the parties submitters, previous to the date of the final award. 2. On the footing of the arbitration being a statutory arbitration, the arbiter exceeded his powers; and the decrees arbitral were *ultra vires*, inasmuch as—(1) the arbiter had no power to pronounce an interim award; (2) he had no power to order the execution by the appellants of works, or to award sums to be paid by them, on the footing that such works should be executed by them; (3) the arbiter had no right to enforce the execution of works by the appellants, or to award damages in respect of their non-execution; (4) he was not entitled to award compensation for prospective or contingent damage, at least in the absence of proof that damage and injury was, or would necessarily be, caused by the operations of the appellants, and in the face of the evidence adduced by them to the contrary; (5) he was not entitled to prejudge or dispose of the claims of compensation which might be competent to tenants under leases, and, in particular, he was not entitled to prejudge or dispose of the claims of tenants whose farms or possessions were not intersected by the line of railway, or to award compensation to the landlord (Sir Norman Macdonald Lockhart) in respect of such claims, leaving the appellants to seek relief from him; nor had the arbiter any right to restrict the appellants' right of relief as against Sir Norman in respect of such claims; (6) the proceedings in the submission were conducted irregularly, and in violation of the ordinary rules applicable to arbitrations. 3. Even if the arbitration did not proceed on the footing of a mere statutory arbitration, the arbiter also exceeded the powers conferred upon him, and the decrees arbitral pronounced by him were also *ultra vires*, and incompetently pronounced, on the various grounds above specified and set forth. 4. The decrees arbitral were vague and general in their terms, and uncertain. They failed to specify the claims of the deceased Sir Norman Macdonald Lockhart which were sustained, and in respect of which the sums awarded were found due, or to state the amounts or proportions awarded with reference or as applicable to the different heads or branches of claim. 5. The sums awarded by the arbiter embraced compensation for damage, or supposed damage, payable to tenants, and, in particular, to tenants whose farms or possessions were not intersected by the railway, while such claims could not legally be made the subject of any claim under the arbitration, to which the tenants were no parties, and which claims were not referred to the decision of the arbiter. 6. The sums awarded in respect of the claims of these tenants were not distinguished from, but were inseparably mixed up with and formed part of, the aggregate compensation found due, in respect of damage, to Sir Norman and his representatives, the proprietors of the lands.

The respondents maintained, in their *printed case*, that the judgment of the Court of Session was correct, in respect—1. The submission under which the awards were pronounced was not itself sought to be set aside; and it was therefore to be assumed to be a competent arbitration of all the matters embraced within it. 2. The submission was an arbitration of the matters embraced within it, in respect (1) that under the statutes it was competent for all owners of lands to treat with the promoters of public undertakings for the settlement of their claims for compensation in any way they may see fit to do so; (2) that into such submissions it was competent, by mutual consent, to import, by a reference to the statutes, the regulations therein contained for the conduct of arbiters in strictly statutory submissions, and during the proceedings to waive or depart from any of these imported regulations by similar consent. 3. Even assuming that none but absolute owners could enter into such a submission, the late Sir Norman Macdonald Lockhart was absolute owner of the lands taken by them, and was not an heir under a strict entail, or otherwise under disability to sell said lands and contract with the appellants

relative thereto. At all events, so far as the present action was concerned, Sir Norman not being alleged to be an heir of strict entail, and so under disability, must be assumed to have been absolute owner of the lands. 4. Even assuming Sir Norman to have been an heir under a strict entail, it was not incompetent for him under the Statutes to enter into the submission in question; and separately,—(1) there was no averment or plea to the effect, that an heir of entail was incapacitated from entering into such a submission; (2) such averments and pleas would be relevant only in a challenge of the submission itself, not of the awards alone, where the submission, as in the present summons, was unchallenged; and (3) in point of fact, it was not under the Statutes incompetent for Sir Norman to enter into the submission in question. 5. The imported regulation under which the submission would have terminated on the lapse of three months from its date without an award having been pronounced, was waived and departed from by the mutual consent of parties, expressed in the various prorogations of the submission, and more particularly in the formal minute of renewal in November 1846, whereby power was conferred upon the arbiter to prorogate the submission from time to time as he should find occasion to do so; and because the submission was protected against falling on the death of Sir Norman by the imported regulation contained in the 24th section of the Lands Clauses Act. 6. In any event, the minute of renewal in November 1846, even if not effectual as a prorogation of the original submission, was nevertheless a competent renewal, and constituted a new arbitration of all matters contained in the original submission, with all the conditions set forth or imported therein, except in so far as the same might be inconsistent with the provisions of the minute of renewal; and the renewed submission therefore was not to terminate by the death of Sir Norman; and, at the same time, it was to continue in force for such time as the arbiter might consider it necessary to prolong it. 7. Even without the imported provision of the 24th section of the Lands Clauses Statute, the submission being an integral and essential part of the contract of sale between the appellants and Sir Norman, and the contract having been implemented by Sir Norman giving the appellants possession of his lands on the faith of such submission, it did not fall by the death of Sir Norman, but continued in force after his death. 8. It was competent, in terms of the consent in the submission, both in its original form and under the minute of renewal, to pronounce interim as well as final awards; and such awards were duly pronounced under a valid and subsisting submission. 9. The submission not having been a statutory submission, it was incompetent and irrelevant to seek to reduce the awards pronounced under it upon grounds which assumed its statutory character; and because, even assuming it to have been statutory, the objections stated by the appellants are unfounded in fact, and untenable in law; and also because these objections are irrelevant and inapplicable in a reduction of the awards alone. 10. The awards were rightly pronounced under a subsisting submission, and it would be unjust to the respondents, and contrary to good faith, if the appellants were to be allowed to reduce them, on the faith of their implementing which the late Sir Norman Macdonald Lockhart allowed them to enter into possession of the lands, and so to alter their position and character as to render restitution *in integrum* impossible. 11. At all events, the interim award having been pronounced before the death of Sir Norman, was unchallengeable, and binding upon the appellants.

Rolt Q.C, and *R. Palmer* Q.C., for the appellants.—This award was *ultra vires* and void. The reference which was entered into was either under the Statute, or it was one at common law. 1. If it was a reference under the Lands Clauses Act, 8 Vict. c. 19, then § 35 enacts, that "if the arbiters or their umpire shall for three months have failed to make their or his award, the question of compensation shall be settled by the verdict of a jury." Here the arbiter did not make his award within the three months, even though the submission may be taken as renewed on 9th November 1846. Where a Statute like this specifies a fixed period for the making of the award, the Statute must be strictly obeyed. The arbiter's power was gone after the period expired—*Glasgow and Barrhead Railway Company* v. *Nitshill Coal Company*, 7 Bell's Ap. 325. 2. Even if the submission is to be taken as one at common law, then the death of Sir Norman put an end to it—Ersk. 4, 3, 29; *Robertson* v. *Cheyne*, 9 D. 599. The respondent must now, therefore, have his compensation settled by a jury.

The appellants have done nothing which could convert a reference of one kind into a reference of the other kind, and the two kinds of reference are, in many respects, inconsistent. The parties clearly contemplated at first a reference under the Statute, and not a reference at common law.

Even if the awards were pronounced at the right time, they contained findings which were *ultra vires*. They ordered expensive and unnecessary accommodation works to be executed. They also awarded large damages for prospective injury, and also damage done to tenants who were no parties to the submission, and who themselves might claim compensation. Therefore the awards should be declared void either in whole or in part—*Pigott* v. *Eastern Counties Railway Company*, 3 C. B. 229; *Lawrence* v. *Great Northern Railway Company*, 16 Q.B. 643; *Vaughan* v. *Taff Vale Railway Company*, 3 H. & N. 743.

Attorney General (Bethell), *Anderson* Q.C., and *Sir H. Cairns* Q.C., for the respondents.—

The submission was regular, and it was quite competent, by mutual consent, to adopt the regulations of the Statute, and to waive these. Thus the statutory period of three months for the making of the award was distinctly waived by consent; and even at common law the death of a party was no revocation—*Selkirk* v. *Nasmyth*, M. 627. The minute of renewal, if not a good renewal, was equivalent to a new submission. There was nothing *ultra vires* in any of the findings of the arbiter—*Edinburgh, Perth, and Dundee Railway Company* v. *Richardson*, 13 D. 552; *Eads* v. *Williams*, 4 De G. M. & G. 674.

Cur. adv. vult.

LORD CHANCELLOR CAMPBELL.—My Lords, the first ground on which the appellants seek the reduction of the two decrees arbitral, the subject of this litigation, is, that the authority of the arbiter had expired before they were executed.

There has been much controversy as to whether the submission is to be considered to have been under the Statute, 8 and 9 Vict. cap. 19, or at common law, or partly under the Statute and partly at common law. The appellants contend, that whatever view is taken of this question the decrees arbitral are void; alleging, that if the submission was under the Statute, the authority of the arbiter determined at the expiration of three months from its date; that if the submission was at common law, the authority of the arbiter expired at the death of Sir Norman Lockhart; and that if the submission be of a mixed nature, the authority of the arbiter must be considered as entirely gone, before he executed the final decree arbitral, so that the interim decree arbitral became a nullity.

But I am clearly of opinion, that whatever view is taken of the nature of the submission, the authority of the arbiter continued in full vigour down to the time when he executed the final decree arbitral. The 35th section of 8 and 9 Vict. cap. 19, says, "that if, when the matter shall have been referred to arbitration, the arbiters or their umpire shall for three months have failed to make their or his award, the question of compensation shall be settled by the verdict of a jury." But this is merely a power given for the advantage of the parties, enabling either party to obtain a settlement of the compensation by a jury in case of improper delay in the arbitration; and this advantage the parties might renounce. It could not possibly have been the intention of the legislature to prohibit the parties from enlarging the time for making the award for a week, if, at the expiration of three months from the date of the submission, the arbiters, after great labour bestowed, and heavy expense incurred, required a few days more to complete their inquiries and perfect their calculation. It seems to me absurd to suppose, as was suggested, that this enlargement could only take place once for three months. Neither that Statute, nor common law nor common sense, impose such a limit on the power. Here, by the mutual consent of both parties, the time was enlarged in writing in a way familiarly known, according to Scotch procedure; and the enlargement of the 6th and 9th November 1846 amounted to a fresh submission, giving the arbiter, in the most express language, at his pleasure, power further to enlarge the time, both parties binding and obliging themselves to acquiesce in and fulfil his award, and homologating and confirming the bygone prorogations. Accordingly, the appellants continued to attend the arbiter, and acquiesced in his authority, till the interim award was executed.

The appellants next contend, that the authority of the arbiter expired at the death of Sir Norman Lockhart. But although, generally speaking, the authority of an arbiter by the law of Scotland does expire on the death of either of the parties, I am of opinion, that if this was merely a conventional or common law submission, the intention of the parties was to include in it the provision of the Statute, that it should not determine, by the death of the landowner, who was claiming the value of his land taken by the company, and compensation for the damage done to the rest of his estate by the severance, and the works which the company had constructed, and were about to construct, under the powers of their special act. The arbiter was in the situation of a person appointed by vendor and purchaser to fix the value and price of an estate sold. And the case of *Lord Selkirk* v. *Nasmith* clearly shews, that, when there is any such reference, it is by the law of Scotland competent to proceed, notwithstanding the death of one of the parties. Therefore, in any way in which the nature of the submission may be regarded, there seems to me to be no doubt, that the authority which it originally conferred remained in the arbiter till he had executed the final decree arbitral.

But we have had an argument to prove, that both decrees are void by reason of the misconduct of the arbiter. The seventh plea in law, which would have admitted this ground of reduction, was abandoned in the Court below, as is mentioned in an interlocutor not appealed against. I do not wonder that it was abandoned; for there seems to me to be no evidence whatever to support it. What is now chiefly relied upon is the remit to Mr. Newland as an expert, which is said to be contrary to the maxim, "*delegatus non protest delegare.*" In answer it has been shewn to us, that this proceeding was according to the established practice of courts of justice in Scotland and of judicial arbiters. Indeed, the remit never was complained of by the company, nor by the counsel in the Court of Session. An opportunity was afterwards given of examining Mr. Newlands as a witness, when a great number of witnesses were examined on both sides.

Again, it is said that the awards are not binding, because Sir Norman Lockhart is sometimes designated in the pleadings "heir of entail." But there is nothing to shew, that he was not a proprietor of his estate with full powers to do all that he did in his dealings with the company; and there is no colour for saying, that they can be in any danger from any claims to be made by his successors.

However, on the part of the appellants, the chief stress was laid upon the arbiter having exceeded his authority; and the decrees arbitral would be void, if he had therein awarded beyond his authority anything to the prejudice of the appellants, which could not be severed from what he has lawfully awarded within the scope of his authority.

The direction about insurance against fire, even were there a plea to meet it, could not, I think, be considered of this description, for it may clearly be severed from the rest of the award, and, if *ultra vires*, would not be binding; and the same may be said of the sum to be paid for clearing the burn.

The chief objection was made to the award of compensation for damage likely to be sustained in future from the water of the Clyde being penned back by the works of the company, and thereby damaging the land of the claimant. It was contended, that such prospective damage could not properly be included in the award; and that, if any such damage should arise, the proper remedy would be an action against the company. But I am of opinion, that the arbiter was bound to take into his consideration the damage to the land of the claimant likely to be produced by the works which the company were authorized to construct, and were constructing, by virtue of an act of parliament; and that no future action could be brought against the company except for negligence in the original construction of these works, or in the manner in which these works were kept in repair.

To support this objection the judgment of the Court in the case of *Lawrence* v. *The Great Northern Railway* (16 Q.B. 643) was cited. But when the judgment of the Court delivered by Patteson, J., is examined, it will be found, that the action there rested on *negligence*, for he draws the distinction between that case and *Rex* v. *Pease*, (4 B. & Ad. 30,) where the defendant had done nothing but in strict accordance with the act of parliament; and he concludes thus:—"Here the company might, by executing their works with proper caution, have avoided the injury which the plaintiff has sustained. We think, that the want of such caution is sufficient to sustain the action." In *Vaughan* v. *Taff Vale Railway Company*, (3 H. & N. 743,) in which an action was held maintainable against a railway company for damage done to a wood adjoining the railway, from sparks flying from the engine, negligence was alleged by the declaration and found by the jury.

It would indeed have been strange, if, although the mound which the appellants were constructing across the valley of the Clyde, under the powers of the act of parliament, would certainly force back the water to the injury of the claimant's land every time the Clyde was in flood, and there was a moral certainty that the Clyde would periodically be in flood, the damage likely to be done could not be calculated and included in the compensation once for all to be awarded, and if the remedy intended for him was a fresh arbitration *toties quoties* when the flood came down.

Objection was then made to compensation being given for prospective damage to land of the claimants injuriously affected, not confining the claim to the land which the company were entitled to purchase. But I think, that the right to compensation extends to any land of the claimant injured by the severance of that which is purchased, or by the works which the company are authorized to construct. And the test is, whether the land which the claimant retains can be proved to be injuriously affected by this severance or by these works. The right to compensation depends on "cause and effect," not on "distance or proximity."

The only plausible argument, as it seems to me, for the reduction was founded on the second article in the final decree arbitral—"*Secundo*, In respect that the sums found due by this and my interim decree arbitral aforesaid include, *inter alia*, the sum of £4000 awarded to the said deceased Sir Norman Lockhart as compensation for the damages occasioned to his property by the operations of the said company in carrying their line of railway across the valley of the Clyde, I find that the said Sir Norman Lockhart and the succeeding heirs of entail shall relieve the said railway company of any claims which his present tenants, whose farms are not intersected by the said railway, may be enabled to establish against the said company, in consequence of their said operations, to the extent of the interest accruing on the said sum of £4000 from and after the date hereof, calculated at the rate of 3½ per cent. per annum, but under deduction of the sum of £16 4*s*. per annum, included in the abatement of £49 15*s*. to be allowed by Sir Norman Lockhart to the tenant of Wester Lampits, in terms of my said interim decree arbitral, and I decern accordingly." This objection is distinctly made by a plea in law; and, at first, it seemed fatal upon the suggestion, that the arbiter had included in the compensation to Sir Norman Lockhart what was due to a class of his tenants, who themselves had claims for compensation which they might bring forward against the company. But, upon a proper examination of the decrees arbitral, it was made out to my satisfaction, that no sum was awarded under this head to

which Sir Norman Lockhart was not himself entitled, and that the company cannot be in the slightest degree prejudiced by the conditional indemnity which is provided. Indeed, there is reason to believe, that this clause was introduced for the security of the company at their own request.

It was suggested at the bar, on the part of the appellants, that if the House should not give judgment for the entire reduction of the decrees arbitral, we should make a declaration as to the nullity of any part of them which may be considered *ultra vires* and not binding. But there being nothing in the decrees arbitral by which they are nullified, I am of opinion, that we are not bound to follow the course proposed, and I must advise your Lordships simply to adjudge, that the appeal be dismissed with costs.

LORD CRANWORTH.—My Lords, the point argued at the bar on the 2d, 3d, and 4th pleas was, that the arbiter, when he made his decree arbitral, had ceased to have any authority, for that, if the submission was to be regarded as a submission under the statute, all the authority of the arbiter ended by reason of the indefinite prorogations made in this case. If, on the other hand, it was not an arbitration under the statute, then it fell by reason of the death of Sir Norman Lockhart before the making of the decree arbitral. I think there is no weight in these objections. The arbitration was not strictly an arbitration under the statute. The parties agreed to give to the decree arbitral certain incidents not belonging to it by force of the statute, and for that (if for no other reason) the arbitration was not merely a proceeding under the statute. But the inquiry, as to whether it was or was not merely statutable, appears to me an idle waste of time. For if it had been merely a statutable proceeding, I see no reason to doubt, that it would be competent to the parties to authorize prorogation, as long as they might think it for their interest to keep the arbitration on foot, at least within reasonable bounds. The provision in the statute, that if the decree is not made within a specified time the matter shall be settled by a jury, is a stipulation introduced to prevent either party to the submission being prejudiced by unreasonable delay, and could not have been meant to prevent any extension of time, which both parties considered desirable for their common convenience. The consequence is, that the prorogations did not invalidate the proceeding, treating it as statutable. On the other hand, treating it as an arbitration not under the statute, I am of opinion, that it was not brought to an end by the death of Sir Norman Lockhart. He was in substance a vendor, selling his land to the company; his obligation was to part with his land, and to part with it for a consideration to be ascertained in a particular mode. There is authority for saying, that, when the amount of the consideration has been ascertained in the stipulated mode, the vendor's representatives are bound to do what he would himself have been bound to do if he had lived. The present case cannot be distinguished in principle from that of *Lord Selkirk* v. *Nasmith*, M. 627. Even if this were not so, still I think, that the death was not, in this case, important. For the arbitration was intended by the parties to be conducted, as far as might be, under the sanction of the statute. And I see no reason why we may not hold, that this statutable incident, giving validity to the proceeding, notwithstanding the death of one of the parties, would prevail, even though the parties may have added other sanctions not contemplated by the statute. On these short grounds, therefore, I concur with the LORD CHANCELLOR on this first point. I think there is no ground for saying, that the power of the arbiter had expired before he made his decree arbitral.

The other point insisted on by the appellants arises on the sixth plea. They contend that, supposing the arbiter had jurisdiction to make his decrees arbitral, they are void as being in two respects *ultra vires*,—First, because the arbiter gave decree for damages entirely prospective and contingent; and, secondly, because he gave decree in favour of Sir Norman for damages assumed to be likely to be incurred by tenants, whose lands are not traversed by the railway, and who were not parties to the submission. On the first point, the argument of the appellants rests on no foundation whatever. When the legislature authorizes the working of a railway, and enables the company, for the purpose of its construction, to take the lands over which it passes, it expressly binds the company to compensate those whose lands it takes, not only for the value of the land taken, but for all incidental damage which the making of the railway may occasion. When the amount to be paid to a landowner is left to be settled by an arbitrator, it is for him to say, whether the probability of this incidental damage is so great as to enable him to treat it as a matter practically lessening the value of the property of the landowner not taken for the railway. If he is satisfied that it is so, he is not only authorized but bound to award compensation. And this is what has been done in the present case.

With respect to the second ground, the facts are as follows: The arbiter awarded compensation to Sir Norman for contingent damage occasioned to his property by the carrying of the railway across the valley of the Clyde. The lands thus damaged were not traversed by the railway, and were, as to part at all events, in the occupation, not of Sir Norman himself but of his tenants. Of the right of the arbiter to award compensation to the landowner in such a case there cannot, as I have already stated, be any doubt; and the only question is, whether the decree is vitiated and made liable to reduction, because the arbiter has added, that, in respect of the sum awarded for damage to these lands, the landowner shall, to the extent of the interest of

the sum awarded, indemnify the company against any claim on them by the tenants. For that is the true effect of the award.

I can discover nothing in this direction which can invalidate the award. The sum awarded on this head was £4000, and we must assume that to have been the fair compensation for the damage occasioned to the lands, that is, to the inheritance. No claim had been made by the tenants of the lands in question, but the arbiter thought they might set up a claim at some future time. If the arbiter was mistaken in thinking, that such a claim could be set up by the tenants of farms not intersected, then the direction in question is one which must be inoperative, and therefore harmless. But suppose, that any such claim could be asserted, I can see nothing unjust or *ultra vires* in the direction, that, to the extent of the interest of the capital sum awarded, and which, in effect, becomes part of the inheritance, the company should be protected against the future claims of the existing tenants. In dealing with such a subject as that of future probable damage, and giving an immediate sum certain as the fair compensation to the landowner in consideration of his becoming exposed to evils, which may be greater, or may be less, or even may never arise at all, it is impossible to do more than approximate to strict justice; and the course taken here by the arbiter seems to me to be one which might be not unreasonable. He, in substance, increases the value of the inheritance by a sum of £4000. If the contemplated probable evils should turn out to be less than the arbiter contemplated, he will have given too much. If greater, he will have given too little. No one can contend, that, on such a ground, the award is bad. How is the case varied by the circumstance, that the sum awarded is not an absolute sum of £4000, but a sum of £4000 liable to the extent of the interest thereon to indemnify the company against certain possible claims of the then existing tenants of the lands in respect of the probable damage for which the £4000 was awarded? I see no reason for thinking, that this was not within the competency of the arbiter. The £4000 can only be withdrawn from the bank in which it is deposited by an order of the Court of Session; and due care will, of course, be taken, that it is not withdrawn till the time is past, within which any claim can be made on it.

Therefore, even independently of the view of this case taken by the LORD CHANCELLOR, (in which I entirely concur,) namely, that the error (if error it be) does not afford ground for reduction, I concur in the conclusion, that the decree below ought to be affirmed.

I have not adverted to any of the other objections insisted on at the bar, none of them in my judgment being raised by the pleadings. But it is right, I should say, that if they had been legitimately before the House, I should concur with the LORD CHANCELLOR in thinking, that they were unfounded.

LORD WENSLEYDALE.—My Lords, I also think, that the judgment of the Court of Session should be affirmed. During the course of the argument at your Lordships' bar, I have felt very great doubt, but that doubt affects a very small part of this case, and must give way to the opinion already expressed.

The most important objections to the decree arbitral were these—1st, That the submission to arbitration was either statutory under the 8th Vict. cap. 19, or at common law, and in either supposition the award was void. 2d, That the arbiter acted without authority in employing an engineer to survey and report, and so delegated a part of his judicial duty to him. 3d, That he also acted without authority in awarding prospective and contingent damages. 4th, That, in awarding a sum of money to Sir Norman R. Lockhart as a compensation for damages, he imposed an obligation on him to relieve the railway company of the claims of tenants whose lands are not intersected by the railway; and that those claims were uncertain, and rendered the sum payable to Sir Norman uncertain.

Several other objections were made in the argument, but they are either of no weight, or, if of any, are not open upon any of the pleas in law. The most important of the objections I have mentioned is, in my mind, the fourth.

The first objection was stated in the form of a dilemma, that it was either a statutory arbitration or one at common law. If statutory, it was said, that it expired at the end of three months, according to the thirty-fifth section of the Lands Clauses Consolidation Act of Scotland, 1845, and could not be extended beyond that period by consent; and that if it was at common law, it fell, by the death of Sir Norman, before the final decree arbitral. I am clearly of opinion, that this objection is unfounded. The thirty-fifth section is, I think, introduced for the benefit of both parties, that the settlement of the question of compensation might not lie over indefinitely, which it would do if the parties had not stipulated, that the award should be made in a certain time. It would have depended upon the mere will of the arbitrator when he should choose to make his award, and the power of appeal to a jury would be entirely taken away. I think, that the principle "*quilibet potest renunciare juri pro se introducto*" applies, and that it was competent for both parties to agree to enlarge the time. Further, there is no doubt, that they did so by the enlargement to a day in blank, (which, in effect, by the Scotch law, is for one year and a day,) and also by their subsequent conduct. If the arbitration therefore was statutory, it did not fail on this ground. If it was an arbitration at common law, it is contended, that it failed by the

death of one of the parties, Sir Norman. I am of opinion also, that this objection must fail. Though the agreement is in form a submission to arbitration, it is really in the nature of an agreement to purchase land from Sir Norman, and the right, so far as related to him, to construct the railway upon it. It is like a binding agreement to purchase an estate at a price to be fixed by a third person; and if one of the contracting parties in such a case were to die, the contract would still be binding, and the surviving party and the personal representative of the deceased would be compellable to fulfil it.

It is, therefore, unnecessary to determine whether the arbitration is statutory or at common law; but I rather think it is, as it has been termed in the course of the argument, "hybrid." It is compounded of both; and so considered, it includes in it, by reference to the statute, the statutory provision, that it shall not fail by the death of one of the parties. The first objection, therefore, cannot avail the appellants.

The second objection—that the arbiter acted "*ultra vires*" in employing an expert to survey and report—is not maintainable. An arbitrator is not bound to examine witnesses; and cannot, by the law of England, insist upon their being examined on oath, unless the submission provides for it. By the 31st section of the above mentioned act he may, but is not bound to examine the parties and their witnesses on oath. Nor is he prevented from consulting men of science in every department where it becomes necessary. So he has a power to call in a valuer to assist him, unless restricted by the terms of the submission. This was decided in *Anderson* v. *Wallace*, 3 Cl. & F. 26.

As little weight is due to the third objection, that the arbiter awarded prospective and contingent damages, which he ought not to do. The answer is, that he really has not done so. The compensation given is for the necessary damages by the construction of the railway, and for the highly probable damages which would be occasioned in the ordinary course of events by the vicinity of the river Clyde.

It becomes, therefore, unnecessary to consider what would be the effect of awarding a sum for purely speculative damages, not reasonably foreseen. Generally speaking, railway and other similar companies acquire parliamentary power to purchase land and to construct their works, on condition of their paying the price of the land and the compensation to the parties who may sustain damage by exercise of the acquired power to do acts, for which, if the authority of the legislature had not been given, the landowners might have maintained an action. That price should be a full compensation, once for all, for the injury to those rights. When paid, the company have obtained a lawful right to construct their works; and if they happen to injure one in the reasonable exercise of these rights so purchased, they are irresponsible for such injury. Those rights are given for the public good; and if an extraordinary unforeseen damage occur, the suffering party must bear it, and is without remedy. But if those acquired rights are exercised unreasonably and without due care, those who have acquired them are responsible as they are for their exercise of common law rights. *Sic utere tuo ut alienum non laedas.*

The case of *Lawrence* v. *Great Northern Railway Co.*, (16 Q.B. 643,) may have been well decided as belonging to that class of cases in which the acquired right has been negligently executed, for which therefore an action would lie. I much doubt whether the company would have been responsible for damages occasioned by the due exercise of their powers, though those damages were unforeseen at the time the compensation was settled and paid. In the case in the Court of Exchequer the damage done to a distant piece of land was clearly not within the terms of the arbitration, the award on which was sought to be impeached, and the dictum of the Lord Chief Baron, that the claimant might proceed for further damages under the 68th section of the general Act was clearly extrajudicial, and was founded upon the authority of *Lawrence's case.*

These observations, of course, do not apply to cases, of which there are some, (*The King* v. *Leeds and Selby Railway Co.*, 3 A. & E. 683; *Lee* v. *Milner*, 2 M. & W. 839,) where, by the express terms of the special acts, compensation for damages from time to time sustained are payable.

The last objection is, in my view of the case, the most serious. It is, that the final decree arbitral is void in consequence of the direction comprised in it, that the sum of £4000 and interest is awarded to Sir Norman as compensation for the damage occasioned to his property by the operations of the company in carrying the line of railway across the valley of the Clyde, and it proceeds to find, that Sir Norman and his heirs of entail shall relieve the company of any claims which his present tenants, whose farms are not intersected by the railway, may be enabled to establish against the company in consequence of their operations to the extent of the interest accruing on the sum of £4000 from the date thereof, at the rate of three and a half per cent. per annum, subject to a deduction. It is said for the appellant, that it is immaterial whether those tenants had really any claim against the company or not, for that it must be inferred, that they were to pay more than for the actual damage done to Sir Norman as the price of his indemnity against those claims, and that it was impossible to say how much more; and that, therefore, the award in this respect was uncertain and void.

It is, however, in my mind, very questionable whether those supposed claims of tenants

are more than imaginary, and whether this clause has not been introduced into the decree, not because there was any real danger of valid complaints by such tenants, but to satisfy importunity of the appellants' solicitors, made before the arbitration was concluded, that the appellants should know in what way the arbiter proposed to secure the company against the tenants' claims, if the money was paid to Sir Norman. At all events, however, it is to be observed, that this provision does not affect the principal sum of £4000 that is certainly due. It is the interest only which is affected, in case any of the tenants' claims should be made good. This is not, properly speaking, an award in which every matter in dispute is to be finally disposed of, but a valuation. And the only effect of the objection ought to be that the valuation should be reduced *pro tanto*, if the respondent should so consent to it. But having heard the opinion already given by my noble and learned friends, I agree with them in thinking that a sufficient case is not made out to reverse the judgment of the Court of Session, either in the whole or in the part.

LORD KINGSDOWN.—My Lords, I entirely concur in the judgment which it is proposed to your Lordships to pronounce, and I think it would be only a waste of time, if I were to go through the reasons which have been already, to my mind, satisfactorily given.

Interlocutor affirmed, and appeal dismissed with costs.

For Appellants, Grahame, Weems, and Grahame, Solicitors, London; Hope and Mackay, W.S., Edinburgh. — *For Respondents*, Robertson and Simson, Solicitors, London; Bell and M'Lean, W.S., Edinburgh.

MARCH 28, 1860.

PERCY ARTHUR CUNNINGHAM, *Appellant*, *v.* SIR THOMAS CUNNINGHAM FAIRLIE, *Respondent.*

Entail—Fetters—Alienating—Disponing—Reduction—*The prohibitory clause of a tailzie declared, "that it shall not be lawful to the heir male of my body, nor to any other of the heirs or members of entail, to sell, dispone, wadsett, or impignorate the lands, nor to contract debts thereupon." The irritant and resolutive clause provided, "that if the heirs or members of entail, shall act and do in the contrary of any of the particulars above specified, with respect to altering the order of succession, selling, or contracting debt, then all and every one of such debts, acts, and deeds, shall be* ipso facto *void and null."*

HELD (affirming judgment), *That the tailzie was invalid, in respect that "disponing" was not struck at by the irritant clause.*[1]

The *defender* having appealed, maintained in his *printed case* that the judgment of the Court of Session should be reversed because—1. The deed of entail was effectual in terms of the Statute 1685. *Russell* v. *Russell*, 15 D. 192. 2. Because the Statute 11th and 12th Vict. c. 36, § 43, upon which the respondent founded as shewing the invalidity of the entail, referred solely to defects in the prohibitory clauses of deeds of entail, and not to any alleged defect in the irritant or resolutive clauses. *Bogle* v. *Cochrane*, 7 Bell's Ap. 75.

The *respondent* in his *printed case* supported the judgment on the following grounds—1. The prohibitions in the deed of entail against alienating were not duly fenced by a valid or sufficient irritant or resolutive clause. And 2. An entail, defective like the present, in regard to any one of the statutory provisions, was, by the Entail Amendment Act, 11 and 12 Victoria, cap. 36, § 43, declared to be invalid and ineffectual as regards all the prohibitions, and the estate declared subject to the debts and deeds of the heir in possession. *Boswell* v. *Boswell*, 14 D. 378; Sandford on Entails, pp. 298, 299; Bell's Principles, § 92; 1 Stair, 14, 1; 1 Bankton, 19, 3; 3 Erskine, 3, 4; 1 Bell's Commentaries, (6th edition,) p. 87; *Ogilvie v. The Earl of Airlie*, 2 Macq. 263; *ante*, p. 470; Bell's Principles, (4th edition,) p. 625; 3 Ersk. 8, 29; Duff, Feudal Conveyancing, pp. 358, 359; Menzies' Lectures, p. 697; *Sinclair* v. *Sinclair*, 1 Paton, Ap. 459; *Nisbet* v. *Young*, 2 Paton, 98; *Little Gilmour* v. *Caddell*, 16 S. 1261; *Lang* v. *Lang*, M'L. & Rob. 871; 11 and 12 Vict. cap. 36.

The *Attorney General* (Bethell), and *Kerr*, for the appellant.—The rule established with regard to the construction of deeds of entail is, that they are to be treated as *strictissimi juris*. It is, however, a mistake to suppose, that the Courts are to be ingenious in devising constructions which are favourable to freedom; on the contrary, the plain meaning of the language used must

[1] See previous reports 19 D. 597; 29 Sc. Jur. 276. S. C. 32 Sc. Jur. 473.