received, aided by such other evidence, ought or might reasonably be supposed to have affected the verdict.

Now, my Lords, no observation arises in regard to the effect or value of the parole evidence independently of the letters, because the appellant not only did not request that evidence to be submitted to the jury, which he was bound to do, but he in express terms withdrew it from the jury, and declined to ask for a verdict; and further, there is no exception upon the ground that that evidence was not submitted to the jury, and, under the circumstances, there could not be any such exception.

My Lords, the remaining exception refers to the opinion expressed by the Judge, that the missives or letters being in existence, the tenancy could not be proved by any other evidence. Upon this point, I submit to your Lordships that no exception lies, and that it was the duty of the appellant's counsel, if he had any other evidence which he was prepared to contend ought to have been received in maintenance of the issue, he was bound to produce it, and if rejected upon its being tendered, to except to the rejection; and that it was not competent to the appellant to rest upon the opinion so expressed by the Judge. The respondent had a right to see what that evidence was; and he might not have objected to it, or might have waived any objection, although the evidence might have been objectionable, preferring to rely upon some answer to it, or upon its failing to satisfy the jury, rather than to risk the case upon the validity of the objection; but by the appellant choosing to rest upon the opinion expressed by the Judge, the respondent was deprived of the exercise of that discretion, and the Judge could not waive the production to the prejudice of the respondent.

Upon the whole, my Lords, it appears to me, by the appellant's evidence, that the letting by the corporation was by writing, and that as the issue was a distinct precise issue, whether a specific defined spot of ground was included in the demise, the appellant was bound to produce the written document by which the demise had taken place. The distinction is obvious between the evidence receivable to prove the mere fact of A being tenant of B, where the subject of the tenancy is undisputed, and where the sole question is, if A is tenant of some precise disputed spot—in other words, where the question is, parcel or no parcel of the land let. I also think that upon the bill of exceptions, even if it sufficiently appears that the letters were at all offered in evidence, it must be taken that they were offered as proving leases, and for no other purpose, and that so offered, they were properly rejected, not being stamped. I also think that the bill of exceptions ought not to be allowed, because the letters—the rejection of which is the ground of the exception—do not sufficiently appear upon the record to enable the House judicially to apply the ruling to them. It also appears to me, my Lords, that if they had been read to the jury, they did not furnish sufficient evidence to warrant a verdict that the ground purporting by the letters to be let, comprised the disputed spot: That if the letters did purport to let the disputed spot to the appellant, there was no sufficient evidence of title in the corporation to that spot, to warrant a verdict. Further, my Lords, regard being had to the fact, that neither the corporation nor the appellant were in possession of the disputed spot during any part of the time mentioned in the issue, I think even a formal lease would not, *quoad* the disputed spot, have created the relation of landlord and tenant, as between the corporation and the appellant, in a sense that would sustain the present suit. I am also of opinion, that the ruling of the Judge, that the tenancy could not be proved by any other evidence, did not furnish a valid ground of exception, for the reasons I have stated.

Upon the whole, my Lords, I entirely concur in the view which is taken by my noble and learned friend upon the woolsack, and also submit to your Lordships, that this appeal ought to be dismissed with costs, and that the judgment of the Court below ought to be affirmed.

Interlocutor affirmed with costs.

First Division.—G. H. Lang, *Appellant's Solicitor.*—Evans and Clode, *Respondent's Solicitors.*

MARCH 30, 1852.

THE EDINBURGH, PERTH, AND DUNDEE RAILWAY COMPANY, *Appellants*, *v.* JOHN LEVEN, W.S., *Respondent.*

Lands Clauses Act—Statute 8 and 9 Vict. c. 19—Clause—Construction—Petition to Sheriff, Competency of—Process—*A railway company entered into an arbitration with A, a landowner, as to the price of land to be taken by the company. A subsequently refused to abide by the decree-arbitral, and brought a reduction of it, in which he succeeded; but before decree of reduction was obtained, A served a notice on the company, under* § 36 *of the statute* 8 *and* 9 *Vict.*

c. 19, *claiming a certain sum as compensation, &c. for the land. The company then, within twenty-one days, but without giving previously the ten days' notice and offer required by* § 37, *presented a petition to the Sheriff for a jury to assess the price.*

HELD (affirming judgment), 1. *That the petition was incompetent and null, for want of the notice and offer required by* § 37. 2. *That the company not having presented any valid petition to the Sheriff for a jury to assess the value, within twenty-one days after receipt of A's notice of demand, A became absolutely entitled to the sum he had demanded.*[1]

The respondent was proprietor of certain subjects at Burntisland, Fifeshire. The Edinburgh and Northern Railway Company resolved to acquire certain portions of those subjects for the purposes of their railway. They accordingly served upon the respondent the necessary notice of their intention to take such parts of his property as they required, in terms of the 17th section of the 8th of Vict. c. 19, commonly called "The Lands Clauses Consolidation Act." Shortly after this notice had been given, the railway company offered a certain sum for the ground proposed to be taken; but this offer was rejected. The railway company subsequently entered into possession of, and commenced their operations upon, the respondent's property; and with the view of settling the price of the subjects, and amount of compensation to be paid, the railway company and the respondent entered into a submission in December 1845. In the submission, a decree-arbitral was pronounced on 2d March 1846, fixing the sum to be paid to the respondent at £840. This sum was tendered to, but refused by, the respondent, who soon after brought a reduction of the decree-arbitral, on the ground of informality in the procedure; and, in that action, decree of reduction passed in absence.

Meanwhile, on 12th June 1846, a notice in terms of the 36th section of the Lands Clauses Consolidation Act, was served upon the advocators by the respondent, intimating that he claimed from the railway company the sum of £2200 as the price of, and compensation for, the ground and buildings to be taken by the company, and the farther sum of £800 as compensation for injury done, or to be done, generally to the remaining part of his property by the contemplated operations; and at the same time giving notice of his desire, upon the failure on the part of the advocators to pay the sums claimed, to have the amount of the price and compensation determined by a jury.

Without giving any preliminary notice, (the necessity for which, under the 37th section of the above statute, was the subject of the present action,) the railway company, upon 3d July 1846, presented a petition to the Sheriff, praying that a jury might be summoned to determine the question of disputed compensation between them and the respondent. The petition was admitted to have been presented within twenty-one days after receipt of the above-mentioned notice by the respondent, as required by the 36th section of the Lands Clauses Consolidation Act.

The Sheriff-substitute of Fifeshire, at Cupar, after some discussion as to the competency of the procedure, allowed the respondent to give in answers to the petition. In these answers, the only ground of objection to the petition which requires to be noticed, was the following—viz. that while the Edinburgh and Northern Railway Company had complied with the terms of the 36th section already referred to, by presenting their petition to the Sheriff within twenty-one days after receipt of the notice served upon them by the respondent, they had failed to comply with the requirements of the 37th section of the said act, by which it is provided, that—"before the promoters of an undertaking shall present their petition for summoning a jury for settling any question of disputed compensation, they shall give not less than ten days' notice to the other party of their intention to cause such jury to be summoned; and, in such notice, the promoters of the undertaking shall state what sum of money they are willing to give for the interest in such lands sought to be purchased by them from such party, and for the damage to be sustained by him by the execution of the works."

The Sheriff in consequence of the ten days' notice not being given under 8 Vict. 19, § 37, dismissed the petition. The Lord Ordinary adhered and the First Division also.

The Railway Company appealed, and prayed for a reversal for the following reasons:—

1. Because the statute contemplates two several cases of application for jury trial—the one where the company take the initiative, and spontaneously, and without express requisition, present their petition to the Sheriff; the other where, under § 36, the initiative is taken by the proprietor, and he expressly requires the application to be made within twenty-one days; and a provision intended to be applied to the one case merely, cannot, rightly or legally, be made applicable to the other. 2. Because the ten days' notice of intention to present a petition to the Sheriff is only applicable to the case in which the company take the initiative, and not to the case contemplated in § 36, in which the proprietor himself makes a requisition for the trial, which must within twenty-one days be complied with. 3. Because, even if the statute required notice in the case contemplated in § 36, yet the provision of the statute on that subject being directory merely, the want of that notice in the present case did not infer a nullity in the petition, and its

[1] See previous report, 10 D. 1013; 20 Sc. Jur. 371. S. C. 1 Macq. Ap. 284: 24 Sc. Jur. 413.

consequent dismissal, coupled with the consequence of the company becoming penally liable for the full sum demanded by the respondent; but the utmost extent of right given to the respondent was merely to demand that the purposes of the notice should still be secured to him,—which might have been competently and effectually done without dismissing the petition.

The respondent *answered* that—1. The petition presented by the appellants to the Sheriff was incompetent, and not in terms of § 37 of 8 Vict. c. 19, in respect that the appellants did not, upon presenting their petition, give ten days' previous notice to the respondent. 2. In any view, the judgment of the sheriff is, by § 139, declared to be final and conclusive, and not subject to the review of the Court of Session. 3. The warrant taken by the appellants to cite the respondent was irregular, not being conformable to the provisions of the statute, and the citation served on the respondent was null and void.

After the above judgment of the Court of Session, the respondent brought an action narrating the above procedure, and concluding for payment of £3000 (the £2200 and £800 above mentioned) from the company, as being bound now to pay him that sum as the compensation claimed by him, and on the ground that he was entitled to it absolutely, without further procedure, as a consequence of the failure of the company in duly presenting their petition to the Sheriff within twenty-one days.

The company resisted the action. The Lord Ordinary found in favour of the pursuer, and the First Division adhered.

The company also appealed against this judgment, pleading that—1. The petition presented by the appellants to the Sheriff of Fifeshire was presented in due compliance with the provisions of § 36 of the statute. It was unnecessary, towards making a valid and competent petition under that section, that there should have been ten days' notice of the intention to present it, such as is provided for in § 37, because that notice is only required where the company take the initiative, and make application for a jury trial *ex proprio motu*, and not where the proprietor, under § 36, makes an express requisition for jury trial, with which the company is bound to comply. The petition therefore, having been validly presented without such previous notice, the provisions of the statute were fully complied with; and the alleged penal consequence of non-compliance did not arise. 2. Supposing that the ten days' notice of the intention to present the petition had been requisite, there was still no ground for holding the petition to be null, and, on that ground, enforcing against the appellants the penal provision applicable to the case in which no petition is presented, as the provision concerning the notice is at best directory merely, not imperative; —far less imperative in such a sense, that the want of the notice would not only nullify the petition, but raise against the appellants the penal obligation of paying the whole sum demanded. It was still competent to attain all the objects for which the notice was intended, without dismissing the petition by orders made in the process which the petition originated. And this was the proper course to follow. The petition still remained, and ought so to have been held, a competently presented petition; and, being so, the penal obligation arising on default of its being presented did not take effect. 3. In any view, and even supposing that it was proper to dismiss the petition for want of previous notice, the penal obligation was not enforceable; for whilst the notice is required by § 37, that section does not enact any penalty for the want of such notice, nor declare that, in default, the company shall be bound to pay the full sum demanded. The penalty is enacted by § 36, and takes effect only in default of a petition being presented. If a petition should be actually and in good faith presented, this is sufficient to satisfy the statute, and to avoid the penalty. The object of the statute—viz. to put it within the power of the proprietor to proceed to a jury within a limited and definite period—was fully secured to the respondent. The statutory object being attained, the statutory penalty is not demandable.

The respondent *answered* that—The appellants having failed to avail themselves of the privilege conceded to them by 8 Vict. c. 19, of having the price or compensation named by the respondent, for his land compulsorily taken by the appellants, submitted to a jury in the manner and within the time prescribed by that act, must be held liable for the amount of the price or compensation as fixed by the respondent.

Sol.-Gen. Kelly and *Moncreiff* for appellants.—The question is, if, in cases where the company have not taken the initiative, and petitioned for a jury *ex proprio motu*, § 37 applies. If it does, it is obvious that the company, instead of having 21 days to deliberate whether they should pay the sum claimed, or resort to a jury, would have, in fact, only 11 days, for by § 36 they must present their petition within 21 days, and by § 37 they must give notice 10 days before that. Yet the legislature clearly intended they should have 21 days for such deliberation, for sec. 23, which is the converse of § 36, and deals with the case of arbitration, allows that period. Besides, in the English Consolidation Act (8 and 9 Vict. c. 18), one clause deals with the cases both of arbitration and a jury, and 21 days are given in both events; and though, in the act for Scotland, there are two clauses instead of one, there is no reason to suppose the effect is different as to the number of days. It is said this ten days' notice is necessary to enable the owner to determine whether or not he ought to enter into arbitration; but the very fact of his having proceeded

under § 36 shews he had abandoned the idea of arbitration. He had made up his mind to this point—he says, "Pay me the sum I ask, or summon a jury." Hence it was quite superfluous and unnecessary for the company to renew an offer before petitioning for the jury. No such corresponding obligation is imposed on the landowner, and why should it be on the company? There is no clause calling for such a counter-proposal. Besides, if it were necessary, how easy would it be for the company to comply with that formality, by tendering a nominal sum of 1*s*. There is no mutuality in such a construction of the statute.

[LORD BROUGHAM.—You talk of mutuality: If that were a guide, and if, as you say, a nominal tender of 1*s*. would satisfy the statute, it would follow, that if the landowner did not accept that offer within a certain time, then the company might have his land for nothing. That would be to make it a mutuality.]

It would be no more unjust, however, in the company to take the land for 1*s*., than for the landowner to compel them to give him £300,000, merely because he asked it.

[LORD CHANCELLOR.—Would it not be an evasion of the act for the company to offer 1*s*.?]

No; a railway company never does make a tender of what it really believes is the true value. We say, therefore, that taking a view of this scheme of the whole statute, § 37 looks forward but not backward—that it qualifies the succeeding clauses, but not § 36. 2. Is § 37 imperative, or directory? The omission to give the ten days' notice was at most a mere irregularity, and not a ground of nullity.

[LORD CHANCELLOR.—In what order, then, ought the party to have proceeded, according to your construction?]

He should have gone to the Sheriff and asked ten days' notice to be given to him, and that the trial might be put off until it should be so given; and if he was entitled to the counter-proposal or offer from the company, that that also should be made.

[LORD CHANCELLOR.—Where is the authority in the statute for all that?]

We may as well ask, where is the authority for any proceedings before the Sheriff, except his merely issuing a warrant for a jury. His general jurisdiction is not conferred by this statute, simply because he is a judicial officer well known to the law of Scotland; and his power is assumed to be this—to do justice generally between the parties. He could competently have put the respondent in the position in which he would have stood had the ten days' notice been given.

[LORD CHANCELLOR.—How could the Sheriff give a benefit which is not conferred by the statute?

[LORD CAMPBELL.—The Sheriff has no *nobile officium* here; he acts under the statute, and he has only to construe the statute, and do what it enjoins.]

The Sheriff has a general jurisdiction by the law of Scotland, and the statute assumed that as a basis—hence it did not give him a power to examine witnesses, &c., simply because he had the power already without the statute.

[LORD CHANCELLOR.—Then you mean, in short, that he could dispense with the latter part of § 37, and grant an equivalent for it.]

We think he could. The only difference between the English and the Scotch act is, that the Sheriff in Scotland has the power to do justice between the parties. Besides, § 36 is a highly penal enactment—it makes a silence on the part of the company for a certain time, to amount to acquiescence; and if the company, through some slight mistake, should omit any of the requirements, they might have to pay ten times the real value of the ground, simply because the owner may have asked it. Section 36 must therefore be construed strictly in favour of the company, and the language cannot be extended beyond the requirements of that clause, all of which have been complied with. Further, the act contains no provision, that if ten days' notice be not given, the petition shall be null and void. There is no irritant clause, and therefore no nullity ensues —Ersk. 2, 11, 7; *Maxwell* v. *Stevenson*, 5 W. S. 269; *Thames Co.* v. *Rose*, 3 Railway Ca. 177; *Corregal* v. *London* and *Blackwall Co.*, *ibid.* 411. Stair says (1, 17, 14), everything done contrary to the order or prohibition of a statute is not a nullity; see also Stair, 4, 40, 16. A good test of nullity is this:—Suppose the respondent had taken no objection at all, would the petition not have been good? Besides, though the petition may not have been a good foundation of the inquiry, it might have been good for other purposes. Thus a summons, though insufficient to found a decree, may yet be good to interrupt prescription.—Stair, 2, 12, 26. So here the petition was at least good to avoid the penalty by default; the respondent may have been entitled to stop the proceedings, but not to go for the whole sum on the ground of default.

Second Appeal.—The respondent here was as much out of the statute as we were. He took advantage of § 36 at the time the award stood unreduced. He had elected his course; and there is no power given by the statute to a party who has elected to go into arbitration, to go simultaneously to a jury. Section 23 seems clear as to this.

[LORD BROUGHAM.—I see no trace of this argument having been taken in the Court below. You can only raise it here if the record will admit of it.]

We think we are warranted in now raising it, especially under our second plea in the defences,

which was, "that the claim is, on its merits, groundless." The parties had both engaged to go into an arbitration, and that arbitration was going on, and the award was unreduced when the respondent served his notice. Now, in these circumstances, we were not bound to answer that notice. The notice was incompetent, while the alternative course was being taken. Suppose, before the award had been given, he had treated it as null, taking the chance of its ultimately turning out objectionable, would we have been bound to answer the notice so served? The election of the one course—that of arbitration—was totally inconsistent with his proceeding at the same time to take the benefit of the other course—viz. jury trial.

[LORD CAMPBELL.—Then how was the price here to be ascertained unless by the amount of the landowner's demand—the petition, as you assume, being null, and the ground being taken possession of?]

It is difficult to say.

Bethell Q.C., and *A. Broun*, for respondent—

[LORD CHANCELLOR.—You need not address yourselves to the appellants' last argument, raised here for the first time, as we think the record does not admit of it being urged as a point in the case.]

It has been long settled in our law, as well as in Scotch Appeals, that where a statute conferring powers on a company to acquire land *in invitum*, lays down certain directions to be observed, these, so far from being merely directory, are in fact preliminary conditions. They must be strictly performed—*per* Lord Eldon in *Blakemore* v. *Glamorgan Canal Co.*, 1 Mylne and K. 162; *Goldie* v. *Oswald*, 2 Dow, 534; *Shand* v. *Henderson*, 2 Dow, 519; *Webb's Case*, 1 Rail. C. 599. The Court is not to be moved by the mere hardship of the individual case, else it would have a dispensing power. But there is no trace of such a doctrine either in law or equity. The Court has no duty to perform but to construe the act. It is said here, that if § 37 apply to a case in another part of the statute to which § 36 does not apply, this shews that §§ 36 and 37 refer to distinct classes of cases. But this is an unsound mode of construction. The words of § 37 are universal, and most comprehensive, and this universality cannot be thus cut down to the measure of one or two cases only. When we take § 36 along with § 37, there is something reasonable in the arrangement. Thus, of the 21 days given to the company, the first 11 are for deliberation; till the end of them, the company are *in dubio*. But, then, if they resolve to petition, they must give ten days' notice to the landowner—and why?—in order that he also may have time to deliberate on their offer, and to prepare for the trial. There is no pretence for saying the Sheriff had any extraordinary power to act. He merely acted ministerially, and could only act in that way. A court of equity even will not relieve from the observance of a statute, unless a fraudulent use has been made of the provisions of the statute.

Second Appeal.—The company having taken possession of the land, cannot now turn round and say the price is a penalty, and they ought to be relieved from paying it. The contract of sale has been completed, but the power of ascertaining the price by a jury has been lost, and the respondent is thus entitled to the sum he demanded.

Moncreiff replied for appellants.

LORD CHANCELLOR ST. LEONARDS.—My Lords, in this case there are two appeals; and for myself I must say, agreeing with my noble and learned friends, that during the whole of the argument, I have not been able to entertain any doubt as to the true construction of this act of parliament—and this certainly is one of several cases which your Lordships have heard during the present session, in which an attempt has been made to put what I shall term a violent construction on the plain words of an act of parliament. I am very far from saying that you ought not to put a construction on general words so as to limit their operation, if you find materials to do so upon the face of the act of parliament itself; but if words are perfectly plain, and apply to all cases generally, it is, in fact, legislation to cut down their operation, simply because they bear hard on an individual in a particular case.

Now, my Lords, this act of parliament appears to me to be very sensibly framed. It provides for companies which have power to take lands *in invitum;* if they can, they are to agree with the parties, and if they cannot agree, they may go to arbitration; and § 35 provides for the case of arbitration failing within three months,—if it does fail, the party seeking compensation is required to do something under that particular section.

In this case, under § 17 of the act, the company gave notice of their intention to buy, and that notice, followed up by what took place, made as perfect a contract as could exist.

It is said that § 36 is highly penal. It may be very disadvantageous, and may operate very harshly on the company in this case, if they have made a slip; but there is nothing penal in it—it is the simplest of all simple things. If there be no agreement, no arbitrament, binding on the parties, the party claiming compensation shall have liberty to require a jury, stating the price he is willing to take; and he does that at the peril of having to pay the costs under a subsequent section. Supposing § 37 is to be embodied in § 36, where would be the hardship or difficulty of construction? If a party entitled to compensation gives a notice such as is required by § 36, the company will have to do this. In the first place, they will have to give a notice to

the party that they intend to present a petition to the Sheriff for a jury, as they do not agree to the sum proposed. It has been very often dropped at the bar as if § 37 simply required a notice; but it requires, with a notice, an act of the deepest importance to be done, viz. that the company, as purchasers, shall state the price that they are willing to give. In that case, the parties are put on a state of equality;—one party is bound to state the sum he asks, and the other the sum he is willing to give.

We are told at the bar, and I know it to be correct, that this provision is evaded, and that companies, being alarmed lest the sum they offer should be considered the smallest, put a nominal sum. That is an evasion of the act of parliament. I do not say it is one that can be punished, but it is an evasion of the clear intention of the act of parliament, which meant that the parties should state distinctly the sum the one is willing to give, and the other to take. Again, the company is to be at the peril of costs, and they are punished in that respect. Supposing § 37 to be embodied in § 36, and the company have first to give a notice to the person entitled to compensation—that is, to the owner of the land—of their intention to present a petition to the Sheriff for a jury, that requires ten days' notice, and, as I have already stated, they must add to that the price they are willing to give. Then, within 21 days, they must present a petition to the Sheriff; and what is the consequence if they do not? That which is called a penal consequence, ensues. Now, what is the consequence? The man to whom the property belongs, has stated the sum he is willing to take for it; the man to whom the property is to belong, is called upon to state the sum he is willing to give; and if he who is to buy does not desire a jury to be summoned within 21 days, then he is to be considered as fixed to the price named. It may be a low price, or it may be a high price; but the act of parliament endeavoured, in requiring a price to be stated, to prevent litigation, and to induce the one party to state a sum which the other party might be inclined to give, and so to prevent the necessity of going to a jury. The case has been argued simply on § 36; and it is said, if you import § 37, then, in the first place, where are the 21 days? I think that argument was very satisfactorily answered by Lord Fullerton in the Court below,—it is not any given number of days, but it is any day within the 21 days. It may be the last day. Section 37 requires that you should give ten days' notice before you present your petition to the Sheriff. Then you have the 21 days. Suppose, under § 37, you give the notice of your intention, and you do not choose to follow that up under § 36, I am not aware that there is any power to compel you to do so; and if not, you would have the 21 days; you are called upon to do an act sooner—that is, to tell the party ten days before you can do the act, that you mean to do that act—that is, present a petition. Under the clause, you have the 21 days in which to present a petition; and if you do not like to do so, you need not do so,—and you may then take what are called these penal consequences,—you may take the estate at the sum at which it is offered to you.

Now, considering that the company are bound from the time they give the notice, and that the party seeking to obtain the price for his land is bound, from the time he asks for a jury, to state the sum he is willing to take if the company do not choose to avail themselves of the opportunity afforded to them of going to a jury under § 36, there is a perfect contract. One party says, "I give you notice that I am going to buy your land, and I am ready to give you £10,000 for it." The other party either acquiesces, and takes the £10,000, or elects to have the matter tried by a jury. I see, therefore, no hardship in the case; the hardship, if there be any, is, that there might be something ambiguous on the face of the act of parliament,—that is the only hardship I can see; for if the act of parliament has once received a proper construction, there is no difficulty, and no hardship.

Now § 37, which immediately follows § 36, is in the most express terms applicable to any case, and to all cases, in express words, following upon § 36, which, at the latter portion of it, refers expressly to the summoning of a jury to try the amount of compensation. Yet the argument is rather singular on this point. It is said, § 37 will apply to the case where there is an initiative on the part of the company, but it does not apply to a case where the initiative is on the part of the person claiming compensation. Why? Are you to introduce the words—"In the case which is not before provided for?" There is no case provided for in this act of parliament, previously to this section, speaking of the company's seeking to have compensation settled by a jury. Therefore, if it does refer to anything preceding, it must be to § 36, and it is admitted that it does apply to the section which follows. The company have, under § 38, themselves to begin, and they are to present a petition to the Sheriff, and give previous notice of their intention to do so, in order to have the compensation assessed; and it is then admitted that § 37 applies to that. There is much more reason for contending that it applies to § 36, because, in the case to which it is admitted it does apply, the other party has not been called upon to state the sum which he is willing to take; he has not bound himself at all; but this act of parliament requires, in a given case, that the man to whom the land belongs shall bind himself by making an offer. Can there be any case, therefore, under this act of parliament, which so strongly—so naturally—according to its clear import and meaning, requires that the company should, in order to meet fairly the other side, give notice, in terms of the act of parliament, of the sum which

they are willing to give? They are to give that notice in all other cases; and when this case requires the application of the law more strongly than any other case that can exist, why is it by construction only, and in the face of the strongest and most clear words, comprising this as well as every other case, to be excluded? If any case is to be excluded, this is the precise case which ought to fall within the rule; and I need not rely on the juxtaposition, but no one can look at the collocation of the sections without seeing that the arbitration clauses are to form one system, the jury clauses are to form one system, and then the clauses carry out that system. I therefore submit to your Lordships, without the slightest hesitation, that this clause clearly applies to the case at the bar, and, applying it, it extends to § 36.

Now, § 38 requires, that in every case in which any such question of disputed compensation shall require to be determined by a jury, the company shall present a petition to the Sheriff, signed by a certain officer. Can it apply to anything more strongly than to those cases provided for in §§ 36 and 37? It may apply to other cases, but it clearly applies to those; and it is admitted at the bar, that if it does apply to § 37, it clearly and equally applies to the other.

Without, therefore, going further into the construction of this act of parliament, which I take leave to say, in my mind, admits of no doubt, the clear construction, I submit to your Lordships, is, that § 37 is to govern and rule § 36, and § 38 equally applies, and that, consequently, the company were bound, not only to give a ten days' notice to the person claiming compensation, of the intention to present the petition, and to state the sum which they were willing to give, but they were bound also to present that petition within twenty-one days after receipt of a notice from the person so claiming. If that be the true construction, there is an end of all the difficulty which is suggested at your Lordships' bar; because the argument there presents the difficulty simply by confining the operation of § 36 within the limits of that section, whereas the moment you hold that § 37 is by true construction embodied into, and forms part of, § 36, there is an end of all difficulty. My Lords, that disposes of the *first appeal.*

Now, my Lords, the *second appeal* is in regard to the price. As soon as the difficulty which had been suggested, and which had no foundation in law, with regard to the award, is removed, the cases stand on the same footing; for as, by the true construction, there was a contract between the company and Mr. Leven, the person entitled to the estate, for £3000—and as, by § 36, where the party has before elected to take the estate at the sum asked, a right of action is given to the party entitled to the sum, to recover it from the company—that action appears to me not to have admitted of any defence; and I suppose, from what I see in the papers, that hardly any defence was attempted to be set up; and if any defence was set up, it did not succeed. The right of action has accrued; the company are in possession of the land which they took under their clauses giving them the right to do so; they deposited the money; they are not to be prejudiced, undoubtedly, by that; but the effect of the affirmance which I propose, with your Lordships' concurrence, to give to the decision of the Court below, will be, that the land will belong to the company, and £3000 will be paid by the purchaser.

LORD BROUGHAM.—My Lords, this case depends entirely on the construction of the 36th and 37th sections of the act. The authorities which have been referred to in this case throw no important light on the question in dispute; either they are general,—that is, directory, about which there can be no dispute whatever, and therefore in that view they are immaterial,—or they are too particular, if you come to the special cases to which the dicta of judgments and decisions apply; for unless it is perfectly clear what is the result of a statute being found to be imperative, or directory,—that being admitted on all hands, the only question is, whether the section in discussion and the case at the bar fall within the one description or the other; and nothing is less fruitful than examining a case which does not come on all fours with the case at the bar, because statutory provisions do not coincide in all particulars; for it depends entirely on the close resemblance between the two cases, whether the statute or the statutory provision in question, falling within the one description or the other, is directory or not. Therefore I lay out of view altogether those decisions referred to by way of authority.

The question then is, whether § 37 comes within and governs the proceedings referred to in § 36, and I have really no doubt whatever that it does. *First*, (though I do not rely entirely on that,) the juxtaposition of the sections—the one coming immediately after the other—is not to be laid out of sight; but the substance of the second shews clearly that it does form part of, and is referred to in, § 36, and more particularly as the way in which reference is made to that section, I think, shews it still more clearly. "Shall present," says § 37, "their petition for summoning a jury:" Does not that clearly refer you back to what is laid down in § 37? They shall present their petition to the Sheriff to summon a jury; then reference is made in § 36 to the petition,—not to the Sheriff, because that had been given before; it had been indicated in the immediately preceding section to whom the petition should be; it is said,—not "their petition to the Sheriff to summon a jury," but it is taken shortly,—"shall present their petition for summoning a jury."

Now, then, my Lords, it is said that § 36 is in the nature of a penal enactment. It does not

strike me in that light at all; it is a statement of that which should be done in certain circumstances. There are different ways in which the price may be ascertained; if the parties do not agree, it is to be ascertained by arbitration; or if that fails, or is not adopted, by the verdict of a jury; but prior to that, and where neither of those clauses are necessary to be resorted to, it may be ascertained by the agreement of the parties. Now, my Lords, I take the words which follow the words "and in default," to be only one mode in which the provisions of the statute point out the agreement, or what should be taken to be acquiesced in; in these particulars, and in these circumstances, the silence of one of the parties shall be taken to be consent, and he shall be deemed and taken to have acquiesced.

Now, does § 37, by its structure, clearly embrace § 36? Nothing can be more general than the words are,—on summoning a jury for settling any case of disputed compensation, he shall give not less than ten days' notice; and it is perfectly clear, as my noble and learned friend has already stated to you, that it is not a mere notice, but there is to be a statement of the terms by which they are willing to abide. Now this is very material to the party,—the ten days' notice is a benefit to the party, to enable him to make up his mind whether he shall have recourse to the verdict of a jury, or whether he shall take the offer that is made. He gets this notice; the party is not willing to take this offer, and is willing to make another offer: Will he accept that offer or not? If not, then it is to go before a jury; but the ten days' notice is very material to him, as time within which he may resolve on either accepting that offer, or at all events coming down from the terms which he formerly wished to impose on the company. The whole structure of this section, connected with § 36, appears to me to leave no doubt that the provision is given, and that the course pointed out is imperative, and that the company is bound to take that course, and if that course is not taken, the alternative follows.

I am therefore of opinion, that the Court have put the right construction on the section in both instances, both in the first and second appeals, and that both fall within the same description as regards their connection with this construction,—the first appealing against the interlocutor of the Sheriff, and the second respecting the price.

LORD CAMPBELL.—My Lords, I entirely agree with the view taken of this case by my noble and learned friends, and I shall occupy but a very few minutes of your Lordships' time in adding only one or two observations.

With regard, my Lords, to the *first appeal*, I am not able to see any ground for it; and, with the greatest respect for the learned Judges who in the Court below took a different view, I cannot understand the view they took. The question was, whether the Sheriff ought to have summoned a jury, there having been no notice given. He would have been guilty of a gross breach of his duty if he had done so, for it is expressly enacted, that before the promoters of the undertaking shall present a petition for summoning a jury, they shall specify the price. Such notice had not been given,—therefore the company had no right to present this petition; and they having no right to present the petition, the Sheriff was bound to refuse it. That is the subject of the interlocutor which forms the subject of the first appeal,—and I repeat, that I am not able to see any doubt that can be thrown upon it.

My Lords, with respect to the *second appeal*, I think it admits of more doubt, although, on consideration, I entirely agree with the view taken by my noble and learned friends. It is quite clear we cannot leave out of our consideration that there had been an abortive arbitration. Although that point was not presented in the Court below, if it had been presented by the record we should have been bound to hear it; it would have come very ungraciously,—every presumption would have been against it; but, if fairly taken on the record, we should not have excluded the counsel at the bar from remarking on it. We could not hear it, and, sitting as a Court of Appeal, determine on it, without the Court below determining upon it; we should then have been bound to hear it. But after the consideration it has had, it appears that there are no allegations to raise the point. If you look at what is alleged on the one side and the other, it is quite clear that the parties entirely abandoned the arbitration, and placed themselves in the same situation as they would have been in if no arbitration whatever had ever taken place. What was the state of the parties upon the 12th of June, when the demand was made by the landowner? The title to the land had been required by the company, because, after the notice had been given by the company to the landowner, and the landowner, by assigning a price to the land, had taken a step, the company had got a title in it—they were the proprietors of the property—but the price remained to be ascertained, and this act of parliament has in a very clear manner determined how that price is to be ascertained under such circumstances; if it is not by arbitration, then a demand is to be made by the owner of the land, and then the company, if they do not acquiesce in that demand, must, at the time there specified, present a petition, and they must give the notice that they mean to do so, and that notice must contain a counter-proposal of the sum that the company are willing to give; and then, my Lords, follows this most clear and plain clause, on which there can be no disguise or doubt, "the company shall present their petition to the Sheriff to summon a jury for settling the sums in the manner thereinafter pointed out, and in default thereof, shall be liable to pay to the parties so entitled as aforesaid, the amount of compensation so claimed,

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.