charge. I can indeed imagine a case where there would be real *lis alibi pendens* when the question raised under the first suspension and interdict would come again on an objection to the second charge. In such a case an abandonment of the first charge without the first suspension being disposed of might not warrant a second charge. But that is not the case we have before us.

LORD ORMIDALE—This case has got into a most embarrassed condition. The first charge is one which cannot be maintained. The Lord Ordinary has found to that effect in a reduction of the messenger's execution. His interlocutor has still to be submitted to review. In the meantime we are pressed for judgment in the suspension of a second charge; that second charge proceeds upon the same warrants as did the first, but these warrants stand unimpeached, and the Court has found by express interlocutor that the first suspension was not intended to affect the ground of the charge at all. Now, because the first charge is standing so far as regards the question of expenses in the first suspension, the charge itself having been departed from as a charge, it is contended that this second charge is incompetent for the purpose of obviating payment of what appears to be an undoubted debt. I am of opinion that in the circumstances the second suspension is quite competent. There was a number of cases quoted to us in support of the opposite view, but they appear all to turn on the point of *lis alibi pendens* as the ground on which it was held that this second charge could not be maintained. None of the cases are in point here, where the first charge was withdrawn as a charge for payment before the second charge was given. It would, I think, be a denial of justice to the charger were we to pass this note without caution; and the very fact that the suspender is, as acknowledged by his counsel, unable to find caution, is reason itself sufficient on the part of the charger in losing no time in taking what steps he can to recover his debt. In respect therefore of no caution, I think this note should be refused.

The Court adhered.

Counsel for the Defender—J. C. Smith. Agent—John Macmillan, S.S.C.

Counsel for the Respondent—Trayner. Agents—D. & W. Shiress, S.S.C.

Tuesday, November 30.

SECOND DIVISION.

[Lord Curriehill.

NORTH BRITISH RAILWAY CO. *v.* LINDSAY AND OTHERS.

Compensation—Lands Clauses Consolidation Act—Railway Company.

A railway company served notice of their intention to take for the purposes of their railway a certain portion of a farm. Notice was served upon the tenants in possession, and afterwards upon the firm of the landlords' agents, who had, in answer to an application from the company, intimated their readiness to accept service for him. When the clerk of the company served this notice upon the agents he was informed by one of the firm that the tenants in possession had renounced their lease of the farm, which had been re-let to a new tenant for a number of years. The lease to the new tenant had only been signed by the landlord upon that day, although executed by the tenant two days earlier. The new tenant subsequently lodged a claim with the company for compensation, and the company thereafter brought a suspension of certain proceedings at his instance. *Held*, that as against the company he could have no claim for compensation, in respect (1) that he had failed to prove that prior to the date upon which the notice to take was served there was a completed contract of lease between him and his landlord, and that (2) no right could be created after that date to the prejudice of the company.

Observations upon the effect of a notice that lands are to be taken compulsorily under statutory powers.

Observations per Lord Justice-Clerk upon the doctrine of *tantum et tale*, and the position of a purchaser acquiring lands in virtue of statutory powers.

The North British Railway Company brought a note of suspension and interdict against David Salmond Lindsay, farmer at Wormit, Fifeshire, Peter Christie, also a farmer in Fifeshire, and John Heatley Dickson, land-valuator at Saughton Mains, Edinburgh. The object of the Company was to stay proceedings in an arbitration under the Lands Clauses Consolidation (Scotland) Act, 1845, for settling a claim for compensation made against them by Mr Lindsay—Messrs Christie and Dickson being the arbiters nominated. The claim made by Mr Lindsay rested upon the ground that the company had taken compulsorily, for the purposes of their railway, part of the farm of Wormit, of which he was the tenant.

The Company pleaded in support of their note of suspension that Mr Lindsay was not the tenant in possession either at the time when their notice to take the lands was served or when they entered into possession, and that when their notice was given his lease had not been executed by the landlord and delivered. They also maintained that both Mr Lindsay and his landlord were aware prior to the execution of the lease that the Company required and were ready to take the lands.

The Lord Ordinary passed the note, and afterwards, upon 23d March 1875, a proof was taken, when the following circumstances were established.

In 1871 the North British Railway Company, in virtue of their powers under the Tay Bridge and Railways Act, 1870, served a notice upon Mr Wedderburn, of Wedderburn and Birkhill, the proprietor of the land in dispute, intimating the Company's intention to take a certain part of his property. Notice was also served upon Mr Blair, tenant of that part (being the farm of Wormit), under a lease of nineteen years expiring at Martinmas 1882. The land required by the

Railway Company, to the extent of 1·540 acres, was shortly afterwards taken possession of, and Mr Blair's claim as tenant settled. In the end of June 1873 the Company had prepared further notices of their intention to acquire the remaining portion of the land. By this time Mr Blair was dead, and the farm of Wormit was held by his trustees, who had, however, executed provisionally a renunciation of their lease. In June 1873 negotiations between Mr Wedderburn and Mr Lindsay, the respondent, as to the farm of Wormit, had been entered into, but it was arranged that Blair's trustees should occupy the farm until Martinmas of that year, when, in the event of matters being settled between him and the landlord, Mr Lindsay should get possession. Of these negotiations it appeared that the Railway Company were then ignorant, and on 10th July they served a second notice upon Blair's trustees, the tenants in possession. They had written on the 7th, intimating to the agents of Mr Wedderburn (Messrs Kerr & Macfarlane, Dundee) their intention of serving a notice upon their clients, and asking whether they desired the notice to be sent to Mr Wedderburn or to themselves. Messrs Kerr & Macfarlane, having written a reply which reached the Company's office on the 12th, to the effect that they would accept service, a clerk was sent to Dundee upon that day, who served the notice at their office before one o'clock. One of the firm, Mr Macfarlane, then informed him that Blair's trustees had renounced the farm of Wormit, which had been re-let to a new tenant, Mr Lindsay. In consequence of this information, a notice intimating the Company's intention to take the land, amounting to over sixteen acres, was subsequently served upon Mr Lindsay, but under protest, so as not to prejudice the Company.

Upon 15th July Messrs Kerr & Macfarlane sent a written acceptance of service of notice to the Company's agent.

It appeared from the evidence that a lease of the farm of Wormit had been sent to Mr Lindsay for his signature by Messrs Kerr & Macfarlane upon the 2d of July, and had been signed by him upon the 10th of that month. It was then sent to Birkhill, where it was signed by Mr Wedderburn upon the 12th.

One of the conditions contained in the circular sent to offerers for the farm of Wormit was as follows—"Until the lease be adjusted and signed there will be no binding agreement between the landlord and any offerer." Mr Lindsay lodged with the Company a claim for compensation and a demand for arbitration, and he nominated as arbiter Mr Christie. The Company, but under protest, also nominated an arbiter, Mr Dickson, and afterwards brought this note of suspension of the proceedings under the arbitration.

The Lord Ordinary, upon 8th June 1875, pronounced the following interlocutor—"The Lord Ordinary having heard the counsel for the parties, and considered the closed record, proof, and whole process—Repels the reasons of suspension; recals the interim interdict; refuses the suspension, and decerns: Finds the complainers liable in expenses; appoints an account thereof to be lodged, and when lodged remits the same to the Auditor of Court to tax and to report.

"*Note.*—(After narrating the facts of the case) The first plea in law for the complainers raises a novel and important question under the Lands Clauses Consolidation Act. In the first branch of that plea the complainers maintain that the arbitration should not be allowed to go on, in respect that Mr Lindsay had not and has not any right or interest entitling him to compensation, 'he not having been the tenant in possession of the said lands either at the time when the complainers' notice to take the same was served or at the time when the complainers entered into possession.' If the complainers had been voluntary purchasers, who had bought the property after the date of the lease, but before the tenant entered into possession, the general rule by which such a lease is held not to be binding upon a singular successor might have been applicable. But it has never yet been decided, and apparently the question has never yet been raised, whether a public company taking land compulsorily under their own private Act and the provisions of the Lands Clauses Consolidation Act, is in the same position with regard to leases as a voluntary purchaser. Mr Deas, in his valuable treatise on the Law of Railways, says—'It is thought that to entitle a tenant to compensation, possession must have taken place upon the lease before the date of the company's notice.' With great deference, however, to an opinion so justly entitled to weight as that of Mr Deas, I am inclined to think that it is not quite clear that under the clauses of the statutes which deal with lands subject to leases (secs. 112 to 115) possession is required as a title to compensation in the case of a tenant for a term of years unexpired, or in the case of any tenant, except one for a year or less. In the view, however, which I take of the facts of the case, it is not necessary to decide this question, because the general rule as to the necessity of possession does not hold in the case of a singular successor who at the time of his purchase is made aware of the existence of a lease which, though executed, has not been followed by possession —*Richards* v. *Lindsay*, M. 15,217. Now, in the present case, the complainers were made aware, at or before the time when the notices were served, *i.e.*, when the contract of sale was concluded between them and the proprietor, that the old lease had been renounced and that the farm had been let on a new nineteen years' lease to the present respondent. The first branch, therefore of the complainers' first plea in law is untenable, and must be repelled.

"The second branch of that plea is to the effect that the respondents' claim for compensation is bad, because the lease had not been executed by the landlord and delivered when the notices were served. The evidence shows that the lease was executed by the tenant on the 10th, and by the landlord on the 12th July, on which day the notices were served, and that both parties considered it a binding lease. It does not appear to have been executed in duplicate; and, as is generally the case, the deed remained in the hands of the landlord or his agents for behoof of both parties. This plea also is, in my opinion, untenable, and must be repelled.

"It is necessary now to notice the second plea in law for the complainers, to the effect that they were prevented from serving the notices before the execution of the lease through the *mala fides* of the proprietors' agents. In the record, throughout the proof, and at the debate, the complainers

maintained strenuously that Messrs Kerr & Macfarlane acted *in mala fide* in reference to the notices, inasmuch as having been informed by Mr Johnstone's letter of 7th July that the complainers were about to serve the notices for the land required by them from Mr Wedderburn, whereby the Company would become the purchasers of the land, these agents in bad faith delayed answering that letter, for the purpose and with the effect of having the new lease to Lindsay completed and executed before the notices could be served, and to enable Lindsay to make a claim for tenant's profits to which he would not otherwise have been entitled. This plea of course assumes that the completion of the lease before the notices would entitle Lindsay to make such a claim without possession having followed upon the lease. Now, it may be that Messrs Kerr & Macfarlane, seeing that the Company after two years' delay were now proceeding in earnest with the notices, may have pressed on the completion of the lease, but I do not see that they can be charged with bad faith to the company in doing so. It may have been uncourteous in them to delay answering Mr Johnstone's letter of the 7th of July, but I do not think it was dishonest. The matter of the lease had long been the subject of the negotiation with Lindsay, and Mr Wedderburn was in bad health at the time, and it was desirable to have the farm let to a suitable tenant, so as to relieve Blair's trustees from further connection with the farm; and the lease would have been signed on 2d July, several days before the date of Mr Johnstone's letter, had not the tenant unexpectedly raised some objection to the terms of the document.

"But even if the landlord's agents had improperly taken advantage of the delay which they had caused in the service of the notices, I do not see how Mr Lindsay, the tenant, can be thereby affected. Messrs Kerr & Macfarlane were not his agents. He knew nothing about the contemplated service of the notices; he was not taking any advantage of the Railway Company, nor was he unduly hastening the execution of the lease. On the contrary, he delayed the execution for several days, because the terms of the lease, as prepared by the landlord's agents, were in his opinion insufficient. And the complainers do not accuse him of any bad faith in the matter. On this branch of the case I am of opinion that the complainers' allegations of *mala fides* are unfounded, and that, even if well-founded, they are not relevant as in a question with Lindsay, the respondent.

"On the whole matter, therefore, my opinion is that the suspension must be refused, and that the arbitration must be allowed to proceed."

The North British Railway Company reclaimed.

Argued for them—The effect of the notice to take the lands served by the railway was to complete the purchase, and the lease entered into in spite of that notice was *in mala fide*, and could not stand in a question with a singular successor. Here there was no possession under the lease, which is necessary to make it good against a purchaser. This is not the prorogation of an old lease, but a new one.

Argued for the respondent—The Railway Company assume that they stand in the favourable position of ordinary purchasers. This is not so. They are not treated as singular successors by the Act, which binds them to make inquiry before purchase as to parties having interests, and contemplates that all persons having interests shall be compensated by the Company against whom any equitable claim may be stated. Here the tenant had a most manifest interest. They are not singular successors in the sense of the Act 1449, c. 17, and the test in this case is whether the respondent's right be good against the granter, not if it be good against a singular successor. The position of the Railway Company is rather that of a trustee in sequestration, or adjudger, who takes the estate subject to all the rights and equities affecting it at the time. A mere notice to take lands by the Railway Company does not constitute a contract. The notice is merely a step in the process of purchasing. If after they have given notice they fail to follow it up by taking possession, the lands may be leased to a new tenant. The Company were in knowledge of this lease when they gave the notice.

Authorities—Act 1449, c. 17; Lands Clauses Consolidation (Scotland) Act, 1845; Stair, i. 15, 4, iii. 2, 6; Erskine, ii. 6, 23-5; Bell on Leases, 168; Hunter on Landlord and Tenant, i. 473-4; Deas on Railways, 114, &c.; *Cranston's Creditors* v. *Scott*, Jan. 4, 1757; *Creditors of Douglas* v. *Carlyles*, July 2, 1757, M. 15,219; *Johnston* v. *Cullen*, Feb. 24, 1676, M. 15,231; *Walker* v. *Campbell*, Nov. 16, 1730, M. 2805; *Richard* v. *Lindsay*, Jan. 6, 1725, M. 15,217; *Campbell* v. *Edinburgh and Glasgow Railway Company*, March 7, 1855, 17 D. 619; *Sweetman* v. *Metr. Railway Company*, 1864, 14 M. 543; *Carter* v. *Great Eastern Railway Company*, April 25, 1863, 8 Law Times, 197; *Haynes* v. *Haynes*, March 23, 1861, 30 L. J. ch. 578; *Fleming* v. *Howden*, July 16, 1868 (H. of L.). 7 Macph. 113; *King* v. *Hungerford Market Company*, 1832, 4 Barn. and Advl. 596; *Bogg* v. *Midland Railway Company*, March 2, 1867, 36 L. J. Ch. Rep. 440.

At advising—

Lord Justice-Clerk—This is a suspension brought at the instance of the North British Railway Co. of certain proceedings taken by the respondent for the purpose of having an alleged claim of compensation settled by arbitration under the Lands Clauses Act. The land in respect of which compensation is claimed by the respondent consists of sixteen acres of the farm of Wormit, belonging to Mr Wedderburn of Wedderburn, of which farm the respondent is the tenant; and the interest on which he claims is founded on a lease of the farm bearing date the 12th of July 1873, with possession at the Martinmas following. It is alleged for the suspenders that this lease gives him no interest under the statute to demand compensation, because their notice to take the land was given on the 12th of July 1873, and the lease in question not having been followed by possession at that date, is not available against the suspenders, who are singular successors.

The respondents plead in reply (1) that the complainers having had notice of the lease before the completion of their right, it is effectual against them without possession; and (2) they maintain that a railway taking land under their compulsory powers are not singular successors, but acquire no higher right than a trustee under the Bankrupt Statute who takes *tantum et tale* as the bankrupt held the lands.

I am not moved by either of these considerations. It is no doubt true that no one is entitled to grant double conveyances of the same subject to two different disponees, and that if the second disponee accepts the conveyance in the knowledge of the first conveyance, his right is liable to be set aside, although it may have been the first completed. But whether a purchaser under a title entirely unchallengable, or even an adjudger or inhibiting creditor, is bound to give effect to inchoate or incomplete rights in respect of previous knowledge of their existence, is a very different question. As in the present case, however, it would rather appear that the complainers had not, and could not have had, notice of this contract, as I shall afterwards explain, it is not necessary to pursue this question farther.

As regards the contention so strongly urged from the bar, founded on the doctrine of *tantum et tale*, I think the argument involved some misapprehension as to the past history and present position of this branch of the law. It seems to be assumed, quite erroneously as I think, that our modern jurisprudence gives greater effect to latent equities in the transmission of land than our older law. But this is not so. Until the case of *Redfearn*, decided in the House of Lords in 1810, the rule *assignatus utitur jure cedentis* was very largely applied. In that case, in which it was for the first time found that a special assignee was not bound by a latent trust which qualified the right of his cedent, it was conceded that the previous rule of the Law of Scotland was otherwise; and the judgment proceeded on views of expediency which prevailed in the Law of England. The short report of the import of the judgment in the case of *Gordon* v. *Cheyne* (2 Shaw, p. 566) brings this out very clearly. It represents the Court as holding "that the general rules of law founded on by Cheyne embraced purchasers and special assignees prior to the case of *Redfearn;* but that on proper views of equity and expediency the House of Lords had found that they could not be subject to latent equities; and, with the exception of Lord Gillies, they held that the principle of that decision could not apply to the case of a general body of creditors under a sequestration, who took the rights of the bankrupt *tantum et tale* as they stood in the bankrupt." The case of *Fleming* v. *Howden* proceeded on this ground, and Lord Colonsay was careful to guard the judgment as far as related to the diligence of individual creditors, as to which he entirely reserved his opinion. Whatever therefore may be the authority of the older decisions, in which the Court preferred a productive comprising to a tenant under a tack without possession, they were pronounced at a period of the law when the Court gave more weight to latent equities than could be extended to them now. But we have here a very different case to deal with. It would be difficult to reduce the title of the complainers below that of a special assignee; but while I could not follow Mr Fraser to the point at which he wished us to arrive, I so far agree with him as to think that the position of a statutory company taking land under their compulsory powers is not that of a voluntary purchaser in all respects. On one hand, the title they acquire is not subject to be qualified by equities of any kind, latent or patent, as far as regards their right to and possession of he land acquired. Their right and use is only qualified by the purposes of their undertaking, and they cannot be impeded in so applying it. There can be no question as to good faith in its acquisition, for the seller has no choice in the matter, and the purchaser, within the limits assigned to him, may buy when he pleases. The fee itself is transferred, and the value of the subject and all the rights affecting it are merged in a general obligation on the part of the purchaser to make full compensation to those having an interest in the lands. But, on the other hand, the obligation on the purchaser is one of compensation or indemnity; and the right to demand it arises entirely from the provisions of the statute, and must be determined by them. It does not follow that the interests affected by the exercise of powers of compulsory purchase must necessarily be those which would affect a voluntary purchaser under a contract in which the seller may make what conditions he thinks fit. I say no more on this head excepting that this seems to me a very large and important question, and that if the case depended on it, I should have desired an opportunity of considering it very deliberately, as I think it deserves more thorough investigation than it has hitherto received.

Before, however, we can reach this question there are two preliminary points to be determined —*First*, was there a completed contract of lease when the complainers gave their notice? and *secondly*, if there was not, could a contract completed after that date affect the complainer's rights and obligations?

As to the first of these questions, in order to its solution it is necessary to attend in some detail to the history of this matter. In 1871 a person of the name of Blair was tenant of these lands under a lease which at that time had eleven or twelve years to run. The Railway Company gave notice to take 1.540 acres of the farm, and settled the tenant's compensation at that time. In June 1873 more land was required. Mr Blair had died previously, and Mr Wedderburn. the proprietor, was in negotiation with his trustees for a renunciation of the current lease, and with the respondent for a new lease for nineteen years from Martinmas 1873. The compulsory powers of the railway expired on the 1st of August 1873. On the 7th of July Mr Law, who is a clerk to the solicitor of the North British Railway Company, wrote a letter to Kerr & Macfarlane, who had acted as Mr Wedderburn's agents in Dundee, asking to know if they would accept service of the statutory notice on behalf of the railway company. From some cause, which has not been satisfactorily explained to my mind, this letter was not answered by Messrs Kerr & Macfarlane until the 11th, a delay all the more to be regretted from its bearing on the negotiations then in progress with the new tenant. Mr Law, not having received an answer, resolved to go personally to Dundee on the 12th, and did go, although the answer arrived that morning. He arrived at Messrs Kerr & Macfarlane's office, and served the notice, he says, before one o'clock. Mr Macfarlane says that he reached the office about two o'clock, which may be assumed as the latest date on which the notice was served.

Meantime the negotiation for a lease of the farm stood thus—In the month of November 1872 the landlord had issued a general circular to offerers stating the terms and conditions on which

the farm would be let. Those conditions contain some clauses of importance. The second, third, and fourth articles of the conditions refer to land taken or to be taken by the railway, and to the tenant's interest therein; and the ninth condition is, "until the lease be adjusted and signed there will be no binding agreement between the landlord and any offerer." In the month of May 1873 the respondent went over the farm, and on the 13th of May he wrote asking whether the damages done by the railway are to be compensated to the incoming tenant. Messrs Kerr & Macfarlane answered that the claims would remain with the landlord, a reply which brought from the respondent an offer for the farm, dated 31st May 1873, "stipulating that all compensation for damages caused by forming the new line of railway on the farm will be left in the hands of the tenant." This offer was not at once accepted, and the negotiations go on until as late as the 10th of July, when Messrs Kerr & Macfarlane wrote to Mr Wedderburn in the following terms:—"It is only to-day that I am in a position to write as to Wormit. We have had much trouble and anxiety in connection with it. We differed with Stewart on some details. He was bearing or seeking to bear too hard upon us, and we communicated with Lindsay, and the lease which is sent herewith is the result. You will see that he is to pay £345, and is to get £300 of repairs, which is an improvement on his own terms, and better than Stewart was latterly proposing." It is therefore certain that until Mr Wedderburn received the letter of the 10th of July there not only was no concluded bargain with the respondent, but it was doubtful whether Stewart might not have been preferred.

The extended lease was returned, signed by Mr Wedderburn, along with a letter bearing date on Saturday the 12th, and received on Monday the 14th of July. In these circumstances the question is, whether there was any concluded bargain prior to the notice? I am very clearly of opinion that no such bargain has been proved. There is and can be no presumption whatever that the lease was signed before the service of the notice on the 12th of July, the date of which is fixed; and the presumption rather is, when one date is fixed and the other left uncertain, the uncertainty must fall on the party who has failed to render it certain. I think it right to observe also, that when Mr Macfarlane wrote to Mr Wedderburn on the 10th, and that when Mr Wedderburn signed the lease on the 12th, he was perfectly aware that these lands never could be the subject of the lease, because Mr Macfarlane had notice on the 8th that the remaining lands scheduled were to be taken by the railway company, and that the only effect of the lease as regarded this part of the farm was to attempt to constitute a claim of compensation for lands which never could come into the possession of the tenant.

I am therefore of opinion that on the facts it is not proved that when the notice in question was served there was any concluded agreement between the respondent and Mr Wedderburn.

The only remaining question therefore is, What is the effect of an agreement concluded after the date of the notice? And this raises the question as to the legal effect of a notice to treat for lands to be taken compulsorily.

It has been usual to describe the nature of such a notice by saying that the Act of Parliament empowering the company to take the land compulsorily is equivalent to an offer to sell; and that the notice is the acceptance of that offer on the part of the purchaser. Perhaps this formula may be somewhat too absolute for the real relation of the parties, for if after the notice the company do not follow it up by proceeding to take possession and to settle the compensation to be paid under the statute, I am not prepared to say that the proprietor may not proceed in the administration of his estate as before, and create rights in the course of that administration which the Company may ultimately be obliged to respect. If the Company had not proceeded to take possession, and had allowed the respondent to enter to the lands at Martinmas 1873, the case might have assumed a different aspect. I think, however, it admits of no doubt that the notice to take the land constitutes a completed contract to this effect, that neither party is entitled to resile, and that either party is entitled to enforce it, and that no right can be created by the seller to the prejudice of the purchaser after the date of the notice unless with the consent or tacit acquiescence of the purchaser. I do not doubt that the effect of such a notice may be entirely obliterated by the inaction of the company which gives it. But we have no such case here. The Company proceeded immediately to take the necessary steps under their contract, and took possession of the sixteen acres on the 3d of October, after consigning in bank sums to meet the claims of Mr Wedderburn and the former tenant. I am of opinion therefore that the whole case fails on the fact, and that the questions of law which have been argued do not arise.

Lord Ormidale — As the circumstances in which the present dispute has arisen are stated, so far as material, by the Lord Ordinary in the first part of the note to the interlocutor now under review, it is unnecessary to repeat them.

The respondent Mr Lindsay, on the assumption that he was entitled to compensation from the defenders for about sixteen acres of the farm of Wormit, which he said he held under lease from the proprietor Mr Wedderburn, made a claim for the same upon the suspenders, on the ground that they had taken these sixteen acres for the purposes of their railway. The suspenders, in consequence of the claim so made, and to prevent their being foreclosed as to its amount, adopted provisionally, and under protest, the proceedings necessary under the Lands Clauses Act for having its amount ascertained. They, however, at the same time presented the present suspension and interdict, in which they maintain that these proceedings ought to be suspended and interdicted as, being in the circumstances unnecessary, in respect that the respondent had no lease and was not in the possession of the lands when they were taken, and he is not entitled to any compensation. That the course thus adopted by the Railway Company is a perfectly competent one has not been, and could not well be, disputed.

On the other hand, and in answer to the suspension and interdict, Mr Lindsay, the respondent, has produced a lease bearing to have been granted on the 12th of July 1873, the day the

notice to take the lands by the suspenders was served on the landlord's agents; and he (respondent) avers and maintains that the lease had been duly executed, not only on the same day, but in point of time before the notice was served; and the respondent also maintains and avers that although he was not then in possession of the farm or any part of it—his entry to it not being till Martinmas thereafter—the suspenders had been made aware of the lease before their notice was served, and are therefore bound to compensate him as tenant of the lands taken by them.

The parties having been allowed, and having adduced, a proof in support of their respective averments, the Lord Ordinary, on advising that proof, has decided in favour of the respondent, and the Court has now to dispose of a reclaiming note at the instance of the suspenders against that judgment.

It is obvious that the leading, if not the only, question for the determination of the Court now is, whether the lease founded on by the respondent had been duly completed, and existed at or before the time when their notice to take the lands was served on the landlord or his authorised agents, for if the respondent held no completed lease at that time, the suspenders cannot be burdened or affected by a lease subsequently obtained. This principle was given effect to by this Court in the case of the *City of Glasgow Union Railway Company, v. M'Ewan & Co.*, 8 Macph. p. 747) and by the Master of the Rolls (in England) in re Marylebone (Stingo Lane) Improvement Act *ex parte Edwards* (12 Law Reports, Equity, p. 389; and it has been also repeatedly determined, as exemplified by the cases referred to in Mr Deas' work on Railways (pp. 144-5-6), that by a notice on the proprietor to take lands the acquisition or purchase of them is effected. It is true that, as prescribed by the Lands Clauses Act, further proceedings are necessary for ascertaining and settling the price or compensation to be given for the lands so purchased or acquired, as well as other collateral matters, but their purchase or acquisition is not thereby altered. After delivery of their notice to Mr Wedderburn or his authoised agents, the suspenders, on the one hand, could not resile from their obligation to take the lands, and, on the other hand, neither was it in the power of Mr Wedderburn to deal with the lands so taken, by granting a lease of them, or otherwise burdening or affecting them. The cases referred to by Mr Deas make this very clear.

When then did the suspenders, the Railway Company, acquire the lands in question from the proprietor Mr Wedderburn, by serving on him or his agent, in terms of the Lands Clauses Act, a notice to take them, and had the lease founded on by the respondent been previously completed in his favour? That the notice was served or delivered in Dundee to Mr Macfarlane, of Messrs Kerr & Macfarlane, the proprietor Mr Wedderburn's agents, on Saturday the 12th of July 1873 at one o'clock, or at latest between that hour and two o'clock, by Mr Law, a clerk in the office of Mr Johnstone, the Railway Company's solicitor, seems on the evidence to be indisputable; and that Mr Macfarlane on the same day informed Mr Law that the respondent had obtained a lease of the farm of Wormit is admitted by the suspenders in the sixth article of their condescendence. But the parties are at issue as to whether the lease had been executed by the proprietor before or after the lands in dispute had been taken by the suspender's service of notice. In regard to this all important question there can be no doubt, I think, that the *onus* lies on the respondent Mr Lindsay. It is he who founds on the lease, and the existence of it prior to the service of the suspenders' notice is essential to his case. It does not, however, appear to me that Mr Lindsay has established that his lease had been duly completed prior to the service of the suspenders' notice. That it had been under consideration by him and the landlord, and their agents, is true, and that it had been sent in an extended form, with Mr Lindsay's own signature to it, by Messrs Kerr & Macfarlane to Mr Wedderburn, the landlord, for his signature, two days before the service of the suspender's notice to take the lands, may be also true. But it is manifest from the terms of Messrs Kerr & Macfarlane's letter of 10th July sending the lease to Mr Wedderburn, that he had not previously known or approved of all its terms, and therefore he might, if he had pleased, have declined to execute it. That it was in his power to have done so is indeed clear from the circular, subject to the terms of which the respondent must, according to the testimony of Mr Macfarlane, have offered [for the the lease, and which by its ninth head expressly declares that "until the lease be adjusted and signed there will be no binding agreement between the landlord and any offerer." Mr Wedderburn, however, appears to have signed the lease and returned it to Mr Macfarlane by letter dated the 12th of July, and it also appears to have been received by Mr Macfarlane, at Dundee, on the 14th of that month, but at what hour on the 12th of July, whether before or after one or two o'clock, by which time the suspender's notice had been delivered, does not appear.

Nor do I think that the evidence as to what took place at the interview between Mr Law, who delivered the suspender's notice to Mr Macfarlane, and the latter gentleman, materially affects the matter. This evidence is contained in the 6th article of the suspender's condescendence, and in the testimony of Mr Law and Mr Macfarlane. In the article two of the suspender's Condescendence it is merely said "that when the said notice was delivered the person who delivered it on behalf of the Company was informed by Messrs Kerr & Macfarlane that the former tenants, Blair's trustees, had executed a renunciation of the lease, and that the farm had been relet for 19 years from Martinmas 1873 to respondent." Mr Law, again, the person who served the suspender's notice on the 12th July, says that on arriving in Dundee he went immediately to Messrs Kerr & Macfarlane's office, saw Mr Macfarlane, and handed the notice to him; and again, "when I saw Mr Macfarlane I was told by him that the farm had been let to a new tenant. He did not give me the name of the new tenant that day, and I did not ask for it." He then goes on to explain that it was not for some days afterwards that the name of the new tenant was obtained, and in this Mr Law is corroborated by the letters Nos. 130 and 132 of process. And although Mr Macfarlane was examined as a witness after Mr Law, he does not appear to have been asked any question at all for the purpose of

shewing whether his communication to Mr Law about the new tenant was made before or after the suspender's notice had been delivered. Mr Macfarlane could not possibly have stated to Mr Law on the 12th of July that the new lease had then been completed and executed by Mr Wedderburn the landlord, for, as has been already explained, it was only sent to Mr Wedderburn for execution on the 10th, and did not come back from him executed till the 14th.

In this state of the matter it appears to me that it must be held that the notice was served before any reliable information was or could have been furnished as to the new lease or tenant; and, at any rate, that it has not been proved that the new lease had been executed by Mr Wedderburn prior to the service or delivery of the suspenders' notice. And if this be so, it is unnecessary and would be idle to inquire whether knowledge had reached the suspenders prior to the service of their notice that a lease was being executed, for if, *de facto*, the existence then of a duly completed lease has not been proved, there is an end of the matter.

In the view I take of the case, as now explained, the question dealt with by the Lord Ordinary, whether a lease on which there has been no possession could affect the suspenders—does not arise. I must decline therefore to deal with that question as one which, however important in itself, could have no practical interest in the present case, and I must reserve my opinion regarding that question, and the argument of the respondent in support of his view of it.

The result is, that for the reasons I have stated, I am unable to come to any other conclusion than that the interlocutor of the Lord Ordinary should be recalled, and suspension and interdict granted as craved. What claim, if any, the respondent may have against his landlord, in respect that a portion of the farm let to him has been taken by the suspenders, is not for the Court to determine in the process. But I may remark that if the respondent should encounter any difficulty in regard to that matter, it would appear from the correspondence that it has been very much of his own seeking.

Lord Gifford—In this case various questions of nicety and difficulty have been argued at the Bar, but I have come to be of opinion that the case may be safely disposed of on the first question of fact raised between the parties, and that it is unnecessary to give any opinion on the more difficult questions of law raised by the suspenders.

The question of fact which I think suffices for the determination of the case is the question, Whether the lease granted by Mr Wedderburn, of Wedderburn and Birkhill in favour of the respondent Mr Lindsay, was granted before or after the statutory notice served by the North British Railway Company upon Mr Wedderburn or his agents on 12th July 1873? I am of opinion, upon the evidence before us, that the contract of lease between Mr Wedderburn and Mr Lindsay was not completed until after the Railway Company had served the statutory notice of 12th July 1873 upon Messrs Kerr & Macfarlane, Mr Wedderburn's agents, it having been previously agreed in writing that service upon them should be the same as service upon Mr Wedderburn himself.

I think it is quite fixed in law that a statutory notice under the Lands Clauses Consolidation Act has the effect of a completed contract of sale between the landowner and the Railway Company, binding upon both parties, and from which neither party can resile without mutual consent. It is true, as argued by Mr Fraser, that in certain circumstances this contract may be departed from, or may be held as departed from, by the conduct of both parties, particularly in cases of long delay of both parties to carry out or enforce the contract, but none of the cases and authorities quoted interfere in the least with the doctrine that the statutory notice when served is a completed contract from which the Railway Company cannot resile, and which can only be altered by the joint consent of both parties. There is no question in the present case, and there can be none, about presumed abandonment.

I think it is also well fixed in point of law, and the rule is in entire accordance with equity and common sense, that after a landlord has received the statutory notice from a railway company purchasing from him a precise and definite piece of land, he cannot thereafter let that land to a tenant or grant any new right over it which will create any new or additional claim for compensation against the Railway Company. The Railway Company are bound by their notice to make due compensation to the landlord and to all tenants and others who had an interest in the lands at the date of the notice, but they are not bound to recognise any new rights which the landlord may have attempted to create after the date of the notice. The notice fixes the point of time at which the Railway Company become proprietors, and the landlord thereafter has no more right to grant a new lease of the land than he would have to sell it to some third party. He may assign his own rights and claims for price or for compensation, but the moment the Railway Company's notice is served he can do no more. In particular, he can then introduce or create no new rights or claims.

This principle has been recognised both in Scotland and in England—in Scotland in the case of *The City of Glasgow Railway Company* v. *Macewan*, 18 March 1870, 8 Macph. 747—in England in the case Marylebone Improvement Act (1871), Law Reps. 12 Equity, 389, and other cases, but I do not think it needs authority to show that a party who has sold his land to another, though by a mere personal contract, cannot thereafter create new burdens upon it so as to impose a higher price or greater compensation against the purchaser.

In the present case, the question of priority of notice or of lease is a very narrow one. Both are dated the same day, 12th July 1873, and had there been no evidence in the case, there would have been no presumption that the one was prior to the other. But when the circumstances disclosed in evidence are taken into account, I have come to the conclusion that the purchase by the Railway Company, by means of their statutory notice, must be held to have been completed before any right of tenancy was conferred by the landlord upon the present respondent Mr Lindsay. No doubt it is unpleasant to have the two contracts running so close upon each other, but even this unpleasantness is somewhat removed for I think it plain that, but for the delay in Mr

Wedderburn or his agents answering the letters of the Railway Company, the statutory notice would have been sooner served. I am also of opinion that there is no real hardship against the respondent, who knew that some land was to be taken by the Railway Company, and who is entitled, as in right of his landlord, to make all claims of compensation which the landlord could make so as to vindicate his rights against the landlord under his lease, but he is not entitled to found upon the lease to the effect of getting a greater compensation than the landlord, his author, would have been entitled to.

The facts bearing upon the question of priority may be very shortly stated.

It was known to the whole neighbourhood, and in particular to the respondent, that the North British Railway Company would require to take part of the farm of Wormit for their undertaking, although the precise extent and boundaries of the land required were not known. On 7th July 1873 the notices were ready, and the agent for the Railway Company wrote the agents for the landlord inquiring on 7th July whether they would accept service, or whether it should be made on Mr Wedderburn himself. They had previously accepted services of former notices for Mr Wedderburn. This letter was not answered till 11th July, and the answer did not reach the Railway's agents till the 12th July, although it appears that in the interval the landlord's agents were hurrying on the proposed lease to the respondent. On 12th July 1873 a clerk, acting for the Railway Company was sent to Dundee to serve the notices on Messrs Kerr & Macfarlane, the landlord's agents, they having consented by their letter of 11th to receive service. The clerk, Mr Law, proves that he served the notices on Mr Macfarlane, the landlord's agent, on Saturday the 12th July, about one o'clock. Mr Macfarlane, who received the service, says it might be two o'clock, but nothing turns on this slight discrepancy. Admittedly the notices were served between one and two o'clock on Saturday, 12th July, and from that moment the purchase was completed, and the Railway Company were proprietors of the lands in the notice.

The lease stands thus—It was signed by the tenant, the respondent, on 10th July, but the terms were not fully adjusted then, for the tenant before signing it insisted upon a new clause being inserted at the end relative to the compensation due by the Railway Company, and to this clause, as well as to the lease itself, the landlord's assent was necessary. The lease was sent to the landlord for signature that same day (the 10th), and he subscribed sometime on Saturday the 12th. There is no evidence as to the hour of subscription, although the respondent might have called the instrumentary witnesses, who would have proved at what time of day the signature was adhibited. In the absence of all evidence I am disposed to think that the presumption is against the respondent. The Railway Company have done all that they can in proving the hour of their service; the other party have not chosen to prove the hour of Mr Wedderburn's signature, although they had the means of doing so; and I do not think it unfair to hold that they abstained because they could not bring the signature to an earlier hour than the service of the notice. But probably much does not depend on the mere hour, for the signed lease remained in the landlord's power and under his control. It was sent by him to his own agent, whom it did not reach till Monday the 14th July. Now, on Monday 14th July it was the duty of Mr Wedderburn's agent to have withheld the delivery of the lease from the tenant excepting on the condition that the tenant took his chance of the effect of the Railway Company's notice. The landlord no doubt signed the lease in good faith, not knowing of the Company's notice, but he took care to send it to his own agent, who knew before he got it that the Company's notice was an impediment which prevented its completion. The landlord and his agent would have been quite entitled and were bound to tell the respondent that the notice had been served if it were prior, and to refuse to deliver the lease except under reservation of its effects. Sometimes, indeed, a mutual contract is completed by mere signature, but this is only in cases where no impediment to the contract has arisen before actual completion.

On the whole therefore, although the point is a very narrow one, I am of opinion that the Company's notice must be held to have been prior to the actual completion of the contract of lease. I reach this conclusion the more willingly that it is proved the landlord's agents knew the railway notices were coming, and, whether intentionally or accidently, delayed the service. The result is, that the respondent here must claim compensation only through his landlord, or as in right of his landlord. He cannot found upon his lease, which is subsequent to the notice, and can give no broader right against the Company than the landlord himself had.

It is said, and has been held by the Lord Ordinary, that "at or before the time when the notices were served" the Railway Company had been made aware of the respondent's lease. I do not think that this is proved, but the contrary. The utmost that is proved is, that *immediately after* the notices were served—that is, after Mr Macfarlane took them from Law's hand—he said to Law that the farm had been relet, but plainly this is not before service, but after it. Besides, I do not think that Law, a mere clerk and messenger serving the notices, was the party to whom such intimation should be given; and even if Macfarlane's statement had preceded the service,—that is, preceded the delivery of the notices—it would not legally have stopped service. The messenger had nothing to do but to deliver formal notices, and any statement made to him could not go beyond a mere protest or reservation of rights. Besides, Mr Macfarlane had no right to say on Saturday the 12th that the farm had been relet. The signed lease did not come back to him till Monday the 14th, and even then, if I am right in the view I have taken, it was in the landlord's power, and ought only to have been conditionally given to the tenant.

The view which I have now taken supersedes the much larger and much more important questions whether, to enable a tenant to claim under the statutes he must not be in possession of the lands under his lease? and whether, if the Railway Company obtain possession not only before the tenant does, but before the tenant's term of entry under his lease arrives, they will be liable to him as tenant under the statutes? These

questions do not seem to have been settled by any decided case, or by any authority of which I am aware, and I desire to reserve my opinion. I think the questions are attended with great difficulty.

Probably it may be proper in the interlocutor about to be pronounced to make it clear that, while the respondent is not entitled to go to arbitration or to claim as tenant under his lease, his whole claims as assignee or implied assignee of his landlord are reserved entire. The nomination of the arbiters is in general terms, and a simple suspension and interdict might possibly be held to exclude him altogether, which of course is not intended.

LORD NEAVES was absent.

The Court pronounced this interlocutor—

"Recal the interlocutor complained of; sustain the reasons of suspension; suspend, prohibit, interdict, and discharge, in terms of the note of suspension and interdict; find the reclaimers entitled to expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Suspenders — Dean of Faculty (Watson)—Balfour—Strachan. Agents—Dalmahoy & Cowan, W.S.

Counsel for Respondent—Fraser—Robertson. Agents—Morton, Neilson, & Smart, W.S.

Thursday, December 2.

FIRST DIVISION.

GILMOUR AND OTHERS (STEUART'S TRS.) *v.* HART.

Contract—Disposition—Essential Error—Restitution.

A entered into a contract of sale of property to B, under burden, as A understood, of a feu-duty of £9, 15s. The disposition omitted mention of the burden, and on proof it was found that in granting it A laboured under essential error, of which fact B was aware.—*Held* (1) that reduction of the disposition and claim for *restitutio in integrum* was competent, and was the proper remedy, and decree given accordingly; and (2) that the remedy of varying the disposition so as to constitute the feu-duty a real burden on the subjects for the future, and ordaining B to pay arrears, was in the circumstances incompetent.

Evidence—Proof by Parole.

Held that parole proof was competent to show the existence of error on the part of A, and of knowledge of the error on the part of B, but not for the purpose of interpreting the contract.

The pursuers of this action were Mr Allan Gilmour of Eaglesham and others, trustees of the deceased John Steuart, writer in Pollokshaws, and the defender was Thomas Hart, mill-manager, Pollokshaws.

The action concluded *inter alia* (1) for reduction of a disposition dated January 1873, by the pursuers to the defender, disponing for the sum of £75 a property known as the Cogan Street property, Pollokshaws, or (2) for a declarator that the defender was bound to free and relieve the pursuers of the sum of £9, 15s. sterling of the *cumulo* feu-duties of £16, 14s. 11½d. sterling, payable from the said subjects, with corresponding casualties, and that the sum of £9, 15s., and corresponding casualties, were real liens and preferable burdens upon the property, and the defender should be decerned to free and relieve the pursuers of the same from Martinmas 1873 inclusive, and for all time coming. And further, that warrant should be granted to have such decree recorded in the appropriate register of Sasines.

Mr Steuart, at his death on 2d February 1871, owned amongst other properties one known as the Cogan Street property, built upon a portion of the Printfield Lands, situated in Pollokshaws, belonging to Mr Steuart, and held partly of Sir William Stirling Maxwell, and partly of another superior. The feu-duty payable to the former was £13, 14s. 11½d.; of this sum £4 was allocated on some portion of the lands not belonging to Mr Steuart, the balance only of £9, 14s. 11½d. having been in use to be paid by him. Mr Steuart's trustees on entering upon the management of his estate, and with a view to the sale of his heritable properties, had these valued by Mr Thomas Binnie, land valuator in Glasgow, and their agents in a letter to Mr Binnie, dated 9th February 1871, informed him that Mr Walter Steuart, agent of the City of Glasgow Bank, Pollokshaws, and the testator's brother, and Mr Brown, the late Mr Steuart's managing clerk, would furnish him with any assistance he might require. Mr Brown at the time of this action carried on business as a writer in Pollokshaws, and was the sole partner in the firm of John Stewart & Brown, and was the defender's law agent. A rental was sent to Mr Binnie by Mr Brown, in which, after a statement of the rents of the Cogan Street property, there was this note—"feu-duty, £9, 14s. 11½d., Sir W. Maxwell, Bart.;" and it was upon the footing that the property was burdened with this feu-duty that it was accordingly valued by Mr Binnie at £111, 18s. 4d.

The property in question was afterwards extensively advertised for sale, and was exposed three times without there being any offerer. The Cogan Street property alone was put up at the first exposure; but at the two subsequent exposures, the other portions of the Printfield Lands, which were in the trustees' keeping, were also included. The first advertisement was in the following terms:—"To be sold by public roup, upon Wednesday, the 1st of May 1872, within the Faculty Hall, St George's Place, Glasgow (unless previously disposed of by private bargain), all and whole, that plot of ground lying on the south-west side of Cogan Street, Pollokshaws, containing 1 rood, 5½ poles, or thereby, and adjoining Messrs Lochart & Arthur's pottery. Feu-duty, £9, 15s. The situation is very suitable for the erection of workmen's houses."

The second advertisement was in the following terms:—"Properties in New Street and Cogan Street, Pollokshaws. To be sold by public roup, within the Faculty Hall, St George's Place, Glasgow, on Wednesday, 11th September 1872, at 2 p.m. (unless previously disposed of by private bargain):—