I therefore concur in the judgment which your Lordship proposes.

The Court therefore pronounced an interlocutor finding the respondent liable to the petitioners in the expenses incurred by them, and remitted to the auditor accordingly.

Counsel for Pursuers (Complainers) — Lord Advocate (Watson)—Trayner—Moncreiff. Agents —Irons & Roberts, S.S.C.

Counsel for Respondent—Asher—Mackintosh. Agent—Thomas Carmichael, S.S.C.

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*Tuesday, January 7.**

OUTER HOUSE.

[Lord Curriehill, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* STOCK OR MOON (WM. MOON'S TRUSTEES) AND OTHERS.

Mora—*Taciturnity—Where Claim of Compensation made against Railway Company for Injuries to Property through Works Executed Twenty Years previously.*

A railway company in 1846 obtained an Act of Parliament to maintain certain piers and works, with the necessary quays, approaches, and conveniences connected therewith. The works so authorised were completed in 1851. At that time there were certain negotiations between the parties with a view to a sale, but these had fallen through. In 1877 a claim for compensation for injuries done to a property by the execution of the works in question was for the first time made by the trustees of the proprietor, who had died the preceding year. *Held* (by Lord Curriehill, Ordinary, and acquiesced in) that in the circumstances the claim was barred by *mora* and taciturnity.

In the year 1846 the Edinburgh and Northern Railway Company obtained two Acts of Parliaments, viz., "The Edinburgh and Northern Railway (Newport Railway Extension) Act 1846," authorising an extension of their system from Cupar to Newport *via* Ferry-Port-on-Craig, and "The Edinburgh and Northern Railway (Tay Ferry) Act 1846," authorising the purchase of the ferry between Ferry-Port-on-Craig and Broughty on the north shore of the river Tay.

In the following year the same company obtained an Act for the improvement of the ferry, intituled "The Edinburgh and Northern Railway (Improvement of the Ferry between Ferry-Port-on-Craig and the North Shore of the River Tay) Act 1847." By this Act the company, subject to the provisions thereof and to the various Acts recited in its preamble, were authorised to make and maintain the requisite piers and works in the lines or course and upon the lands delineated on the Parliamentary plans, with the necessary quays, approaches, and conveniences connected therewith.

In February 1848, while the works so authorised were in the course of being executed, a note of suspension and interdict was presented to the Court of Session at the instance of Mr William Moon, of Russell Mill, against the railway company and their contractor, in which it was alleged by the suspender that he was proprietor of a warehouse and wharf at Ferry-Port-on-Craig lying between the pier commonly used by the ferry-boats on the ferry on the west, and the harbour or pier of Ferry-Port-on-Craig used for shipping purposes on the east; that the said company had built a stone pier, and were proceeding with the execution of other works which would have the effect of destroying the advantages belonging to the wharf or warehouse.

An interlocutor was pronounced in the suspension and interdict by Lord Robertson (Ordinary on the Bills) on 17th March 1848 refusing to grant the interdict craved. This interlocutor was acquiesced in by Mr Moon, and the action was not further proceeded with.

The whole of the works authorised by the Act of Parliament for the improvement of the ferry were duly completed by the company in or about the year 1851. The name "Edinburgh and Northern Railway Company" was changed in 1849 into the "Edinburgh, Perth, and Dundee Railway Company," and this railway company was amalgamated with the North British Railway Company in 1862.

Mr Moon died in 1876, and on 21st September 1877 a notice and claim was served on the complainers by the respondents, who were Mr Moon's trustees, in which they alleged that the Edinburgh and Northern Railway Company, in virtue of their Acts therein recited or some of them, had required and taken for the purposes of the works a portion of the subjects in question, and had also injuriously affected the remainder thereof by reason of the formation and construction of the works, whereby the deceased William Moon and his trustees were entirely deprived both on the north-east and north sides of the subjects, of frontage and access and egress by the river Tay and beach thereof, and were prevented from landing goods in their warehouse, for which previous to the construction of the railway works the pier and shore had been used.

The trustees claimed in the notice and claim (1) the sum of £1000 as and for compensation for the portion of the subjects including the pier taken and used as aforesaid; (2) the sum of £1000 as and for compensation for the damage done to and sustained by the remaining portions of the subjects through the execution of the works.

The railway company nominated an arbiter with a view to provide against their losing the benefit of the Lands Clauses Consolidation Act, and thereafter brought this suspension against Mr Moon's trustees and the arbiter to prevent their proceeding with the arbitration.

The complainers denied that they had taken any portion of Mr Moon's property, or in any way injured it by the execution of the works. They also averred that although Mr Moon had survived the formation of the works for thirty years, no claim for compensation had been made by him, and that they were placed at a great disadvantage and subjected to the greatest possible prejudice by the undue delay which had taken place in making it, as they were thereby deprived of evidence which would otherwise have been available

* Decided January 3, 1879.

in regard to the condition of the subjects in question, and the purposes for which they had been used prior to the erection of the new works. They further stated that since then the locality had been entirely altered, and the warehouse sold to a railway company, by whom it had been entirely removed.

The complainers, *inter alia*, pleaded—"The respondents are barred by *mora* from making or maintaining any claim for compensation in respect of the operations complained of."

The respondents in their answers withdrew the claim for the value of the subjects said to be taken by the railway company, and consented to interdict being granted with regard to that. In answer to the complainers' plea of *mora* they averred that during the latter half of 1847 negotiations had been carried on between the company and Mr Moon on the assumption that the company were to acquire the property, and that it was only a question of price between them. That question it was ultimately agreed to submit to arbitration, and a minute of reference was signed by Mr Moon, but was ultimately rejected by the company because Mr Moon insisted on the insertion of the following clause—"That the said Edinburgh and Northern Railway Company, in order to prevent all questions of damages or otherwise to the said William Moon from their operations opposite to and in front of the said wharf and warehouse, have agreed to purchase the same with the privilege appertaining thereto at a price to be set thereon." After the interdict was refused, as previously stated, negotiations were again opened between Mr Moon and the company for a purchase of the property. A second minute of reference was prepared in April 1848, but its terms were never adjusted by the parties. Thereafter the company fell into such insolvent circumstances that a purchase by them of the property was out of the question. Mr Moon, however, consistently maintained throughout his life to these companies and the complainers that they were bound to take his property owing to the damage that had been done to it. He was not, however, aware that he was entitled to claim compensation for injury done to the property although the company had not taken and should not take the property itself.

After parties had been heard in the Procedure Roll on the plea of *mora*, the Lord Ordinary (CURRIEHILL) pronounced an interlocutor finding that the respondents were "barred by *mora* and taciturnity from maintaining any claim for compensation in respect of the operations of which they complain," and therefore sustaining the reasons of suspension, and declaring the interdict formerly granted perpetual.

He added a note, which, after stating the facts as above set forth, proceeded:— "Thereafter [*i.e.*, after refusal in April 1848 of the interdict asked by Mr Moon, as above narrated] the permanent works were proceeded with by the company, and were completed in or about 1851, and these consisted, *inter alia*, in the erection of a quay, loading bank, and landing slip, and other works, which were to some extent constructed *ex adverso* of the complainer's subjects, and which undoubtedly did prevent access between the sea or river Tay and Moon's Wharf, at least on one side thereof. But William Moon, although he saw these operations going on, and survived their completion for at least a quarter of a century, never took any steps whatever to claim compensation for the deprivation of his anchorage and of his frontage and access to the sea. Whether such a claim, if timeously made, would have been competent to him, although none of his lands had been taken by the railway company, it is unnecessary to decide. I shall only say that it would be difficult to deny the competency of such a claim after the decision in the House of Lords in the case of the *Metropolitan Board of Works* v. *Macarthy*, 22d June 1874, 7 L.R. Eng. and Ir. App. p. 243. And if so, Moon would have been entitled to claim compensation for the whole damage done to the subjects, because he was, as I have already explained, truly the proprietor of the whole subjects at the time when the damage was done to these.

But it is unnecessary to pronounce any judgment upon these points which are raised in the second and fourth pleas-in-law for the complainers, because I have come to be of opinion that their first plea-in-law is well founded, and that the claim for compensation now made by the respondents, the trustees of Moon, is sopite by *mora* and taciturnity on the part of them and of their author William Moon. Moon, as I have said, never made any claim for compensation, although he lived till 1876. In the interval the whole of the foreshore and part of the harbour ground or anchorage had been filled up by the railway company, and the whole condition of the bed of the Tay on the east or north-east side of William Moon's property had been entirely altered. The Edinburgh and Northern Railway Company was thereafter amalgamated with the Edinburgh, Perth, and Dundee Railway Company, and the whole concern was afterwards acquired by the complainers, the North British Railway Company, and it was not until September 1877, a year after William Moon's death, that his trustees served on the complainers the notice and claim which is set forth in articles 9 and 10 of the complainer's statement of facts. The claim as made erroneously included £1000 'as and for compensation for the portion of the said subjects, including the said pier, taken and used as aforesaid.' But during the preparation of the record in this action the respondents discovered that that part of their claim was entirely groundless, and they accordingly withdrew it, in respect that no part of the subjects or pier had been taken or used by the complainers or their predecessors. The other part of their claim, however, in which they insisted and still insist, is for 'the sum of £1000 as and for compensation for the damage done to and sustained by the said deceased William Moon, and done to and sustained by, or to be done to or sustained by, the said trustees by reason of the execution of the said railway works;' and the claim is rested upon the allegation that the complainers or their predecessors injuriously affected the said property by reason of the formation and construction of the said works, whereby the said deceased William Moon and his trustees were and are entirely deprived both in the north-east and north sides of said subjects of frontage and access and egress by the river Tay and beach thereof, and are and were prevented from landing goods in their warehouse, for which previous to the construction of the said railway works the said pier and shore were used, and for

any other purpose requiring water frontage. The respondents nominated an arbiter on their behalf, and the complainers, the North British Railway Company, likewise nominated an arbiter, but under protest, and they then brought the present process of suspension to have the arbitration restrained, in which interim interdict was granted and still subsists.

"In dealing with the plea of *mora*, on which the prayer of the note is mainly rested, I shall assume, as I am bound to do, the competency of the respondents' claim for compensation, and that in point of fact William Moon's property sustained real damage from the works of the railway, inferring more or less compensation. Now mere delay in asserting such a claim will not of itself bar an action for giving effect thereto. There must be something more than delay. There must be taciturnity—that is, persistent silence maintained under circumstances which are calculated to lead the other party to infer that the claim has been abandoned or withdrawn. Such a plea is peculiarly applicable to a claim which is not liquid or rested on a written document, but requires to be constituted before it can be enforced. The present appears to me to be a case of that description. It is a claim brought forward for the first time in 1877 for compensation in respect of damage alleged to have been caused by work begun in 1847–48 and completed in 1851. Such a claim clearly required to be constituted, but no attempt to constitute it has been made until the present time. The law applicable to such a case is fully stated by Lord Benholme in deciding the case of *Cook* v. *The North British Railway Company*, 1st March 1872, 10 Macph. 513—'I think that the claim for damages is cut off by *mora* on the part of the pursuer. The word *mora* suggests mere delay, but I am free to admit that in the ordinary case delay of itself is not sufficient to establish a plea of *mora*, and that abandonment must be implied in the delay. But when the claim is one which requires constitution such as the claim in the present case, I think the plea of *mora* will be justified by delay for a certain length of time in constituting the claim. In such a case presumption of acquiescence or abandonment is not required. I do not think that this poor man ever acquiesced or abandoned his claim against the railway company; but his failure to constitute a claim for so many years was an injury to the defenders which justifies the plea of *mora*.' So also Lord Neaves—'I think there was *mora* involving taciturnity. It is not mere delay or lapse of time which makes *mora*, but delay which leads the other party to believe that the claim has been given up. It is unfair that a man should be allowed to keep back a claim of this kind until it suits him to bring it forward when all means of rebutting it may have been lost.' And in the case of *Cullen*, 16th November 1838, 1 D. 32, Lord Glenlee states the law as follows:—'In questions of delay in the bringing forward of claims there is a great difference between claims constituted by writing, however informal, and those other claims which arise out of facts and circumstances which may occur; and it does not appear that where there are opportunities of settling such claims as the latter they are to last for forty years. I suspect the statute of prescription had reference to written claims. The extinction of claims by taciturnity is a most valuable rule. I think the advocators' claim in the present case comes a great deal too late, and that it is sopite.' These cases were commented on in the case of *Cuninghame* v. *Boswell*, 29th May 1868, 6 Macph. 890, where the plea of *mora* and taciturnity was repelled. But in that case, although the claim had not been insisted in for upwards of thirty-four years, it was a claim for debt constituted by a written obligation, and the plea of *mora* and taciturnity was rightly held to be inapplicable, the opinion of Glenlee in *Cullen's* case being, however, there quoted with approbation.

"In the present case the whole circumstances tend to the conclusion at which I have arrived, viz., that the plea of *mora* must be sustained. It is said by the respondents in their fifteenth statement of facts that it was in consequence of the insolvency of the railway companies that the negotiations for the purchase of the property ceased in 1848 and were not renewed; but they add—'Mr Moon, however, consistently maintained throughout his life to these companies and to the complainers that they were bound to take his property owing to the damage that had been done to it.' Now, assuming that statement to be correct, the demand that the railway company should purchase his property at a valuation is the only claim which Mr Moon ever made against the complainers or their predecessors, and it is a claim obviously in itself untenable. It could never have been enforced by him; he could not have compelled the company to make such a purchase. But although he had *ex hypothesi* a good claim of compensation for damage done to his property, he never even brought it forward during the long period I have mentioned. It is true that the respondents say in the record that 'Mr Moon was not however aware that he was entitled to claim compensation for injury done to his property although the company had not taken and should not take the property itself.' Now that appears to me a very lame explanation. It simply amounts to a statement of *ignorantia juris* on the part of Mr Moon, but assuming his ignorance, I cannot see that it betters the case of the respondents. He was bound to know what his legal rights were, and the railway companies were entitled to all the benefit to be derived from his delaying for nearly thirty years to constitute his claim. But I do not think that this statement of ignorance on the part of Mr Moon is true in point of fact, because it appears that in the course of the abortive negotiations in January 1848 for the purchase of the property, the minute of reference for the ascertainment of the price, which was actually signed by Mr Moon, contained a clause inserted by himself to the effect that 'the said Edinburgh and Northern Railway Company in order to prevent all questions of damages or otherwise to the said William Moon from their operations opposite to and in front of the said wharf and warehouse have agreed to purchase the same with the privileges appertaining thereto at a price to be set thereon.' Now, it is evident from that circumstance that Mr Moon believed in 1848 that he had claims of damages of some kind against the railway company for their operations external to his property, and as he failed during his lifetime to take any steps whatever to ascertain and constitute his claim, and as owing to the great lapse of time, the death and removal of officials, and

loss of testimony from other causes, the railway company would be put to serious disadvantage in rebutting the claim now made, I am of opinion that the claim is barred by *mora* and taciturnity, and that the proposed arbitration cannot be allowed to proceed. The interdict already granted will therefore be declared perpetual."

The interlocutor was acquiesced in.

Counsel for Complainers — Lord Advocate (Watson) — Balfour — Strachan. Agent—Adam Johnston, Solicitor.

Counsel for Respondents—Robert Johnstone and Henry Johnston. Agents—Leburn & Henderson, S.S.C.

Friday, January 12.

SECOND DIVISION.

[Lord Craighill, Ordinary.

CUMMINGS *v.* MACKIE AND OTHERS (SKEOCH'S TRUSTEES).

Issue—Reduction of Deed—Where the Ground of Reduction was that the Witnesses did not see the Subscription.

In an action of reduction of a testamentary deed on the ground that the witnesses did not see its subscription, the pursuers proposed the following issue, which was approved of by the Lord Ordinary:—"Whether A B and C D, the alleged witnesses to the said trust-disposition and settlement, or either of them, did not see the said W S subscribe the same, and did not hear him acknowledge his subscription?" The defenders reclaimed, and proposed to add the words "or that he did not acknowledge it in their presence," on the ground that the testator might have acknowledged by a sign or a nod. The Court *adhered*, holding that the issue as adjusted was in the usual form, and that the words used included any sufficient acknowledgment of his signature by the testator.

Counsel for Pursuers (Respondents)—Nevay. Agent—Robert Broatch.

Counsel for Defenders (Reclaimers)—Guthrie Smith—Gebbie. Agents—Adamson & Gulland, W.S.

Wednesday, January 15.

SECOND DIVISION.

[Lord Rutherfurd Clark, Ordinary.

LOCHGELLY COMPANY (LIMITED) *v.* LUMPHINNANS IRON COMPANY.

Trade-Mark—Trade Name—Property in Trade Name—Interdict.

The Lochgelly Coal and Iron Company raised a suspension and interdict against the Lumphinnans Company asking the Court to interdict them from selling any coal under the name of "Lochgelly coal" except what came from the complainers' pits. It was proved that the Lochgelly Company and their predecessors had for a number of years sold all their coal, though raised from various seams, under the name of "Lochgelly coals;" that it was favourably known in the market, and the only coal known under that name. It was also proved that the Lumphinnans Company were owners of part of a seam called the "Lochgelly splint seam," which extended over a considerable area, part being also owned by the Lochgelly Company. *Terms* of interdict granted against the respondents in these circumstances.

The complainers in this action, the Lochgelly Coal and Iron Company (Limited), carried on business as coal and iron masters at the works of Lochgelly, in Fife. They had acquired in 1872 a lease of the minerals in the estate of Lochgelly, which did not expire till 1903. They stated on record that the Lochgelly collieries had been established at great cost, and had been in operation for upwards of a century; that the coal derived from them had acquired a wide reputation, and was known both in this country and on the Continent under the name of "Lochgelly coal," and was the only coal so known in the market; that it was known by various distinguishing names, *e.g.*, "Lochgelly steam coal," Lochgelly splint coal," according to its kind and quality, but that they were alone entitled to describe coal by the name of Lochgelly, which the public understood as denominating exclusively coal produced at their collieries. They further averred that for many years they and their predecessors had selected and prepared coal for shipment abroad, and that this coal was favourably known by the name of "Lochgelly coal."

They had recently discovered that the respondents, the Lumphinnans Iron Company—who were lessees of the coals and other minerals in the lands of Lumphinnans adjoining Lochgelly—had begun to sell at home and to ship to the north of Europe and elsewhere coal from their colliery as "Lochgelly coal," and had also issued circulars offering for sale coal procured from their collieries under the name of "Lochgelly coal." This was stated to be an infringement of the complainers' rights, and it was said that the name had been adopted for the purpose of misleading the public.

This note of suspension and interdict was therefore presented, in which the Court were asked "to interdict, prohibit, and discharge the said respondents from designating, advertising, selling, shipping, or exporting, and from causing to be designated, advertised, sold, shipped, or exported as 'Lochgelly coal' any coal worked or raised by the respondents from their works at Lumphinnans or elsewhere, or any coal other than that worked and sold by the complainers at their Lochgelly collieries, and from using the name of 'Lochgelly' either by itself or in combination with other words to designate any coal sold, shipped, or exported by them other than coal worked and sold by the complainers as aforesaid, and from in any manner of way infringing the sole and exclusive right of the complainers to use the name of 'Lochgelly coal' for the purpose of designating the coal wrought by them as afore-