Friday, March 5.

SECOND DIVISION.

[Lord Fraser, Ordinary.

NISBET HAMILTON *v.* THE COMMISSIONERS OF NORTHERN LIGHTHOUSES.

Property—Compensation for Land taken under Statutory Authority—Prospective Damage—Damage from Use of Land taken—Nuisance—Foghorn—Merchant Shipping Act 1854 (17 *and* 18 *Vict. c.* 104), *secs.* 404, 405, 412—*Lands Clauses Consolidation Act* 1845 (8 *and* 9 *Vict. c.* 19).

In proceedings to fix the amount of compensation to which the proprietor of an island, situated in a navigable channel half-a-mile from the rest or mainland part of his estate, was entitled for the acquiring of land for the erection of a lighthouse on the island, the arbiter fixed a sum for the land taken, and also (subject to the opinion of the Court as to the legality of such compensation) a sum for the injury which might be expected to the feuing of the mainland part of the estate by the erection of a foghorn on the lighthouse in the event (then not contemplated) of the Lighthouse Commissioners determining to establish one. The Court *disallowed* the latter sum, because (1) it was uncertain, (2) not connected with the land or for an injury to land, and (3) not resulting from the exercise of the statutory powers.

Lord Rutherfurd Clark *dissented*, because land was taken, and the use which might be made of it was found by the arbiter to be injurious to the rest of the estate.

The Merchant Shipping Act 1854 provides, sec. 404—"Each of the said general lighthouse authorities (of which the Commissioners of the Northern Lighthouses is one) shall have power within its jurisdiction to execute the following works and do the following things:—(1) To erect new lighthouses with all requisite works, roads, and appurtenances, or alter or remove any existing lighthouses. . . . (3) To take and purchase any land which may be necessary for the above purposes, or for the maintenance of the works or the residence of the lightkeepers."

By section 412 The Lands Clauses Consolidation (Scotland) Act 1845 is incorporated in the Act, it being declared that the Act "shall apply to all lighthouses to be constructed, and all land to be purchased, under the powers thereof."

In 1883 the Commissioners of Northern Lighthouses, incorporated by the Merchant Shipping Act 1854, determined to erect a lighthouse upon the island of Fidra, in the Firth of Forth. In pursuance of that purpose they entered into negotiations with Lady Mary Hamilton, the then heiress of entail in possession of the entailed estate of Dirleton, of which estate Fidra formed part. A minute of agreement was entered into between Lady Hamilton's *curator bonis* and the Commissioners, which narrated that the Commissioners in exercise of their statutory rights to acquire land for the purposes mentioned in the 404th section of the Merchant Shipping Act 1854, and under the powers and provisions of that Act, and of the Lands Clauses Consolidation (Scotland) Act 1845, and Lands Clauses Consolidation Amendment Act 1860, had resolved to acquire certain portions of Fidra Island in order to erect a lighthouse, lightkeeper's house, &c., the compensation to be paid by them therefor to be fixed by arbitration in terms of the Lands Clauses Consolidation (Scotland) Act 1845. Lady Mary Hamilton (by her *curator bonis*, Ralph Dundas, C.S.) agreed to convey the said portions of land to the Commissioners on payment of an annual feu-duty, to be fixed by the arbiters to be appointed. Arbiters were appointed, and after their appointment they selected an oversman. On the oversman the submission ultimately was devolved. Lady Mary Hamilton died in the course of the proceedings, and her daughter Miss Mary Nisbet Hamilton, the pursuer, was duly sisted as claimant.

On 28th February 1885 the oversman issued his final sentence and decree-arbitral. He found Miss Hamilton entitled to an annual feu-duty of £48, 10s. in respect of the value (£970) of the land taken The nearest point of land taken was 1270 yards from the Marine Cottage of Archerfield, 3020 yards from the mansion-house of Archerfield, and from the nearest point of the other lands of the estate of Dirleton suitable for feuing for building, 1530 yards. He found that no compensation was in point of fact due in respect of injury to the privacy of the Marine Cottage and mansion-house and policies of Archerfield, or for injury to the view therefrom (on which ground a claim had been made), but "(4) That the erection and use of a foghorn signal with the object of producing the greatest possible amount of noise in connection with the lighthouse upon Fidra Island was admitted to be in the powers of the Commissioners, and that although not included in the present plans it is in the circumstances reasonable to anticipate that a foghorn signal will be erected and used by the Commissioners in the exercise of their powers; (5) That the noise produced by such a foghorn signal, although its effect is diminished in proportion to the distance, will in fact, even at the distances above-mentioned, injuriously affect Archerfield House as a residence, and the other land of the estate suitable for feuing, so as to depreciate to some extent their pecuniary value; (6) That the proprietor of Dirleton has not yet brought any part of the land suitable for feuing into the market, and has declined offers for feus, but that it is reasonable to anticipate that part of such land may be feued for building within a period that can be foreseen; (7) That compensation is due, if maintainable in law, in respect of the damage to be done to the pecuniary value of Archerfield House as a residence, and of the land suitable for feuing for building on the said estate, by the use of a foghorn signal, due allowance being made for the prospective or postponed character of such damage; (8) That when damage will be in fact caused by the use of works erected, or to be erected upon land taken compulsorily under the Lands Clauses Acts to other lands of the same proprietor not taken, it is not settled, so that it can be assumed by a valuation arbiter that a claim for compensation is or is not in law maintainable, but that it is expedient to fix the amount of such compensation in the event of its being judicially determined that in the circum-

stances of the present case, as stated in the preceding findings, a claim for compensation is on this ground maintainable in law; (9) That the sum due in the event of its being admitted or judicially determined that in the circumstances of the present case, as stated in the preceding findings, a claim for compensation is upon this ground in law maintainable (due allowance being made for the prospective or postponed character of such damage), is £1000, and that no compensation is upon any other ground in fact due in respect of injury or damage to the lands of the claimant not taken." This sum of £1000 was in terms of the minute of agreement to be converted (if found capable of being allowed) into an annual feu-duty of £50.

The Commissioners declined to pay the said annual feu-duty of £50 for damages that might be caused by erection of a foghorn.

Miss Nisbet Hamilton brought this action to have it declared that her claim was maintainable in law "for compensation in respect of the damage to be done to the pecuniary value of Archerfield House as a residence, and of the land suitable for feuing for building on the said estate of Dirleton, by the use of a foghorn signal on Fidra Island, which forms part of the said estate, due allowance being made for the prospective or postponed character of such damage, and that a claim for compensation is in law maintainable when damage will in fact be caused by the use of works erected or to be erected upon land taken compulsorily under the Lands Clauses Acts to other lands of the same proprietor not taken; and that in the circumstances of the present case, as stated in the said findings [of the oversman] the sum due by the defenders to the pursuer for compensation upon the ground foresaid, due allowance being made for the prospective or postponed character of such damage, is in terms of the said decreet-arbitral £1000."

She stated—"(Cond. 6) The pursuer is advised that compensation is legally exigible by her in respect of the damage to be done to the pecuniary value of Archerfield House as a residence, and of the land suitable for feuing for building on the said estate, by the use of a foghorn signal, but as the defenders have refused to pay any sum in name of such compensation the present action has been rendered necessary."

She pleaded—"The pursuer being in law entitled to compensation for the damage to be done to the pecuniary value of Archerfield House as a residence, and of the land suitable for feuing for building on the said estate of Dirleton, by the use of a foghorn signal on the island of Fidra, and the amount of such compensation having been assessed by the said oversman at £1000, she is entitled to decree in terms of the conclusions of the summons with expenses."

The Commissioners maintained that they were not bound to give such compensation. They stated that they had no intention to erect a fog signal on the Island of Fidra.

They pleaded that the pursuer's claim was unfounded in fact and unwarranted in law.

The Lord Ordinary decerned for the £48, 10s. of annual feu-duty which was admittedly payable as the commuted value of the £970 given by the oversman as compensation for land taken; *quoad ultra* assoilzied the defenders.

"*Opinion.*—The pursuer is proprietor of the island of Fidra, in the Firth of Forth, and of the estate of Dirleton on the mainland. The island is distant from Archerfield House 3020 yards, and is distant from the other lands of the estate of Dirleton, belonging to the pursuer, suitable for feuing for building, 1530 yards.

"The Commissioners of Northern Lighthouses, the defenders in this action, resolved to carry out a work that had been long needed, by the erection on the island of Fidra of a lighthouse, and for that purpose they required to obtain a portion of the island, which they did, to the extent of 1 acre 1 rood and 34½ poles. They were entitled to demand the cession of this in virtue of statutory authority. The 404th section of the Merchant Shipping Act 1854 authorises them to take lands for their purposes, and the 412th section incorporates the Lands Clauses Consolidation (Scotland) Act 1845 with the Merchant Shipping Act, and declares that the Lands Clauses Act 'shall apply to all lighthouses to be constructed, and all land to be purchased under the powers thereof.'

"The parties entered into a submission to two arbiters (who ultimately devolved it upon the oversman, Mr Mackay) to ascertain what sum should be payable to the pursuer by the defenders. The oversman found and determined by his decree-arbitral that the sum due for the land actually taken was £970, which by the consent of parties was commuted to an annual payment of £48, 10s., and in regard to this item there is no dispute.

"But besides obtaining the price of the land actually taken the pursuer claimed that compensation should be made 'in respect of the damage to be done to the pecuniary value of Archerfield House as a residence, and of the land suitable for feuing for building on the said estate of Dirleton by the use of a foghorn signal on Fidra Island which forms part of the said estate, due allowance being made for the prospective or postponed character of such damage.' The defenders maintained before the oversman that this latter claim was inadmissible. The oversman not having power to decide this question of law, proceeded to ascertain what amount of damage should be allowed on this head in the event of it being admitted or judicially determined that a claim for compensation is on this ground maintainable in law, and the sum he fixed was £1000, which he commuted to an annual payment in perpetuity of £50. The question now to be answered is whether the latter claim is in law maintainable. The Commissioners of Northern Lighthouses have not erected a foghorn signal upon the land which they have taken, and they state upon record that they 'have no intention to erect a fog signal on the island of Fidra.' Although they have no present intention to do so, their statement upon record will not prevent them at some future time from coming to a different conclusion, and the decision of the present Commissioners will in no way be binding upon their successors in the absence of any contract between the present Commissioners and the pursuer. The case therefore must be dealt with upon the footing that the Commissioners have power to erect a foghorn signal, and that they may exercise such power at some future time. Hitherto there have been fog signals used by the defenders at only five of their sixty-five lighthouse stations—

St Abb's Head, Sanda, Pladda, Mull of Kintyre, and Langness. The Commissioners use bells at rock stations far from land, and where there is not space for working fog signals—Skerryvore, Dhuheartach, and the Bell Rock. Whether Fidra which is so near the land would be considered a rock station is considered doubtful; but hitherto, even in regard to the three rock stations named, the only instructions they have issued to their light-keepers is as follows:—'During foggy or stormy weather the light-keepers must toll the bells where such are provided.'

"It is in these circumstances that the pursuer now demands a sum of money to be immediately paid to her, because at some future time the Commissioners may dispense with bells, and instead thereof use fog signals, the ground being that if a fog signal were used upon Fidra land belonging to the pursuer fitted for feuing for building will be rendered less acceptable to the persons looking out for that kind of investment. No feuing has taken place hitherto, and the pursuer does not say that she intends to feu now or at any future time.

"Thus there are two elements of uncertainty in regard to this claim. First, whether or not the Commissioners will ever authorise a fog-signal to be used upon Fidra, and secondly, whether the pursuer will ever consent to feu the ground round Archerfield House. The claim is therefore somewhat novel; and although the decisions have been numerous in reference to demands by persons whose lands have been compulsorily taken, there is no case which comes up to this one. The claim is made under the Lands Clauses Act, which is an Act applicable to all undertakings requiring statutory authority for the compulsory taking of land, and is not confined, as the Railway Clauses Act is, to the case of railways. The clause in the Lands Clauses Act under which this claim can be made—if it can be maintained—is the 61st, which is in the following terms:—'In estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard shall be had not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such lands by the exercise of the powers of this or the special Act, or any other Act incorporated therewith.' The claim must be under the words 'injuriously affecting' the other lands of the proprietor—words which have given rise to more numerous and somewhat irreconcileable decisions than any other words occurring in modern legislation. If the Commissioners of Northern Lighthouses never erect a foghorn signal upon Fidra, they will have done nothing to the disadvantage of the feuing capabilities of the Dirleton estate, and therefore they maintain that in these circumstances there are no grounds for awarding damages in consequence of a thing which may never happen, and which they say has its origin merely in the timorous apprehensions of the pursuer. It is, they maintain, a damage too remote to be capable of estimation. The pursuer refers to the case of *Oswald* v. *The Ayr Harbour Trustees* (24th January 1883, 10 R. 472, and [July 23, 1883] 10 R., H. L., 85) to show that prospective damages resting merely upon probabilities might be claimed. Harbour Trustees demanded from a proprietor in virtue of their Act a piece of ground belonging to him for the purposes of their undertaking. They had full power to demand the whole property from its owner, but wishing to limit the price they had to pay, they consented not to use the ground in such a way as to debar the owner's access to the harbour. The Harbour Trustees were contented to take less than they had power to take, but the Court determined that they could not renounce the statutory power to take the whole ground in full property, and could not bind their successors not to take it. Compensation was therefore found due for the whole ground which the trustees had statutory power to take.

"That case has no application to the present. The defenders have got no statutory powers, and are therefore under no implied obligation to erect a fog signal upon Fidra. If they erect such a signal, they will erect it in virtue of their general powers of management of lighthouses, in the same way as they have put up bells upon lighthouses at rock stations.

"No doubt, in the case of the *Caledonian Railway Company* v. *Lockhart* (March 23, 1860, 3 Macq. 808) the House of Lords determined that where damages can be reasonably foreseen and estimated, it may be very fit and convenient that the arbiter should ascertain the amount by at once fixing the sum of money to be paid. In that case the prospective damages did not depend upon any uncertain events in the future. They were damages resulting from the construction of the railway, and which any person of skill could immediately estimate. 'The compensation given,' said Lord Wensleydale, 'is for the necessary damages by the construction of the railway, and for the highly probable damages which would be occasioned in the ordinary course of events. It becomes therefore unnecessary to consider what would be the effect of awarding a sum for purely speculative damages not reasonably foreseen.' The present claim is for speculative damages of the character referred to by Lord Wensleydale.

"Again, in *Stone* v. *Yeovil* (2 C.P.D. 99, 1876) waterworks trustees were empowered to purchase and divert a stream belonging to a landed proprietor. They gave notice to the latter that they intended to take the whole stream, but found that their necessities did not require more than a part, and they refused to make payment except for the part they actually took; but the Court held, that having power under the statute, and having given notice that they were to take it, they were bound to pay for the whole. The giving notice to take the whole was founded upon very much as the ground of judgment.

"None of these three cases governs the present one, which is more of the character of the case referred to by Lord Hatherley (*City of Glasgow Union Railway Company* v. *Hunter* (1870), L.R., 2 Sco. Appeals, 80, when he said 'anticipated damages for noise of trains and for smoke, which may accrue hereafter, do not appear to be the proper subjects of an estimate for compensation before they happen. They might very well be the proper subjects of an interdict when they were happening, or were expected to happen. But as they are matters which may or may not be continued for a longer or a shorter time, one does

not see how it can be right and proper that this compensation should be given for those anticipated evils, the character of which cannot be fully or fairly ascertained beforehand.' This remark has special application to a case like the present, where the anticipated damage does not arise from the anticipated exercise of statutory powers, or which might be the natural consequence of an Act intended to be carried out, but, on the contrary, is expected to flow from an act which may be done by the Commissioners, but which may never be done. The difference between this case and that of *Ayr Harbour Trustees* and *Stone* v. *Yeovil* is simply this, that the persons who took the land from the owner there had statutory authority to do so, while the defenders have none. They are entitled, no doubt, to use all the means known to science, for making mariners aware of impending danger, but there is no certainty that they will ever use a fog signal, and if damages are to be allowed for the use of a fog signal, why not for a bell? The one is weird and lugubrious no doubt, but the other is frequently very irritating.

"Then comes the important question, whether the complaint of the pursuer can be entertained at all, on the ground that it injuriously affects her property,—for that is the sole ground for which compensation can be given. Personal suffering from discordant noises, or smoke nuisance, and the like, are disregarded. The oversman seems to have been of opinion that there was substance and reality in the claim, for he has awarded to the pursuer £1000. But is this consistent with authoritative decisions such as *Hammersmith, &c., Railway Company* v. *Brand* (L.R., 4 E. and I. App. 171, 1868-9), by which it was determined that one cannot recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned, without negligence, by the passing of trains after the railway is brought into use, even though the value of the property had been actually depreciated thereby. This case was afterwards followed by the decision of the House of Lords (*City of Glasgow Union Railway Company* v. *Hunter*) [above cited] in which it was 'held that statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of the claimant's lands be taken or not.'

"In the subsequent case of the *Caledonian Railway Company* v. *Walker's Trustees* [March 29, 1882], (L.R., 7 App. Cas. 259), the case of the *Hammermith Railway Company* was approved of, and in the course of his judgment in that case Lord Blackburn said—'It must also be now considered as settled that the construction of those statutes is confined to giving compensation for an injury to land or an interest in land—that it is not enough to show that an action would have lain for what was done if unauthorised, but it must also be shown that it would have lain in respect of an injury to the land or an interest in the land.'

"In the case of *Hammersmith* the railway company had not taken any of the land which belonged to the complaining proprietor (while in the case of *Hunter* they did), and it is said that this constitutes a difference between it and the present case. Reliance is placed upon the opinion expressed by Lord Chelmsford in the *Duke of Buccleuch* v. *Metropolitan Board of Works* (L. R., 5 E. & I. App. 458, 1872), to the following effect—'In neither of these cases' (*Hammersmith* and *Hunter*) 'was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if in each of the cases lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration or smoke or noise occasioned by passing trains.' This is scarcely correct, for in *Hunter's* case land had been taken from the claimant. The opinion of the learned Lord was *obiter*, but, notwithstanding, it must carry all the respect due to Lord Chelmsford's position and learning. But is it sound? 'It does seem strange,' said Baron Bramwell, 'that the taking of a piece of a man's land, or even the blocking of one of his lights, should let him in to prove all sorts of damage for which he could not otherwise recover. I should pause before I assented to such a proposition' (*Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R., 3 Exch. 328). In the case (*Hammersmith*) where it was determined that a proprietor whose property was made less valuable by reason of vibration caused by the railway traffic had no claim, the grounds of judgment proceeded in no way upon the fact that no portion of his land had been taken by the railway.

"It must always be kept in mind in reference to this matter that a person is not entitled to demand compensation under the Lands Clauses Act for anything for which he could not demand interdict or damages at common law. This must be taken now as settled. Lord Campbell in the case of *Penny* v. *South-Eastern Railway Company* (7 E. and B. 660) laid down this doctrine in the following terms:—'Unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed.' Lord Chelmsford in the case of *Ricket* v. *The Metropolitan Railway Company* (L.R., 2 H. of L. 187, 1867) adopted this as good law; and in the case of the *Hammersmith Railway Company* v. *Brand* again insisted upon it. In like manner, Lord Blackburn in the case of the *Caledonian Railway Company* v. *Walker's Trustees* [March 29, 1882] L.R., 7 App. Cas. 293, 1882) expressed himself as follows:—'It must now be considered settled, that on the construction of these Acts compensation is confined to damage arising from that which would, if done without authority from the Legislature, have given rise to a cause of action.' There are many authorities to the same effect which are collected in a note to Deas' Treatise on the Laws of Railways, 271.

"Now, if such be the law, can it be contended that an action will lie against parties who use foghorns around our foggy coast. Every night during the winter and spring months the foghorn is heard in the Firth of Forth and all along our coasts; and the Merchant Shipping Act contains a series of regulations as to when it should be used, and imposes penalties for the neglect of using it (Merchant Shipping Act, secs. 295, 298, and 299). It is out of the question to maintain that a foghorn signal is a thing which injuriously

affects property. Its sound is—as already said—weird, and may agitate sensitive organisations in an unpleasant way; but that is not an injury to property, and therefore not a subject for compensation under the Lands Clauses Act. It may be a personal grievance, but nothing more. Therefore the result at which the Lord Ordinary arrives is this, that the whole of this claim for £1000, or £50 per annum, must be disallowed."

The pursuers reclaimed, and argued—In this case the oversman had found that the erection of a foghorn signal was within the rights of the defenders, and might reasonably be anticipated. Miss Nisbet's land might also be feued. He had therefore found that £1000 was the proper sum to be awarded as compensation to Miss Nisbet Hamilton for the damage done to her land, and the Court could not go behind the oversman's award—*Oswald* v. *The Ayr Harbour Trustees*, January 24, 1883, 10 R. 472, and 10 R. (H. of L.) 85. A claim for compensation must embrace all damages, either existing or which can be reasonably foreseen—*Caledonian Railway Company* v. *Lockhart*, March 23, 1860, 3 Macq. 808; *Croft* v. *London and North-Western Railway Company*, January 27, 1863, 3 Best & Smith, 436. (2) This was a claim maintainable in law. The defenders' power to take the necessary land was given by the Merchant Shipping Act 1854, and was absolute. The Lands Clauses Act was used merely to get the machinery for working the Act. The pursuer was in a different position from a person whose land was taken compulsorily by a railway company. The distinction between damages arising from construction of works as opposed to their use was based purely on the terms of the Railways Clauses Act, and not on the Lands Clauses Act—*Hammersmith Railway Company* v. *Brand*, July 6, 1869, L.R., 4 Eng. & Ir. App. 171. Where injury arises as here from damage done to the part of a proprietor's lands, which is not taken, from a legalised nuisance on the part of his land which is taken, he is entitled to compensation —*Stockport Railway Company*, May 9, 1864, 33 L.J., Q.B. 251. The damage here was not personal, but really pertained to the land.

Argued for the defender—The defenders had no intention of erecting a foghorn signal on Fidra, and more was not alleged than that they had power to do so. Therefore the prospective damage was too remote to be taken into account. The case of *Hunter* referred to the powers of construction and not to the use that might be made afterwards of the thing constructed—*City of Glasgow Union Railway Company* v. *Hunter*, June 30, 1870, L.R., 2 Scot. App. 78. The damage that the oversman had found compensation ought to be given for was for a personal injury, and therefore the allowance of that sum could not be supported in law.

At advising—

Lord Justice-Clerk—I concur with the views of the Lord Ordinary in this case. It appears to me that the pursuer has entirely failed to make out any sufficient or satisfactory grounds for the claim of damages which she has made. The ground of the claim is that under the provisions of the Merchant Shipping Act the Commissioners of Northern Lights have acquired a certain amount of land on the island of Fidra in the Firth of Forth with the object of making a lighthouse upon it. This land was taken by agreement with the proprietor of the estate of Archerfield, which is within two miles of the island of Fidra, and extends along the coast both eastward and westward of the island. The claim by the proprietor of Archerfield as far as the actual land taken is concerned has been adjusted, and it is not necessary for us to enter upon that subject at all. But in regard to the present claim the oversman who had been appointed by the two arbiters to fix the value of the land taken has also fixed the amount of damage expected to be possibly caused in the future if the Commissioners in connection with their lighthouse should erect upon the ground a foghorn signal. They have not erected any foghorn signal as yet. It is of course perfectly possible that they may do so. But they are under no obligation to do so, and they have intimated no intention of having recourse to these means of giving warning to the shipping. The question raised in this case is, whether this possible use of the land taken under their powers is a subject for an award of present compensation. I have come to a clear opinion that it is not.

In the first place, the Commissioners have done nothing that has caused or is likely to cause any damage to the pursuer. Whether they intend to make use of a foghorn signal cannot at this moment be ascertained, because they have come to no resolution upon the subject. It may be true that in some cases where land has been taken for railway or other purposes, and the special use of that land, looking to the nature of the undertaking, is a probable result of the acquisition of the land, the Court have directed probable or possible results to be included in the claim for compensation. But these are all cases where substantially the use of the land was inevitable, or at least impending, as a consequence of the purpose for which the land had been acquired. There is nothing of that kind in the present case. No doubt it might be found necessary and right to institute that mode of warning to those who are navigating the Firth of Forth in case of fog or similar dangers, but that has not taken place as yet, and I doubt greatly if the nature of the anticipated injury be either so imminent or so important as to be the foundation of such a claim.

I think, besides, that apart from the future character of this expected injury, it is not of a nature to ground any such claim. First, because it is not in any way connected with the land; and in the second place, because it is not in any degree a necessary result of the acquisition of the land itself.

The first of these, I think, is conclusive. The island of Fidra is separated from the mainland by a very considerable stretch of the sea. It is not in proximity with any land belonging to the pursuer, and nothing that is done on the soil of the island can by possibility be said to affect the adjacent mainland. The evil anticipated is a sound—a sound which it is supposed will prove unpleasant and disagreeable to the ears of those who hear it, and may affect the comfort of those who live within its reach. But it would require a very peculiar case to enable the Court to give compensation in the way of damage for any such cause. The sound of course has no effect what-

ever upon the land. It only affects those who inhabit it, and one can figure many ways of producing the same annoyances in a mode for which no such claim could by possibility have been pretended. If, instead of erecting the lighthouse on Fidra, the Commissioners had in any other locality obtained from the Admiralty right to moor a floating-beacon beyond the shore, and in that part of the channel in which the Crown was the only proprietor, a fog-signal might be introduced which would have been completely beyond the remedy which is now asked for. There are cases where the question of the vibration caused by railway trains passing, or the smoke and noise and whistling of passing trains, have been put forward to swell the amount of damages in cases of railway compensation, but the general opinion is that these are not well-founded, and of late, at all events they have almost universally been disallowed. These, however, are not in the same category with the case we are now considering, because the noise which a foghorn may make is no part necessarily of a lighthouse or its appurtenances, and the noise is not produced excepting for the only purpose for which a signal is maintained.

This is in no respect an injury affecting land. It has nothing to do with land, and no more connection with it than with the water which intervenes between the Fidra and the mainland. To say that the feuing value of a mile or two of adjacent coast would be depreciated if the Commissioners were to erect a foghorn on Fidra and to use it is in my opinion a far too remote ground of action. The fact that the territory on which the works are placed did at one time belong to the proprietor of Archerfield is not sufficient to put the proprietor in any different position than that of any other occupant of the adjacent land within reach of the sound of this instrument. The injury is precisely the same in the one case and in the other, although it is true that but for the acquisition of the land the proprietor of Archerfield could have prevented any such erection. But it is only too plain that if such an instrument had been erected on land not belonging to Archerfield such a claim would be entirely out of the question. It is a lawful use to make of the property—not only a lawful use, but one for the benefit of the public. The protection of life at sea is a more important matter than the possibility of harsh or disagreeable sounds occurring now and again within a mile-and-a-half of the shore. But it is a rule that has been laid down frequently in similar cases that a use of property which could not be made the subject of action or interdict, apart from the acquisition by compulsory powers, will not be a ground of compensation in estimating the amount due for the use of those powers.

Lord Young—I am of the same opinion, and upon the same grounds. We are of course only concerned here with the legal nature of the claim, not with its reasonableness or unreasonableness in itself, if it be such that the law will allow it. I agree with your Lordship that it is not such that the law will allow. But in considering that question it is almost impossible not to notice its character in itself as reasonable or unreasonable, although, as I have said, our concern is with its character as legal or not. I must say, however, that I have read the views of the overseman as expressed by himself with a considerable amount of surprise. The circumstances briefly are these—The Northern Lighthouse Commissioners require a portion of this little island of Fidra to erect a lighthouse upon, and the value of the land which they are to take in that island is about £970. The island is at a part of the coast which is dangerous to shipping, and it stands at a distance of not quite a mile from the mainland, from which it is separated by the sea at all states of the tide. And the question which is here raised by imagination or considerations of probability or likelihood is about whistling upon that island in the future for the purpose of warning ships off that dangerous coast in foggy weather. The arbiter says it is within the power of the Commissioners to erect a fog-signal—that is to say, a powerful whistle which will be efficacious for the purpose of warning ships so that shipwreck may be avoided. The arbiter expressed this view—that it is reasonable in the circumstances to anticipate that a foghorn signal will be erected and used by the Commissioners in the exercise of their powers. Why? What are the circumstances which make it reasonable to anticipate that? The circumstance present to the mind of the arbiter when he thought it reasonable to anticipate that is, that it may be found necessary for the safety of ships and of human life in foggy weather to warn them off that coast. The claimant lives in a house about two miles off, on the mainland, and says that the whistle will be disagreeable—much more disagreeable than a quiet shipwreck—and she says that that possibility should be valued at £1000. And the arbiter actually gives countenance to that view, that a whistle sounded in foggy weather to prevent shipwreck and loss of life upon the dangerous coast, will, from the disagreeable sound, cause damage to the extent of £1000. I should have thought that the proprietor of a dangerous coast, entitled to exclude all others, if he or she could contrive means of sounding vessels off that dangerous coast in foggy weather, would be bound as a rational and humane being to do it. It is said that the sound will be made only if it is found to be necessary. The lighthouse is to be put up. The land for that is taken and paid for quite properly. But in case it should be found necessary to sound a horn or a whistle in the darkness, when no other signal can be made to warn vessels of their danger, that will no doubt be done. Now, to say that that sound would be disagreeable across the water, and ought to be paid for, is about as extravagant a proposition in character as I have heard of. But its very extravagance is crowned in determining its character as legal. And I know of no authority for giving damages to the proprietor of an estate not otherwise adjacent to this island than that it is on the nearest coast a mile off, and the sea intervening, for a sound which is made upon the island. That is not damage done to the remainder of the estate of the party. The estate adjoining is not hers at all. It is the sea. It is part of the territory of Great Britian, because it is within the three mile limit, and foreign ships could no doubt be kept off. But the view of the arbiter would have been the same if it had been without the three miles, provided the estate wherever it was was within the sound of the foghorn That is not an

adjoining estate. And in the absence of any authority to that effect I yield entirely to the reasons which suggest themselves strongly to my mind against the reasonableness of any such claim. I do not think there is any law for holding that the whistle from an island does damage to the nearest proprietor on the sea-shore, provided that it is within earshot of it, and that that is damage to be paid for if the island happens to belong to him, and it is taken for a legitimate purpose. I do not think it is so; I do not think the pursuer's is a claim of the character which the law will allow. I think it is too extravagant for the law to allow it or countenance it for a moment. Therefore I agree with your Lordship and the Lord Ordinary that this part of the claim ought to be disallowed as illegal.

Lord Craighill—The facts of this case are set forth in the Lord Ordinary's note, and no end could be served by recapitulation. The question is, whether apprehended damage for which the oversman has contingently allowed £1000 is damage for which, under the Lands Clauses (Scotland) Act 1845, sec. 61, the reclaimer is entitled to compensation. The Lord Ordinary thinks not, and I have come to the same conclusion. His Lordship has given many reasons for the findings in his interlocutor, and were it necessary I should probably be ready to adopt most, if not all his views, but such a general concurrence does not seem to me to be required on the present occasion. I am content at once to select as sufficient for the decision of this case the consideration that the damage claimed for, were it ever to be incurred, would not result from the exercise of the powers in the Lands Clauses (Scotland) Act 1845, or of the Special Act—that is to say, in this instance the 404th section of the Merchant Shipping Act of 1854—or any other Act incorporated therewith. If it would not, the ground of the pursuer's claim is swept away, for the provision in the Lands Clauses (Scotland) Act 1845, on which she rests her case, is the last part of sec. 62, which enacts that there shall be included in the price of lands taken, compensation for injury to those lands done by the exercise of the statutory powers. The power the Commissioners have used in taking the lands on Fidra Island, which is to be used for lighthouse purposes, is that given by the section of the Merchant Shipping Act just mentioned, which is a power "simply to erect new lighthouses, with all requisite works, roads, or appurtenances." This, no doubt, is a very general description, and those unacquainted with the details of lighthouse construction would find it difficult even to conjecture what might or might not be included, but for the reasons about to be mentioned a foghorn signal cannot, I think, be taken to form part of the statutory works. As mentioned by the Lord Ordinary, only on five out of the sixty-five lighthouses round the coasts of Scotland has a foghorn signal been erected, and the necessary inference therefore is, that such an instrument is not one which in any reasonable view of the matter can be regarded as one of the "requisite works" or as "an appurtenance" to a lighthouse. A foghorn signal and a lighthouse, though in different circumstances they serve a common end, have no connection the one with the other. Each without the other is or may be complete in itself; the one, in short, is independent of the other. The foghorn signal therefore, whatever else it is, is not a requisite of a lighthouse. Nor could it be so regarded by those who framed section 404 of the Merchant Shipping Act of 1854, because at that time foghorn signals were not only not in use but were unknown. So far as I have been able to discover, there is no mention of anything bearing that name to be found in any of the scientific or commercial or nautical works of that period. "Fog signals" not "foghorn signals" are mentioned in the 295th section of the Merchant Shipping Act of 1854, but the use of it which is in contemplation, and which is made matter of enactment, is only on board ships at sea. There is nothing in this statute or in the amending Act of 1862 which has any reference to fog signals or to foghorn signals to be used on shore or on any rock or island of the sea. This of itself seems to me to demonstrate that a foghorn signal was not, and in the circumstances could not be, one of the requisites of a lighthouse, as that word was used in the enactment from which the Commissioners derive their statutory powers.

But this is not all. By section 405 it is enacted that "Previously to undertaking any such work as aforesaid, the said commissioners or corporation, as the case may be, shall forward a notice specifying fully the nature of the work proposed to be undertaken by them, and their reasons for undertaking the same, to the Trinity House, who shall take the proposed scheme into their consideration and notify to the said commissioners or corporation their approval or rejection thereof, with or without modifications."

This direction of course was complied with, and so there must have been communicated to the Trinity House a full specification of the intended works. But it has not even been suggested on the part of the reclaimer that a foghorn signal was reported as part of the work proposed to be undertaken by the Commissioners. This omission from the details of the work as communicated by them to the Trinity House implied that such a work was not contemplated as a part of the undertaking, and if it was not, its construction, should that ever be realised, will not result by the exercise of any statutory power conferred by the Merchant Shipping Act 1854 or any other relative Act of Parliament. In this, which is my view of the matter, the damage claimed for is not damage which can be allowed for under the clause of the Merchant Shipping Act founded on by the pursuer, because such damage can only be given when lands are injuriously affected by the exercise of powers conferred by the Act or Acts of Parliament under which the undertaking has been or is to be accomplished.

Through these observations there runs the assumption that the injury for which the oversman has allowed conditionally £1000 would be done to the lands of the reclaimer were the foghorn signal to be erected. The fact probably must be taken as it is presented by the oversman. But it is right to say, that were I called to give an opinion on the point it probably would be different from that of the oversman. The injury that would be done, the damage which would be suffered, would at the best be only fanciful or imaginary. The lands would be what they were before. No nuisance to any person or

any thing would be created; were it otherwise, as there is no statutory justification, the proceeding could be reached by interdict, and when the purpose which was to be served by the foghorn signal is so reasonable, it is on every account to be regretted that the pursuer, when her case on its legal merits was at the least so doubtful, should have thought it expedient to make a claim against which so much, and in favour of which so little could be said.

Lord Rutherfurd Clark—I do not regret the decision which your Lordships are about to pronounce. Were it not for the decree of the arbiter, I could not have imagined that the possible use of a foghorn on the island of Fidra could have caused any appreciable damage to the pursuer.

But that decree is binding on us, and it establishes the fact that by one of the uses of the lighthouse, of more or less probable occurrence, the remaining lands of the pursuer have been injuriously affected to the extent of £1000, or, in other words, that their value is diminished by that amount. I can scarcely believe it. But believe it I must. The question then is, whether the pursuer can claim compensation for this injury?

I do not propose to examine the cases which have been decided under the Railway and Lands Clauses Acts. They are very numerous, and are not easily reconcileable. But certain points have been conclusively determined. One of these is, that when no land has been taken, a landowner can claim compensation for injury caused by the construction of the railway, but not by its use. I refer to the case of *The Hammersmith Railway Company* v. *Brand,* and the later case of *Walker* v. *The Caledonian Railway* [both cited *supra*].

The decisions go even further, for a claim for compensation by reason of injury from the use of the railway will not arise in every case when land is taken. In the *Union Railway Company* v. *Hunter* [*sup. cit.*], a piece of Mr Hunter's land was taken, and he claimed compensation for injury to the remainder caused by smoke, noise, and vibration due to the passing trains. He was unsuccessful. The reason, as I take it, was that the injury did not arise from the use of the railway on the piece of ground taken from him. The subject injured was a house fronting a street, and the ground taken was a piece of a garden or court behind it. The street was bridged, and the railway passed close to the house and receded from it when it entered on the ground taken. The consequence was that the injury caused by the use of the railway was not due to, or was not sensibly augmented by, its use on that ground.

But when ground is taken and the remainder is injured by the use of the railway on the ground so taken, the claim for compensation is recognised. Thus in the *Stockport Railway* case [*sup. cit.*], where compensation was given for probable injury to a cotton mill by reason of the risk of fire in the use of the railway where it passed over the ground taken from the millowner, Mr Justice Crompton said—"When the mischief is caused by what is done on the land taken, the party taking compensation has a right to say, It is by the Act of Parliament, and by the Act of Parliament only, that you have done the acts which have caused this damage." So far as I am aware, this case has never been overruled. It is true that in the case of the *Union Railway* v. *Hunter* [*sup. cit.*] Lord Chelmsford may be taken to express some doubt with regard to it. But these doubts seem to have been removed when he came to consider the case of the *Duke of Buccleuch* v. *The Metropolitan Board of Works* [*sup. cit.*], when he says—"In neither of these cases (*The Hammersmith Railway Company* and *Union Railway Company*) [*sup. cit.*] was any land taken by the railway company connected with lands which were alleged to be so injured, and the claim of compensation was for damage caused by the use and not by the construction of the railway. But if in each of these cases lands of the parties had been taken for the construction of the railway, I do not see why a claim of compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration or smoke or noise occasioned by passing trains."

In point of fact, in the case of *Hunter* land was taken from the party who claimed compensation for injury caused by the use of the railway. I have endeavoured to explain why that fact was disregarded, and why the case was dealt with as if no land had been taken. Whether my explanation be sound or not, the fact remains that the case of the *Stockport Railway Company* furnishes the rule for our guidance, and if in the case of the *Union Railway Company* Lord Chelmsford shewed any disposition to question its authority, his later opinion confirmed it.

The result seems to be, that where certain uses of land are permitted by the authority of Parliament—and I here speak of uses as distinguished from construction—a claim for compensation arises in one case only, viz., when the uses exist on land which has been taken, and where by reason of these uses injury is done to the remaining lands. When these conditions are given there is no exception to the rule. The reason seems to be that the landowner cannot be fully compensated unless he obtains not only the price of the land taken but compensation for the depreciation of the remainder, whether due to construction or use.

The land taken from the pursuer was taken for a lighthouse. It was taken under the powers of the Merchant Shipping Act 1854, with which the Lands Clauses Act is incorporated. The former Act enables the defenders to erect new lighthouses, with all requisite works, roads, and appurtenances, and the latter enables them to take land by compulsion for that purpose. One of the appurtenances of the lighthouse is a fog-signal. It is not, indeed, specified by the Act, but it was admitted that the defenders may use it, and certainly they would if occasion required.

The defenders are only enabled to use the fog-signal by taking the pursuer's land. It seems to me therefore that the case falls within the rule which I have endeavoured to explain. The use of the land taken causes injury to the remaining lands of the pursuer, and therefore she is entitled to compensation. I see no difference between this case and the case of the *Stockport Railway Company.* In the one the remaining subjects were injured because they were exposed to the risk of fire. In the other they are injured because from the sound of the fog-signal the pursuer cannot put them to the same profitable use as theretofore. In short, the fog-signal creating a nuisance would

depreciate the value of the remaining land, and I see no ground for distinguishing between causes of damage due to the use of the lands taken, provided that it results in the depreciation of the remainder. Noise is one of the causes of damage which Lord Chelmsford recognises as raising a claim for compensation.

It is said that the damage is consequential and remote. I do not think that it is. If it were certain that the fog-signal would be used frequently the arbiter would evidently have given a much larger sum. But I cannot consider the damage to be either consequential or remote, if it be directly due to one of the uses to which the defenders may put the land, and if it amount to the large sum of £1000.

Again, it is said that the island of Fidra from which the land was taken is separated by the sea from the pursuer's other lands. That is true, but in my opinion it is immaterial. The remaining lands are not the less injured, and the injuries for which compensation can be claimed are not limited to the adjoining lands, At least I see no principle for any such limitation. The principle is that when the use of the lands taken causes injury to the remaining lands, compensation must be made. The pursuer will be a great loser if it be not. It is not severance damage which is alone to be compensated. This is clear from the case of the *Stockport Railway Company*.

Again, it is urged that a fog-signal is not one of the specified appurtenances of a lighthouse. I think this to be immaterial. The defenders are entitled to have all the equipments in the lighthouse which they think to be requisite. That is a matter which is left to their discretion. The pursuer, to use again the language of Mr Justice Crompton, has a right to say that it is by the Act of Parliament, and the Act of Parliament only, that the defenders have done the acts which have caused the damage. If they had not taken the pursuer's lands they could not have caused the injury of which she complains.

The Court adhered.

Counsel for Pursuer—D.-F. Mackintosh, Q.C. —Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Defenders — Pearson — Dickson. Agents—T. & R. B. Ranken, W.S.

Friday, March 5.

SECOND DIVISION.

[Lord Fraser, Ordinary.

CHAPLIN *v.* JARDINE.

Sale—Warranty—Timeous Rejection—Horse.

A person bought a horse on 15th January, and took delivery of it on the 28th. On 19th March he wrote to the seller saying that he had been absent from home, and did not quite know what to do about the horse, which was very vicious in the saddle; that he had not made up his mind to part with him yet, and he desired to know if the seller would change him if he decided to do so. On 24th March he wrote again saying that the horse was vicious, and he must be quit of him at once. On 1st April he wrote threatening legal proceedings if the horse was not taken back and the price returned. Thereafter he returned the horse and brought action for repetition of the price. The Court *assoilzied* the defender, on the ground that the pursuer had not timeously rejected the horse.

George Robertson Chaplin, residing at Murlingden, Brechin, on 8th May 1885 raised this action against David Jardine, a horse-dealer in Edinburgh, for the sum of £85, being the price he had paid the defender for a chestnut horse which he had bought from him on 15th January 1885, and paid for on 29th January 1885, and of which he had taken delivery on 28th January 1885. The ground of action averred by the pursuer was that the defender had warranted the horse sound in every way, and perfectly quiet in harness, but that the horse had turned out not conform to warranty. The defence was (1) no warranty given, and (2) no timeous rejection; the defender pleading—"The horse having been the property of the pursuer since the 15th day of January 1885, the present action should be dismissed with expenses."

The latter defence alone need here be referred to.

The horse was purchased on the 15th January 1885, and was delivered on the 28th of that month, and the price paid the next day. On 23d February Robert Campbell, the pursuer's coachman, wrote to Jardine as follows:—"Dear Sir,—Just a few lines to say that the horse is doing well, and expect to hear from you soon, with a little discount.—Yours respectfully, ROBERT CAMPBELL."

The pursuer stated on record that he "went from home for six weeks immediately after the said horse was sent to him, and before he had used him." On 19th March, having by that time returned home, he wrote thence to the defender, as follows:—"Dear Sir,—I have been from home for the last month, and expected to have heard from you ere this about the bay horse. I do not quite know what to do about the chesnut I bought from you. So far he has made no mistake in harness, but in saddle he is quite the most vicious animal I ever saw. He rises straight up on meeting another horse and makes for them, and altogether is a most dangerous animal both to his rider and to those he meets on the road. I haven't quite made up my mind to part with him yet, but should I do so, would you take him back and supply me with another bay or chesnut, the latter for choice?"

On 24th March the pursuer wrote as follows:—"Dear Sir,—Kindly let me hear from you by return of post in reply to my letter of last week, in which I stated that I was thinking of parting with the chesnut horse I got from you. The horse is now as vicious in harness as he was before in the saddle, and I must be quit of him at once. Have you another animal likely to suit me, bay or chestnut, not more than 15.2½. Please let me hear if it will suit you if I return the horse on Friday next per train reaching Waverley 2.25 p.m."

On 1st April the pursuer's brother wrote to Jardine as follows:—"Sir,—My brother, Mr G. R. Chaplin of Murlingden, Brechin, has written to me regarding the chestnut horse he bought from you some time ago, and also in reference to the bay horse of his which is or was in your possession. He has repeatedly written to you