

English case of the *Mersey Dock Trustees v. Gibbs*, by the House of Lords, must be held to have set aside the authority of that decision, and to have brought back the principle on which such cases are to be decided in future to that which prevailed in Scotland before the judgment of the House of Lords in 1839. Assuming this to be so, the interlocutors of the Sheriff-Court under appeal will fall to be confirmed on the grounds so clearly and well stated in the interlocutor and note of the Sheriff-Substitute, adhered to by the Sheriff-Principal. On the contrary assumption, it is no less clear that these interlocutors must be recalled, and the defenders assuizied from the conclusions of the action. I am humbly of opinion that the latter course ought to be followed for these reasons:—

In the first place, I am not fully satisfied that there may not be reasons which would justly influence the minds of Judges sitting in an English Court in deciding on liabilities arising under their local statutes, which would not apply to Scotland any more than Lord Corehouse was when he delivered his opinion in 1838 against the authority of the English decisions then referred to in support of a contrary doctrine to that which it appears now prevails in England.

In the second place, I am not satisfied that the *Mersey Docks* case, decided by the House of Lords in 1866, presented the same state of circumstances as occurred in the case of *Duncan v. Findlater*, and as occur in this case, viz., the entire devotion of the trust-funds, by force of the statute, to the purposes of the trust, viz., the formation and repair of the roads under charge of the Trustees. But however this may be, and giving to the decision all the authority in principle which the pursuer contends it ought to receive, it is still a judgment in an English case; and this leads me to observe—

In the third place, that I cannot hold the judgment, even of the House of Lords, under an English local statute, sitting as a Supreme Court of appeal and determining a purely English case, as a binding precedent on the Courts of this country. That such a judgment is entitled to the greatest respect and deference is not for a moment to be questioned. But here the situation in which we are placed is altogether peculiar. The law we are called upon to administer has been authoritatively declared by the House of Lords, sitting as a Supreme Court of Appeal in Scottish causes, and has formed the rule for judgment and been followed and observed as such for upwards of thirty years. Until the same Supreme Court of Appeal shall in a Scotch cause alter that rule of judgment as applicable to the law of Scotland, I think it would not be consistent with my duty, whatever may be the views of the other members of this Court, to yield to the authority of a judgment in a purely English case in regard to a purely English local statute, even of that high tribunal. The views of English lawyers and English judges may have undergone a change since 1839 and 1846, but I cannot think that to be a good reason for our adoption of the principle of a judgment inimical to what has been the understood law of Scotland since the judgment in *Duncan v. Findlater*.

LORD DEAS and LORD NEAVES concurred with LORD COWAN.

The Court pronounced the following interlocutor:—

“Dismiss the appeal: Affirm the interlocutors of the Sheriffs appealed from: Find the appellants liable in the expenses in this Court, and remit to the Auditor to tax the same and to report; and remit to the Sheriff to proceed with the cause, and decern.”

Counsel for Defenders (Appellants)—Solicitor-General (Clark), Q.C., and Balfour. Agent—C. Taylor, S.S.C.

Counsel for Pursuer (Respondent)—Guthrie Smith. Agents—Fraser, Stodart & Mackenzie W.S.

Friday, December 12.

FIRST DIVISION.

[Bill Chamber.]

GARDINER v. THE CALEDONIAN RAILWAY COMPANY.

Land Clauses Consolidation (Scotland) Act 1845—Railway Clauses Consolidation (Scotland) Act, 1845, §§ 16, 46, 49, and 69—Caledonian Railway Company, Private Acts (1866 and 1872)—Accommodation Works—Substitute Road.

Where a Railway Company, in exercise of statutory powers, having taken lands from one proprietor, proposed to give part of these lands as a substitute road to another proprietor, which proceeding would have the effect of preventing the former from making a siding to connect his lands with the railway without paying way-leave to the latter:

Held—(1) that whatever is legitimately within the purposes of the railway undertaking is within the purposes of the Lands Clauses Act, and therefore within the purposes contemplated in the acquisition of land by the company. (2) That accommodation works to another proprietor are legitimately within the purposes of the undertaking and of the Act, and the land taken from one proprietor may be lawfully used by the Railway Company in fulfilling their obligation to finish such accommodation works; (3) that where an intersected road belonging to a proprietor on the line cannot be restored, then the giving a substitute road to the proprietor is an accommodation work within the meaning of the Act. (4) That the question of the necessity of giving a substitute road in any particular circumstances is one to be decided solely by the Railway Company, so long as no evidence can be produced of an abuse by them of their legal right, to the detriment of the private party, the landowner.

This was a note of suspension and interdict presented by James Gardiner of Haughhead, in the County of Lanark, in which he asked that the respondents, the Caledonian Railway Company, should be interdicted, prohibited, and discharged from constructing on the lands taken by them from the Complainer's estate of Haughhead, under the power conferred by “The Caledonian Railway (Lanarkshire and Midlothian Branches) Act, 1866,” and “The Caledonian Railway (Additional Powers) Act, 1872,” any service or other road leading from the Glasgow and Carlisle turnpike road, in the neighbourhood of the complainer's property, to the lands of Ross, belonging to Mr

Aikman of Ross, adjoining to complainer's lands on the east; and, in particular, from constructing any such road from the said turnpike road to the said lands of Ross along the west side of the respondents' railway, and between the said railway and the lands still belonging to the complainer; and from making any use of or executing any works upon the said lands taken by them from the complainer, other than were authorised by their said Acts of Parliament.

The circumstances in view of which the application was made, as well as the main arguments urged by the parties, are fully narrated in the note to the Lord Ordinary's Interlocutor and in the opinions pronounced by the Judges on advising.

On the 24th November 1873 the Lord Ordinary (SHAND) pronounced the following interlocutor:—
"The Lord Ordinary allows the complainer to amend the note of suspension and interdict as proposed at the bar: and, having heard counsel, and considered the note, answers, and productions, passes the note.

"*Note.*—The case is not one in which the Lord Ordinary would have thought it proper to grant interim interdict; but he was relieved from deciding this question, as the complainer asked only that the note should be passed.

"The respondents urged that the note should be refused. The Lord Ordinary has come to the conclusion, however, that he ought not to take this course in the existing state of the averments of parties. It appears to him that before the case is ripe for decision both parties may find it necessary or proper to make some addition to their statements on record.

"The case raises a question of importance and novelty. The respondents having, for the purposes of their undertaking, acquired certain lands belonging to the complainer, are in the course of constructing part of their line on these lands. The railway there for some distance runs along and is bounded by the complainer's property, from which the lands acquired by the respondents have been taken. As soon as the line shall be made and in use, the complainer has it in view, taking advantage of section 69 of the Railways Clauses (Scotland) Act, 1845, to make a communication with the railway from his own lands, for the purpose of conveyance of minerals from an important mineral-field belonging to him in which workings are going on; and it was explained that the exercise of this right, if he be entitled to it, will be of peculiar value to the complainer, because it will enable him to have his minerals carried away without paying a wayleave, as he must at present do, to the proprietor of the lands of Ross. The respondents are, however, in the course of making a road on the ground which they have acquired from the complainer, and running alongside of or on the embankment of the railway. This road they intend to give over to the proprietor of Ross; and the result, as alleged by the complainer, will be, that the proprietor of these lands will acquire a strip of what was the complainer's property, and was acquired from him by the respondents for the purposes of their undertaking, which will intervene between the complainer's property and the railway, and the use of which as a road will at all events deprive the complainer of the right or privilege of direct communication by private railway between his own lands and the respondents' line.

"The respondents, in their answers, explain that

their line cuts through an existing road belonging to the proprietor of Ross; that this road cannot be restored compatibly with the formation and use of their railway; and that the road complained of, which they are in the course of making on part of the ground acquired from the complainer, is required as a substitute road, to supply, for the use of the proprietor of Ross, the place of the road cut through.

"The Lord Ordinary is of opinion that the Railway Company is entitled, under the general Acts usually incorporated with the Company's special Act, to take ground from the property of one landowner for the purpose of forming a road or other accommodation work required for the lands of an adjoining landowner, whose property is interfered with by the making of the railway. It has been so decided in England in the cases of *Rangely v. Midland Railway Company* and *Beauchamp v. Great Western Railway Company*, both reported in volume III. of the Law Reports (Chancery Appeals, pp. 306 and 745 respectively.

"If the affrmance of this proposition were sufficient for the determination of the case in the respondents' favour, the Lord Ordinary would have refused the note. But the complainer, assuming this general right on the part of the respondents, has averred that the right is not being fairly exercised by them in the present instance. For the complainer avers—(1) that the construction of the road complained of is not necessary for the purposes of the railway and relative works (including therein accommodation works, as was stated at the bar) and that any diversion of the existing road is unnecessary for these purposes; and (2) that, assuming any diversion to be necessary, it could easily be effected otherwise than in the way proposed, so prejudicial to him, and without causing prejudice to any one. These averments are at present made in very general terms, and it will be only right and proper that they should be made more specific, and indeed more distinct, on the passed note. Thus, in reference to the first of them, the respondents allege that the line is in deep-cutting where it cuts through the existing road on the lands of Ross, and that the road cannot be restored; while at the discussion the complainer denied this, and stated that the line crossed the road about the level, and that, consequently, no diversion or substitute road was required. Again, the complainer alleges that, even if a diversion be required, it can be readily made without prejudicially affecting him or others. It is not explained whether in this view the work can be done without involving the respondents in greater expense than their present course will cause; and this is a matter as to which the Lord Ordinary thinks both parties ought to be more explicit in their statements. If it were conceded by the respondents either that the existing road could be readily restored, and that no substituted road is necessary for the purpose of making good any interruption on the lands of Ross, or that a substitute road could be easily given others, and at as little expense as the operation complained of, and without injury to the respondents, the Lord Ordinary is at present disposed to think the complainer would be entitled, under the Statutes, to the remedy he asks. On the other hand, if there be no unfair exercise by the respondents of their powers, and if it should appear that the course they are taking is the most reasonable for their own interests, having (as they

seem to him entitled to do) economy in view, and not the benefit of one landowner at the expense of another, the opinion of the Lord Ordinary at present is that the legal result would be different. The complainer's averments, however, are sufficiently broad to cover the former of these cases; and the Lord Ordinary has therefore passed the note, to try the question.

"It was pleaded for the respondents that by section 61 of the Railways Clauses Act all difficulties as to accommodation works must be settled by the Sheriff or two Justices. This is true in a question between an individual landowner and the company; but here a third party—another landowner—alleges that the company are acting beyond their powers, and without any necessity for their operations, such as a decree by the Sheriff or Justices might possibly create. In such circumstances, the Lord Ordinary is not prepared to hold that the complainer is not entitled to appeal to this court for a remedy.

"There was no argument stated by the respondents on the limiting effect of the restriction or condition attached to section 69 of the Railways Clauses Act, providing that the company should not be bound to make a junction between a private railway and their line 'in any place which they shall set apart for any specific purpose with which such communication would interfere.' These are words which may have an important bearing on the decision of the case when the facts are more clearly before the court, but at present the Lord Ordinary does not feel warranted in doing more than drawing the attention of the parties to the special terms of the section.

"The Lord Ordinary has stated thus fully his grounds for passing the note to try the question, because of the strong appeal made to him by the counsel for the respondents to refuse the note *de plano*."

The respondents reclaimed.

Authorities cited by the complainer—*Christie v. Caledonian Railway Company*, 10 D. 312; *Flower v. London, Brighton, and South Coast Railway Company*, 2 Drewry and Smeal Ch. Rep. 330; *Q. v. Wycombe Railway Company*, 2 L.R., Q.B. 310.

Additional authority cited by the respondent—*Stoeton and Darlington Railway Company v. Brown*. 9 Clark, H.L., 246.

At advising—

LORD PRESIDENT—My Lords, in this case the Lord Ordinary has passed the note, but has not granted interdict. The complainer does not seek to review that interlocutor, but the respondents do, and say that the Lord Ordinary is wrong in having passed the note, and that he ought to have refused it. Generally speaking, if there is a question to try at all, the course which the Lord Ordinary has followed is the proper course; but the respondents say, that in a case like this the passing of the note is a serious injury to them, because it has the effect of making the matter litigious, and consequently interfering necessarily with the progress of their works, and as the progress of the works of a new railway are always matter of great urgency, there may be a great deal of justice in that complaint. If, then, it appears quite clear upon the face of the proceedings before us that the complainer has no right at all to interfere with what the railway company are doing, it would be unjust to the railway company not to comply with their demand, and to refuse the note.

The circumstances here are very simple. The complainer's estate of Haughhead adjoins the estate of Mr Aikman of Ross, and the railway which is now in course of construction passes through both of these estates. Of course the company required to take land from the complainer, and this they did in the ordinary form. There is no particular speciality about that, except that apparently they took first one portion of land, and then another. There were two notices to take, and two takings of land. In the course of constructing their line through the neighbouring estate of Ross they required to cut through a road which the owner of the estate of Ross had—a private road connecting some portions of his estate with the turnpike road from Glasgow to Hamilton; and they say that they cannot restore this road compatible with the formation and use of the railway and works. Therefore they require to give a substitute road to Mr Aikman of Ross in terms of the 49th section of the Railway Clauses Act, and they purpose to do this by giving him a road along the west side of their line of railway, which is called No. 7. The ground which lies on the west side of the railway No. 7 is part of the ground which the company have taken from the complainer, and the effect, the complainer says, of their giving a road upon that ground along the west side of the new line of railway will be to prevent him from making a siding to connect his coal works with this new line of railway. It appears that at present he has a connection between his coal works and the respondents' Lesmahagow branch—a line which has been in existence for some time; but in reaching the Lesmahagow branch he has to pass over a piece of ground which belongs to his neighbour Mr Aikman of Ross, and consequently he has to pay that gentleman a way-leave for the liberty to pass across that strip of ground to join the railway, and if he could make a siding to join this new branch from his own ground alone, without passing over ground belonging to anybody else, it would save him that way-leave. That is quite a legitimate object undoubtedly. But, on the other hand, it must be kept in view that the right to make a siding to connect lands or coal workings with a railway is not an absolute right on the part of a proprietor. It is subject to a great many conditions. If it is inconsistent with the mode in which the line of railway is laid down, it is a right that cannot be exercised. It cannot be done if the railway is in deep cutting; it cannot be done if the railway is upon a high embankment; it cannot be done if the railway company find it necessary for their own convenience to have any works alongside the rails, and which prevent the siding from being made. In short, it is not a right which a neighbouring proprietor can exercise, unless there is no legal or lawful obstruction of any kind between his own lands and the line of railway.

But the complainer says that this interposing of a road in favour of the proprietor of Ross between him and the line of railway is an illegal obstruction, and upon that ground he came into Court, and asked for an interdict against the railway company "constructing on the lands taken by them from the complainer's estate of Haughhead any service or other road leading from the Glasgow and Carlisle turnpike road in the neighbourhood of the complainer's property to the lands of Ross, belonging to Mr Aikman of Ross; and, in particular, from constructing any such road from the said turnpike

to the said lands of Ross along the west side of the respondent's railway, and between the said railway and the lands still belonging to the complainer." Now, it has not been maintained to us that this is an illegal proceeding on the part of the railway company, or that this is an illegal obstruction between the line of rails and the complainer's land. That was abandoned in argument, but it is somewhat remarkable that that was really the only ground upon which this application for suspension and interdict was originally made. The Lord Ordinary, however, allowed the complainer to amend his statement, and he has now put on record certain averments for the purpose of showing that, although this construction of a road along the west side of the line of rails is not in itself an illegal obstruction, still it is, in the circumstances, not a use to which the railway company are entitled to put the lands they have taken from the complainer.

Now, it seems to me that a railway company taking land under the Lands Clauses Act for the purposes of their special Act are not limited in any way in their use of the land, so long as they apply it to one or other of the purposes of the Act. The leading purpose of the Act of course is the construction of the railway, but there are a great many other purposes of the Act—the purpose of constructing relative works; the purpose of affording accommodation works to persons whose roads are interfered with; the purpose of providing substitute roads for old roads: all these are purposes of the Act; and the railway company say that they have applied this land to one of the purposes of the Act, namely, in providing a substitute road in place of a road which they have cut through and cannot restore. Now, I think that is apparent upon the face of the proceedings. It is impossible to doubt that the land is applied to that purpose, and that that is one of the purposes of the Act.

But it may be for all that, that although the railway company are exercising a power conferred upon them by the statute, they are abusing that power and acting unfairly towards the private party, the landowner; and if that were so, I am very far from saying that they might not be restrained. The powers given to the railway company by these statutes are very large, and they are powers which are to be exercised, in the first instance certainly, according to their own discretion, and according to the views which they may entertain of the exigencies and demands of the work which they are executing; and so long as they confine themselves to the exercise of their power for the purposes of the statute, I apprehend that no Court is entitled to interfere with them. But, on the other hand, there may be cases of abuse; and under cover of exercising their power for the purposes of the statute, and with an apparently legitimate object in view, there may be an indirect and improper object disclosed, so that the exercise of the power shall amount to an abuse of the power; and if that were so, then I apprehend the Court would interfere to prevent such an abuse of power. The only question, then, is whether there is any suggestion of such an abuse of power here. Unquestionably the road has been interfered with—cut through—in the manner contemplated and permitted by the 16th section of the Railway Clauses Act; and the case arises under the provisions of the 46th and 49th sections, which provide what is to be done when a road is so cut

through or interfered with under the powers of section 16. The 46th section enacts that "if in the exercise of the powers by this and the special Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether a carriage road, horse road, tram road, or railway, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operation, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be." Now, that is what the railway company have done, or were in the course of doing, when this complaint was presented. When the operation comes to an end, the 49th section provides "that if the road so interfered with can be restored compatible with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatible with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow." Now, what the railway company say is, that the road which they have interfered with is not only interfered with temporarily, requiring this substitute, but that the substituted road will be permanently required, because the road is so interfered with that it cannot be restored compatible with the formation and use of the railway. On the other hand, by the averments which are introduced into the note of suspension under the interlocutor of the Lord Ordinary, the complainer makes these statements—"The construction of the road in question is not necessary for the construction of the railway and relative works, nor is any diversion of the existing road necessary for that purpose." And again, further on, "Assuming any diversion in the existing road to Ross to be necessary, such diversion would easily be effected otherwise than by the proposed road in question, and without causing prejudice to the complainer or any person interested."

Now, keeping in view what I have already said about the discretion vested in the railway company by the statute to exercise these powers in any way that they think most convenient for the object of the statute, the question comes to be—whether these averments are in any way relevant? It is needless to say that when this amendment was allowed, the complainer was expected to put upon record—and I have no doubt did put upon record—all that he could say against the proposed diversion of the road; and all that he has said appears to me to come to this, that the diversion of the road, and the substitution of another one for it, is not necessary in constructing the railway, and it is not necessary that this should be permanently maintained, because a diverted road could be formed elsewhere, and by other means, which would not prejudice the complainer. Whether the diversion in the road is necessary for the construction of the Railway is in a great measure matter of opinion. If it is doubtful whether it is necessary for the construction of the railway, then it is almost en-

tirely matter of opinion; and the question which naturally suggests itself to one's mind is—By whose opinion are the railway company to be guided in the exercise of their power? The directors themselves, who are the moving body of a railway company, are not, generally speaking, qualified to form an opinion upon such a question, and consequently they consult professional men who are skilled in these matters. They consult, above all, their own engineer, who directs the execution of every work of this kind. Are they not to be guided by his opinion as to whether this is necessary for the construction of the railway, or are they to be brought into Court and forced to take the opinion of another engineer for the purpose of controlling the opinion of their own? That would be a very strange mode of interfering with the large powers entrusted to railway companies under this statute. That I apprehend is quite out of the question, and cannot be listened to; and therefore, to say merely that the construction of this road is not necessary for the construction of the railway, is to say no more than that, in the opinion of the complainer, or of some engineer employed by him, it is not necessary. Now that I think is entirely irrelevant, and can form no ground whatever for interfering with the exercise of the railway company's powers.

The other averment, that assuming any diversion to be necessary it could be effected otherwise and without prejudicing the complainer, is in my opinion a great deal too general an averment. I think it was the bounden duty of the complainer, if he had any case of this kind, to make it perfectly clear in averment what was the particular substituted road that he says could be made without prejudice either to the complainer or to the Railway Company. He has not suggested anything of the kind, but we had a very good illustration in the course of the argument of what kind of suggestions are likely to be made upon such a subject. It was suggested that it could be done by means of a level crossing. But is this Court, for the purpose of protecting the supposed interests of the complainer, to force a Railway Company to make a level crossing at a place where they think it should not be? Certainly I for one, as a Judge of this Court, will never assume such a responsibility. I think the Railway Company are bound to take the whole responsibility of that upon their own shoulders—to make level crossings where they think they may safely be made, and to dispense with them or avoid them where they think they ought not to be made. And, therefore, unless it could have been made perfectly clear that there was some mode of making this road which could avoid the prejudice to the complainer's interests here set forward, and which at the same time would be perfectly convenient with reference to the formation and use of the railway, it would be impossible, I apprehend, for us to interfere. Even that would have been a very doubtful course to take unless the complainer could have gone one step further, and said—"Seeing that this road would suit the purposes of everybody as well as the one which I complain of, I infer that this is an abuse of their power on the part of the Railway Company for the purpose of injuriously affecting my interests." I rather apprehend that it would have been necessary to go that length, at least, in the way of inference from the facts; but nothing of the kind is to be found upon the face of this sus-

pension and interdict. Therefore, I am of opinion that this note ought to be refused and not passed, there being in my apprehension no question to try at all.

LORD DEAS—I agree with your Lordship that where a Railway Company have taken ground for the purposes of the railway, in a proper and regular manner, they are entitled to make any use of that ground for the purposes of the railway which they find necessary, so long as there is no abuse on their part of their powers. I farther agree with your Lordship that, if there is an abuse, this Court is quite entitled when called upon to interfere to prevent that abuse. That being the state of the law, the question which remains behind simply is—whether there is such a case stated in the note of suspension and interdict as to entitle us to pass the note with the view of trying the question whether the Railway Company are or are not fairly and legitimately proposing to exercise their powers, without any abuse whereby injury is to result to the complainer. In that question, I think it would be a material circumstance that this ground was not taken for the purpose of making this road. It might have been suggested that at the time when this ground was acquired it was legitimately taken for the very purpose of making this road, and that, if it had been the fact, would have been of importance to the Railway Company. On the other hand, it is a fact, which may be important if stated on the part of the complainer, that that was not the purpose for which the Company did originally take it. But then I think, with your Lordship, that the proprietor, who is the complainer here, was bound to state something more than that, and to particularise those circumstances which he says go to show that it is not necessary for the Railway Company to make the road upon this ground. There certainly is a defect in his statements there, for, although he has said in general terms that it is not necessary, yet there is no detail to show that that is a serious averment, or an averment which was likely to be successful. There is no statement even that the Railway Company are acting in bad faith, or that they are exercising their powers so as to amount to an allegation of abuse. I think these are things that may be quite legitimately remarked of this note of suspension and interdict. The only hesitation that I have in concurring with what your Lordship proposes to do in the present case is as to whether, on objections of this sort to the relevancy of this note of suspension and interdict, we ought to go the length of refusing to pass the note. I think them plainly conclusive against any interim interdict, but interim interdict has not been granted, and is not now asked. The only question is as to whether the note ought to have been passed at the first. If we had been upon a passed note, and in a closed record, I think the objections to the relevancy of that record would have been perfectly conclusive; but we have not been accustomed to deal so strictly with a note of suspension and interdict when the sole question is whether the note ought to be passed. It has been usual to take into view, as the Lord Ordinary has done, what the Court gathers from the contention of parties to be the case that they really want to bring into Court. Therefore, although quite agreeing with your Lordship about the law of the case, I have considerable hesitation in going the length of refusing the note. I do not

see that there would be any material injury to the Railway Company in passing the note to try the question. They do not indicate anything specific upon that point on the one hand, any more than there is anything specific on the other; and it would appear that there would be no injury to the Railway Company in passing the note. If that is so, I am inclined to think that it would have been the more satisfactory mode of procedure to take that course. It was competent, and if there is no alteration on the forms of procedure it is competent, for the complainer to present a second note of suspension and interdict, and to make his averments more specific than they are here; and if that be competent, it would be a shorter and less expensive mode of proceeding, and better for both parties, if the note were to be passed, and the case tried under this note of suspension and interdict than under another. I have a hesitation about that, and my own leaning would have been to pass the note to try the question. A very important and delicate question might arise in such a case. I cannot say that I hold that opinion very strongly in the face of the well-founded observations which your Lordship has made upon the relevancy of these statements, but, taking into view that the Lord Ordinary has passed the note, if I had been to decide upon the matter myself, I should have agreed with him, and then considered the case of the parties upon the note.

LORD ARDMILLAN—There are certain matters of fact here which are beyond dispute. There are certain legal propositions which are (at least in my opinion) equally clear.

In point of fact, I observe, 1st, the Caledonian Railway acquired in 1869 from the complainer, Mr Gardiner of Haughhead, a certain piece of ground lying along the side of the railway. This piece of ground was acquired by the respondents for the purposes of their undertaking as authorised by the Act of Parliament. It has since been held by the railway company as the property of the company and for the purposes of the Act, and of the undertaking.

It now belongs to the railway. It is not alleged that it was unlawfully acquired, or that it is unlawfully held.

2d. This railway, and a relative railway of the Caledonian Railway Company, cut through a private road on the lands of Ross belonging to Mr Aikman. Either the restoration of this private road, or the construction of a sufficient substitute road for the benefit of the proprietor of Ross, is an operation which that proprietor has demanded and could, I think, enforce from the railway company.

By using for the purpose of constructing this substitute road the piece of ground taken from the complainer, we are informed that the railway company can fulfil their obligation to the satisfaction of the proprietor of Ross, and according to the views which, in the exercise of their discretion, the railway company entertain of the sufficiency and suitability of the road, having regard to the purposes of the undertaking and the interests of the public.

3d. The ground taken from the complainer by the railway company is along nearly its whole length in cutting, and is now possessed, used, and occupied by the company, and is subject to use and occupation for the purposes of the railway company.

4th. Mr Aikman, the proprietor of Ross, is not a party to the action, but he demands the substitute

road, and is satisfied with the proceedings of the railway company.

5th. The complainer has not alleged that the railway company are acting in bad faith, or maliciously, or *in emulatione*, or from any bad motive; and in the absence of such averments the contrary must be presumed.

Keeping these facts in view.—The points which I think are settled in law are, (1) that whatever is legitimately within the purposes of the undertaking is within the purposes of the Act, and therefore within the purposes contemplated in the acquisition of land by the company. (2) That accommodation works to another proprietor are legitimately within the purposes of the undertaking and of the Act, and the land taken from one proprietor may be lawfully used by the railway company in fulfilling their obligation to furnish such accommodation works, (this is decided by the case of *Beauchamp*); and (3) That where an intersected road belonging to a proprietor on the line cannot be restored, then the giving a substitute road to the proprietor is an accommodation work, and a work within the purposes of the Act, and therefore a work to which land taken from another proprietor may be lawfully applied.

This is, in my opinion, the true position of this case in fact and in law.

As the suspension was first brought, the complainer's case was put on the allegation of the illegal and unauthorised procedure of the railway company in using the land acquired from the complainer for the construction of the substitute road for the proprietor of Ross. I am quite satisfied that this ground of suspension cannot be sustained. I need not dwell on this. I concur in your Lordship's opinion, and I think the point clear.

But then, it is averred by an addition made to the statement of facts for the complainer that the proposed use of the land, if not illegal, is at least unnecessary and inexpedient—that the end can be otherwise and as well or even better attained, and that of this the Court are called on to judge.

With reference to this additional averment, the Lord Ordinary has thought inquiry necessary, and, without granting the interdict craved, has passed the note.

I feel compelled to differ from the opinion of the Lord Ordinary. We must deal with this case on the averments made; and I am satisfied that no abuse of power, no bad faith, no bad motive or feeling, on the part of the railway company, is relevantly alleged. The discretion, both in regard to necessity, and in regard to the mode of construction of the road, rests with the railway company, and in the absence of relevant averments of abuse of power, I think this Court cannot interfere. The passing of the note does, I think, imply that the complainer has either stated some sufficient ground of law to be decided, or has relevantly alleged some sufficient matter of fact calling for inquiry.

I think there is no such case here presented to us in law or in fact, and I agree with your Lordship in viewing the suggestion of a level crossing as an instructive illustration of the complainer's argument. We could not ordain the railway company to make a level crossing which might prove to be dangerous.

LORD JERVISWOODE concurred.

The Court recalled the interlocutor, and re-

mitted to the Lord Ordinary to refuse the note, with expenses.

Counsel for Complainer — Dean of Faculty (Gordon) and Mackintosh. Agents—Mitchell & Baxter, W.S.

Counsel for Respondents — Lord Advocate (Young) and R. Johnstone. Agents — Hope, Mackay, & Mann, W.S.

Saturday, December 13.

FIRST DIVISION.

WILSON v. NORTH BRITISH RAILWAY CO.

Expenses—Fees of Counsel—Auditor's Report—Proof.

The Court, on the Auditor's report, (1) refused to allow the fees of more than two counsel in a proof lasting for an entire day; (2) that the fees allowed for a jury trial in the cases of *Cooper* and *Hubback* did not fetter the discretion of the Auditor in modifying the fees in a proof.

This case came before the Court on a note of objections by the Railway Company to the Auditor's report. Exception was taken to the Auditor having reduced the fees paid by the defenders to counsel and counsels' clerk to the extent of £14, 14s. 9d. The Auditor explained the grounds of disallowance in the following Note appended to his report:—"In this case the defenders have been represented by three counsel—two seniors and a junior. One senior and the junior have been instructed throughout, the other senior not continuously, in consequence of occasional absence from Edinburgh. The case is certainly not one for three counsel, and the defenders do not claim fees for more than two, but the fees in the account are stated sometimes as paid to the two seniors and sometimes as paid to the senior who was continuously instructed and to the junior. The Auditor is humbly of opinion that in a question with the pursuer this is not a proper or convenient course, and he has therefore dealt with the fees of counsel as if the senior not continuously instructed had not appeared for the defenders in the case." It having been stated at the bar that it had been the practice of the Auditor to allow in proofs the fees of £21 to senior and £15, 15s. to junior counsel, sanctioned by the Court in jury trials in the cases of *Cooper v. North British Railway Company*, December 19, 1863; 2 Macph. 346, and *Hubback v. North British Railway Company*, June 25, 1864, 2 Macph. 1291, the Court remitted to the Auditor to report specially whether "in his practice he has followed the rule laid down as to the fees of senior counsel in jury trials" in these cases "as being applicable to proofs before the Lords Ordinary, and if not what other rule he has followed."

The Auditor reported in the following terms:—"In obedience to the remit of the Court, the Auditor begs to report that in dealing with the fees of counsel in proofs before the Lords Ordinary he has kept in view the rules laid down by the Court in the cases of *Cooper* and *Hubback*, as regulating the *maximum* fees to be sustained as against a losing party in cases which are not exceptional. There are from time to time proofs in which it humbly appears to the Auditor that the *maximum* fees are not more than adequate for the proper re-

muneration of the counsel who conduct them, and he has in such cases sustained the *maximum* fees, but in the great majority of cases he holds that fees in proofs should be sustained at rates somewhat lower than in jury trials. It seems to him that in jury trials the strain and responsibility upon those who conduct them are greater than in proofs. In a trial, any omission in preparation or absence of evidence may be fatal—the proceedings going on continuously to the verdict, while in a proof the danger is not so great, as adjournment may be and is occasionally permitted. Holding these views, the practice of the Auditor in regard to counsel's fees in proofs, when senior and junior are engaged, has been to sustain jury trial fees somewhat modified. He endeavours, in regard both to trials and to proofs, to satisfy himself, by examination of the record, precognitions, and productions, as to the nature and difficulty of each case, and, keeping in view the ruling of the Court in *Cooper* and *Hubback* and other cases, to fix the fees accordingly. He feels the delicacy of the duty committed to him, and anxiously endeavours to avoid undue interference with the discretion of the agents. With regard to this particular case, the Auditor may state that he limited the fees in the manner objected to by the defenders only after full consideration, and he may add that, even had the case been tried by a jury, he could not have regarded it as one for allowance of the *maximum* fees."

At advising—

LORD PRESIDENT—I think we have great reason to be glad that a special remit was made of this case to the Auditor, for the result is a most satisfactory and sensible report, which proves what I have long felt, that the Auditor bestows great care and pains on his work. I think it would be very unwise to interfere, particularly when it turns out that he has acted on a general rule; and I am for repelling this objection. As to the other point, also I think the Auditor has dealt rightly with it. He is of opinion that this was not a case for the employment of three counsel. The party had a senior and a junior counsel, and at a later stage of the case thought fit to employ another senior. The Auditor has gone on the footing that there were only two counsel throughout, and has taxed the account as though the second senior had never been instructed.

LORD DEAS—I am of the same opinion as your Lordship. I think the Auditor's report shows great discrimination, especially in the distinction which he draws between a proof and a jury trial; the latter is much more anxious, both from the nature of the tribunal, which is less skilful in apprehending the merits of a case than a trained judge, and also from the difficulty of rectifying any mistake which may occur. On both these points I entirely agree with the Auditor's views, and as to the other matter I agree with your Lordship.

LORD ARMILLAN—I agree with your Lordships in thinking it fortunate for the ends of justice that this special remit was made. I concur in all the Auditor says as to this case, and in his application of the rule laid down by the Court in the cases of *Cooper* and *Hubback*.

LORD JERVISWOODE concurred.

The Court pronounced the following interlocutor:—

"Repel the said objections; approve of the