Motion refused.

Counsel for Appellant—Shaw Agents—Rhind & Lindsay, W.S.

Counsel for Respondent—Mackintosh. Agent—Alexander Morison, S.S.C.

Tuesday, July 10.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

AIKMAN *v.* CALEDONIAN RAILWAY CO.

Railway—Compensation—Way-leave.

A., through whose lands a public line of railway passed, gave to G., an adjoining proprietor, and to G.'s mineral tenants, a lease for twenty-one years of ground to make a private line leading from the mineral pits on G.'s estate to the public railway line. Afterwards the railway company having obtained an Act of Parliament for a new branch line, took portions of A.'s and of G.'s lands for that purpose. The effect of this was to do away with the necessity for the private line through A.'s lands. G. accordingly took advantage of a break and terminated the lease. *Held* that the loss of profit derivable from the said way-leave could not be taken into computation in fixing the compensation due to A. for the land taken by the railway company.

The following narrative is taken from the Lord Ordinary's note:—

"The pursuer is curator to George Robertson Aikman, the heir of entail in possession of the estate of Ross, situated in the parish of Hamilton and county of Lanark, and bounded on the west by the estate of Haughhead, belonging to Mr Gardner. The Lesmahagow Junction Railway, belonging to the defenders, intersects part of the estate of Ross, but does not at any point touch or pass through Haughhead. Access, therefore, from Haughhead to that railway could not be had—at all events, conveniently—except by passing over the lands of Ross. In 1861 Mr Gardner let the minerals in Haughhead to Messrs Merry & Cuninghame, and in order to obtain access to said railway he and his mineral tenants entered into a contract of lease with the pursuer, as curator foresaid, whereby the latter let to them for nineteen years from Whitsunday 1861 (with breaks in the option of the tenants at the end of the fifth, tenth, and fifteenth years) whichever of two specified pieces of ground they might select on the estate of Ross, each extending to about an acre, for the purpose of forming therein and using a private railway and lye from the said railway to the lands of Haughhead. By the lease it was agreed that the tenants should pay £150 per annum of fixed rent for the privilege of making and using such railway, or, in the option of the proprietor, certain lordships specified in the lease. Thereafter Mr Gardner and his mineral tenants constructed a line of railway from their pits at Haughhead to the defenders' railway, the total length of which was about 840 yards, whereof about 160 yards were constructed upon the piece of ground selected by them on the lands of Ross, the remainder being constructed on the lands of Haughhead. The line so formed has until recently been used by Mr Gardner and his tenants for the transport of the Haughhead minerals, and for the way-leave over Ross they have duly paid the stipulated lordships. The defenders, by the 'Caledonian Railway (Lanarkshire and Midlothian Branches) Act, 1866,' acquired power to make a line of railway to connect their line at Hamilton with the said Lesmahagow line, the junction to be formed at a point on the lands of Ross; and for the purposes of the said Act, and of a later Act, entitled the 'Caledonian Railway (Additional Powers) Act, 1872,' the defenders, by virtue of their statutory powers, took from the pursuer, as curator foresaid, several portions of the lands of Ross, extending in all to upwards of eleven acres, which are contiguous to the lands of Haughhead belonging to Mr Gardner. The defenders also took sundry portions of the contiguous parts of Haughhead; and upon the ground so taken from the estates of Haughhead and Ross they constructed their new junction railway and certain other works. Mr Gardner was thus enabled, and became entitled, to connect his own branch railway from his pits at Haughhead directly with the defenders' new railway, which passed through the ground taken from himself, without the necessity of passing through any part of the lands of Ross, or of using the private railway and lye which he and his mineral tenants had formed on the lands of Ross in virtue of their lease from the pursuer; and they have recently formed the connection by constructing, at their own expense, a line of railway from their own original private line, at a point within the lands of Haughhead, to the defenders' new line of railway, at a point within the ground taken by the defenders from the pursuer.

"The pursuer, as curator foresaid, and the defenders in March 1875, referred to arbitration in terms of the 'Lands Clauses Consolidation (Scotland) Act 1845;' the amount of purchase money and compensation to be paid by the latter to the pursuer as curator foresaid, in respect of the land, amounting in all to 11·122 acres imperial measure, taken from the estate of Ross under the said Acts, and also in respect of any damage that might be sustained by him as curator foresaid by reason of the execution of the works authorised by the said Acts. It appears that the pursuer anticipated that as Mr Gardner and Messrs Merry & Cuninghame would no longer require to make use of their way-leave over the estate of Ross, they would construct a new private railway on the lands of Haughhead, and would take advantage of the break which would occur at Whitsunday 1876, and terminate the lease as from that date. The pursuer accordingly maintained before the arbiters that he was entitled to compensation from the defenders for the loss of profit under the lease, occasioned, as he alleges in the present record, by the defenders 'having constructed, partly upon the lands taken from him, and partly upon Haughhead, a line of railway which would enable his tenants to reach the Lesmahagow Railway without passing over the ground let to them by the lease.' The arbiters held that it was not within their competence to decide whether the pursuer was entitled to compensation on this account. It was thereupon agreed be-

tween the pursuer and defenders that the arbiters should be requested to fix the amount of compensation which would be payable to the pursuer in the event of its being found that the loss of profit which he derived from the wayleave ought to be taken into computation in fixing the amount of compensation due to him for the ground taken by the defenders. The arbiters, by their decree-arbitral, which is dated 3d and 10th November 1875, found 'with regard to the said claim for deprivation of way-leave,' that in the event of the claim being held good by the Court the sum to be paid should be £2370. On 11th November 1875, the day after the date of said decree-arbitral, Mr Gardner and Messrs Merry & Cunningham gave notice to the pursuer that they would take advantage of the break in their lease at Whitsunday 1876, and declared the said lease at an end as from that date; and in January 1876 they began to construct their new private junction railway between their own original private railway in Haughhead and the defenders' new line of railway, the precise position of which has already been explained. The pursuer has required the defenders to make payment to him of the said sum of £2370, but they have refused to do so; hence the present action."

The pursuer pleaded—"(1) The loss of profit derivable from the aforesaid way-leave ought to be taken into computation in fixing the compensation due to the pursuer for the land taken by the defenders, in respect that part of the value to the pursuer of the ground so taken by the defenders consisted in the circumstance that a way-leave through the pursuer's estate was necessary to the proprietor and mineral tenants of Haughhead, and that the pursuer has been deprived of the said profit by reason of the defenders having taken the said ground."

The Lord Ordinary on 29th December 1876 assoilzied the defenders, adding the following note—

"*Note.*—[*After the narrative given above*]—The legal ground on which the pursuer bases his claim for compensation for deprivation of the foresaid way-leave is 'that part of the value to the pursuer of the ground so taken by the defenders consisted in the circumstance that a way-leave through the pursuer's estate was necessary to the proprietor and mineral tenants of Haughhead, and that the pursuer has been deprived of the said profit by reason of the defenders having taken the said ground.' Now, it is not pretended that any part of the ground leased by the pursuer to Mr Gardner and Messrs Merry & Cunninghame has been taken or used by the defenders under their statutory powers, or that any direct damage by occupation, obstruction, injury to access, or in any other way, has been done to the said ground by the execution of the works authorised by the Acts of 1866 and 1872, and executed by them upon the ground acquired by them in virtue of these Acts; and it is not disputed that the new railway by which the Haughhead minerals are brought into connection with the defenders' system of railway has been constructed by Mr Gardner and his mineral tenants, and not by the defenders, and that it had not been constructed at the date of the decree-arbitral. And it is only in consequence of the recent construction by Mr Gardner and Messrs Merry & Cunninghame of that new private railway that the use of the way-leave over the pursuer's lands of Ross has become unnecessary, and that the lease thereof has been given up by them in terms of the absolute and unconditional power to do so conferred on them by the lease. And the question now to be solved is, whether in these circumstances the loss of the way-leave, which at the date of the decree-arbitral was only prospective and contingent, constituted damage to the pursuer's lands for which he is entitled to compensation from the defenders? I am of opinion that this question must be answered in the negative.

"It appears to me that the connection between the compulsory purchase of the portion of Ross in question and the construction and execution of the authorised works thereon by the defenders on the one hand, and the cessation of the pursuer's income from a way-leave over another part of this estate, is too remote to entitle the pursuer to compensation for such loss. *In the first place*, it is not the execution of any works by the defenders, either on the land taken from the pursuer or on adjacent land, which has brought the use of the way-leave to an end; it is the construction by Mr Gardner and Messrs Merry & Cunninghame of a private railway on their own lands, and the voluntary exercise by these parties of their absolute right to declare the lease at an end at Whitsunday 1875, which have directly brought about this result. And, *in the second place*, the formation by the defenders of works on the land taken by them from the pursuer has not injured the pursuer's lands of Ross in any other sense than this, that the tenants of a portion of the estate of Ross, who got access to the defenders' railway by paying a way-leave to the pursuer, can now get access directly from their own land to the defenders' line. This, I think, is not loss for which the pursuer is entitled to compensation under the Lands Clauses Act. It is not loss or damage for which compensation could have been claimed at common law; and it cannot be regarded as anything more than loss or damage arising from the legitimate use of the defenders' railway after it had been made, and for such loss no compensation can be given under the statutes. The law on this matter appears to have been settled by judgments of the House of Lords in two cases involving the construction of the English 'Lands Clauses Consolidation Act,' which, as regards compensation, is expressed in language similar to that of the Scottish Act. See *Ricket* v. *The Metropolitan Railway Co.*, L.R. 2 H. L. App. 175, and *Hammersmith and City Railway Co.* v. *Brand*, L.R. 4 H. L. App. 171. And these cases were referred to by the Lord Chancellor (Hatherley) and Lord Chelmsford as settling the law in deciding a case from Scotland, viz., *The City of Glasgow Union Railway Co.* v. *Hunter*, 30th June 1870, 8 Macph. (H. L.) 156. Their Lordships held that the injury to be done to lands in the exercise of their statutory powers by a railway company, and referred to in the 48th and 61st sections of the 'Lands Clauses Consolidation Act,' means injury to be done by the execution of the works referred to in sec. 17, and not injury caused by the use of the railway when made. And although Lord Westbury expressed his dissent from the general view of the statute taken by their Lordships, and his disapproval of the judgment in the cases of *Ricket*

and of *Brand*, he said—With these limitations I concur in this, that what is the result of the legitimate uses of the railway cannot be made the subject of a claim of compensation after the railway has been made. Whatever is done by the Company in pursuance of their powers, and done without neglect and without an excess of their authority, is a legitimate consequence of the statutory enactments, and cannot be considered as doing an injury to any one.' Now what the Railway Company has here done is to construct a railway on the land taken from the pursuer, and to permit—what indeed they could not have refused—a connection to be made between their railway and a private line made by an adjoining proprietor on his own land; and if by the use of such connection the way-leave over the pursuer's land is no longer necessary to that adjoining proprietor, I do not see what 'injury,' in the sense of the statute, has been done to the pursuer.

"But further, it is in my opinion not necessary to take such a narrow view of the case as to decide it upon the somewhat strict view of the statutes on which the judgments in the cases referred to were pronounced. The simple and natural construction of the 'Lands Clauses Consolidation (Scotland) Act 1845,' upon which the pursuer's claim rests, leads to the same result. That Act provides, in the case of the purchase of lands otherwise than by agreement, that compensation is to be given for the lands taken, and 'for any damage that may be sustained by reason of the execution of the works.' And by sec. 61 it is enacted that 'in estimating the purchase money or compensation to be paid by the promoters of the undertaking in any of the cases aforesaid, regard should 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 severance of land taken from the other land of the owner, or otherwise injuriously affecting such land by the exercise of the powers of this or the special Act, or any other Act incorporated therewith.' Now, even assuming that the injury for which compensation is to be awarded is not limited, as the recent judgments of the House of Lords would seem to imply, to loss or injury caused by the execution of the works, but includes injury arising from the use of the works after they have been made, it appears to me that the lands of the pursuer cannot be said to have been injuriously affected, or, as Lord Westbury calls it, 'damnously affected,' by the exercise of the defenders' statutory powers, so as to entitle the pursuer to compensation. If any loss has accrued, or is likely to accrue, to the pursuer through the construction of the defenders' new line of railway, that loss is much too indirectly consequential to entitle the pursuer to compensation. No loss had accrued at the date of the decree-arbitral fixing the compensation. The alleged damage was then entirely prospective and contingent; it depended upon two things—(1) upon the pursuer's tenants availing themselves of the option given to them in the lease of the way-leave, and declaring the lease at an end as at Whitsunday 1876; and (2) upon Mr Gardner constructing the private line of railway on his own land between his pit at Haughhead and the defenders' new line of railway. I think it is impossible to say that the necessary and inevitable result of the exercise of the defenders' statutory powers was either to lead to the abandonment of the way-leave or to the construction of the private line over Haughhead by other persons with whom the defenders were in no way connected, and over whom they had no control.

"All that the defenders, up to the date of the decree-arbitral, had done in the exercise of their statutory powers upon the lands taken from the pursuer, was to construct a line of railway so convenient for the district that it was possible, if not probable, that Mr Gardner, the proprietor of the adjacent lands of Haughhead, and his mineral tenants, might find it more profitable to construct a private line of their own than to continue to use the way-leave over the lands of Ross. But even if the arbiters had been satisfied that Mr Gardner and his tenants intended to avail themselves of their statutory right to construct such a railway, and of their right to declare the lease at an end as at Whitsunday 1876, without assigning any reasons, which right had been stipulated for by them and agreed to by the pursuer at the commencement of the lease, the loss of the way-leave so occasioned could not, in my opinion, have been competently dealt with by the arbiters as an injury to the pursuer's lands occasioned by the defenders' exercising their statutory powers. The arbiters would therefore, in my opinion, have exceeded their powers if they had found the pursuer entitled to compensation for such loss in anticipation of the tenants of the way-leave availing themselves of the break in the lease. The exercise of their statutory powers by the defenders has in no way injured the *solum* of the ground over which the way-leave extended; it has not damaged it by severance, or in respect of amenity, or obstructed the access to it, or prevented it in any way from being used either as a private railway and lye or for any other lawful purpose. If affected by the exercise of the defenders' statutory powers at all, it is merely in consequence of a third party having been enabled to construct a competing private line of railway; and I can see neither principle nor authority for holding that for any loss so occasioned the pursuer is entitled to compensation from the defenders."

The pursuer reclaimed, and argued—A party whose land is taken is in a more favourable position for compensation than one who simply claims damage, no land being taken. The proper test is depreciation in the value of remaining ground from acts done on the ground taken, provided the latter be not disconnected with the ground remaining. Several of the English cases depend on the English Railways Clauses Act, which does not give compensation for use of line. The principle that compensation is due where but for the Special Act an action at common law would have lain, does not apply to cases where land is taken. Damage may be contingent as well as prospective.

Authorities—*Duke of Buccleuch* v. *Metropolitan Board of Works*, L.R. 5 E. & J. App. 418, (opinions of Smith and Hannen, J.J.); Lloyd on Compensation, pp. 104 and 119; *Stockport Rail. Co.*, 33 L.J. (N.S.) Q.B. p. 251; *City of Glasgow Union Rail. Co.* v. *Hunter*, 8 Macph. H. of L. 156, (Lord Chelmsford's opinion); *Queen* v. *Cambrian Rail. Co.*, L.R. 6 Q.B. 422; *M'Carthy* v. *Metropolitan Board*, L.R. 7 E. & I. App. 243; *Caledonian Rail*

Co. v. *Ogilvy*, 2 Macq. App. 237; *White* v. *Commissioners of Public Works*, 22 L.J. (N.S.) 22 (C. B. Kelly's opinion); *Ricket* v. *Metropolitan Rail. Co.*, L.R. 3 C.P. 82; *Bourne* v. *Mayor of Liverpool*, 33 L.J. Q.B. 15; *Jubb* v. *Hull Dock Co.*, 9 Ad. & Ell. 443; *Caledonian Rail. Co.* v. *Lockhart*, 3 Macq. 808.

Argued for defenders—The case of the *Duke of Buccleuch* does not shake the principle of *Ricket's* case. The loss here is too remote and contingent. It would have given no right of action at common law. There is a legitimate use of the land taken, and no actual injury to the land left.

At advising—

Lord Justice-Clerk—[*After stating the facts*]—This is no doubt a hard case on the pursuer, for if the branch line had not been made he would probably have been the richer by £150 a-year. But I have come to a very clear conclusion that this claim has no ground whatever on which to rest.

I have gone carefully through the authorities quoted to us. They are not as consistent or satisfactory as might be desired, and even in the last of them—that of *M'Carthy* in the Court of last resort—jurists of the highest authority do not seem altogether agreed as to the principle on which such cases should rest. I forbear, however, any analysis of them, because I am very decidedly of opinion that the present claim stands outside of any principle of compensation which has now been recognised.

It is not said by the claimant that the lands themselves have been injuriously affected in any way whatever. He does not complain of severance, or loss of access, or even of general deterioration in the market. None of these things have been done by the defenders, or, if they have been done, they have been allowed for. What he says is that one man, or firm, who before found it convenient to go through his land, and to pay him for the privilege, no longer finds it for his interest to do so, and has taken advantage of his legal right to put an end to his obligation.

It will be observed that this act which caused the damage was not the act of the Railway Company, but of the lessees of the way-leave, over whom the defenders had no control whatever. They had no power to compel the lessees to take advantage of the break in their lease, or to make the connecting line, nor could they have prevented their doing so. The whole matter is this—That the condition of the neighbourhood being altered, by no act of theirs, the lessees of the Haughhead colliery, as members of the public, choose to use this new railway line instead of going through the pursuer's ground. But with their determination the defenders have no concern. All the public may use their line, and they cannot object; and for the consequences of that use they cannot be responsible.

What the pursuers really complain of is, that the defenders, by affording increased facilities for traffic, have furnished a motive to the lessees to break their lease and make the new connecting line. But that is what all railway facilities have done, and are intended to do. To affect property injuriously is one thing, to divert traffic from one district and take it to another is quite a different thing. The gain of the many is every day the indirect cause of the loss of one, or of several. But this is the true end for which these increased powers are given, and it is in vain to attempt to place on the shoulders of those who afford these facilities the remote effects of the alterations in life which they produce.

Let me suppose that instead of the present case the pursuer had entered into a lease with a grazier to pasture his cattle on their journey to a market. A railway company comes through the pursuer's ground, and the grazier finds it more for his advantage to send his cattle to a more distant station. Is the railway company to be liable to each landowner through whose ground the railway passes in every instance in which such things happen? These things are the voluntary acts of third parties, and all the part which the railway company have in them is, that they have supplied a motive for the change.

But the present is a feeble case, even of the feeble class to which it belongs. It is not one in which the pursuer can allege any general loss of custom or depreciation in the land market. He only can say there is now one customer who will not employ me as he formerly did, and you have no right to take my land with that result without paying me the value of that custom. I have never heard of such a case. If loss of the goodwill of a business or general repute in the feuing market, or elements of that kind, are admissible as objects for which compensation can be demanded, on which opinions differ, the interest involved must be a general one—one affecting the community, or at least a district or neighbourhood. It is as if a shopkeeper were to complain that a line of railway which cut off a corner of his ground enabled one customer to go to the county town instead of dealing with him. In short, the relation of cause and effect is entirely wanting here. The Caledonian Railway did not break this lease. It was the doing of the lessees themselves in the exercise of their legal right, and there are no grounds on which the defenders can be made responsible for the result.

Lord Ormidale—[*After stating the facts*]—From the statement now given it will be observed that the defenders, the Caledonian Railway Company, who maintain that the pursuer's claim is not a good one, did not take any part of the ground over which the way-leave in question passed, or interfere directly with it in any way; and it will also be observed that the pursuer has had awarded to him by the arbiters the purchase money and compensation to which he is entitled for the land actually taken from him. I think it must likewise be assumed, there being nothing said to the contrary, that the purchase money and compensation so awarded comprehended all proper severance damages, if any, sustained by the pursuer. He does not indeed aver that his communications were interfered with, or that any severance damage was sustained by him in consequence of the defenders taking some ground from him, or in any other way. His claim now in dispute is for what is called "depreciation of way-leave" exclusively; and this claim is maintained by the pursuer on the ground, not that the land over or through which the way-leave passes has been taken or interfered with by the defenders, but in consequence of his tenants, Mr Gardner and Messrs Merry & Cuninghame, having brought their lease to an end, as they

were entitled to do, by taking advantage of a break in it. This is obviously a very indirect cause of damage, in any view that can be taken of it, as against the defenders, who were not parties to the lease, and neither broke it nor had the power of breaking it. They had no more to do with the breaking of the lease, and thereby depriving the pursuer of his way-leave rent, than any proprietor of lands in the neighbourhood could be supposed to have who merely allowed the pursuer's tenants to pass through his lands, and in that way enabled them to dispense with the way-leave they had from the pursuer.

But then, no doubt, the defenders have compulsorily taken from the pursuer a portion of his lands, although not that portion over which the way-leave in question passes; and in this respect the case differs from that supposed, of a neighbouring proprietor giving the necessary access over his lands to the tenants of the way-leave. But does that circumstance render the defenders liable in compensation to the pursuer? It could not do so directly, because the lands over which the way-leave passes have not been taken or interfered with. It may be said, however—and here is the only plausibility which the pursuer's claim has—that, independently of statutory compulsion enforced by the defenders, the pursuer, had he been applied to by a private individual to sell the portion of land which has been actually taken by the defenders, would have had it in his power either to have stipulated that no competing way-leave should be allowed through it, or, failing such stipulation, to have insisted for a price all the higher. This is true, but it does not follow that every claim for enhanced price that might be available in a private voluntary sale is competent or admissible in a statutory compulsory sale, any more than it is in the power of a proprietor to refuse in the latter case to part with any portion of his estate at all, although he could do so if he pleased in the former.

But while a party is not entitled in respect of a compulsory sale to a railway company to insist on every claim of damage, however induced, or compensation, however fanciful and extravagant, every fair and legitimate claim is secured to him. Accordingly, the arbiters in the present instance awarded to the pursuer the purchase money or value of the lands actually taken from him; and it must also be borne in mind that in estimating the purchase money or value so awarded to the pursuer, the arbiters were entitled, and must be presumed in the absence of any statement to the contrary to have taken into their consideration, all the capabilities of the ground taken; for example, its building or feuing value, if it had any such. And they were, besides, entitled to add, and must be presumed to have added, in conformity with the universal practice in such cases, a considerable sum more in respect of the compulsory purchase.

In these circumstances, I am unable to see on what ground or principle the pursuer can be held to have right to the sum he now claims, or any claim at all for deprivation of way-leave as against the defenders. Such a claim as against them appears to me, in any fair view that can be taken of it, too remote and indirectly consequential to be sustained; and on this ground, were there no other, I think the Lord Ordinary has rightly assoilzied the defenders.

But the same result must follow if the validity of the pursuer's claim is tried by the principle which has been recognised by the highest authorities, that a railway company is not answerable for consequences resulting to a party, not from the original formation of their line, but merely from its subsequent use, supposing that use to be legitimate in itself and within the statutory powers of the Company. That this is a sound principle appears to me to have been ruled by the House of Lords in, among other cases, the case of *The City of Glasgow Union Railway Company* v. *Hunter*. Now, the pursuer does not say that the mere formation of the defenders' railway, or the operation of the works, caused any damage to him which entitles him to the sum in dispute by way of compensation. On the contrary, it is clear from the pursuer's own statements that the injury for which his present claim is made has arisen from the use, perfectly legitimate in itself, which has been taken of the defenders' railway after its completion. But that cannot be made the foundation of a claim for compensation by the pursuer.

And to apply another test, which has also been recognised by the House of Lords, viz., that the defenders as a railway company cannot be made liable for damage except for what but for their statutes would have been actionable at law. This principle was given effect to by the House of Lords in the case of the *Hammersmith City Railway Company* v. *Brand*, and distinctly recognised as a sound one in the case of the *City of Glasgow Union Railway Company* v. *Hunter*, already noticed. Accordingly, if the defenders had taken any land from the pursuer, or otherwise entered upon or injuriously affected any property of his, outwith or in excess of their statutory powers, they would be liable in an action at law just as any ordinary party; but nothing of the kind has in the present instance been done or is said to have been done by them. They have, on the shewing of the pursuer himself, acted in every respect within their powers, and accordingly they cannot be made responsible to the pursuer as maintained by him.

It was said, however, in the case of the argument for the pursuer, that the authority of the decisions to which I have referred has been displaced by the more recent judgment in the case of the *Duke of Buccleuch* v. *The Metropolitan Board of Works*, but after a careful examination of the report of that case I have been unable to find that this is so.

The result is, therefore, that in my opinion the interlocutor of the Lord Ordinary reclaimed against is well founded, and ought to be adhered to.

Lord Gifford—I think that the question in the present case, when divested of its specialties, really comes to be this—Is a landowner, a part of whose estate is taken under compulsory powers by a railway company entitled to claim and receive from the company, not only the full value of the land, with damages for severance and for direct injury done to the adjoining land, but also to claim and receive compensation for the loss, injury, or destruction which the facilities which the railway will afford when constructed may occasion to the traffic on a private road belonging to the landowner, and situated on another

part of his estate? Perhaps the question may be put even more generally—Is a railway company ever bound to pay to the proprietors of roads, either public or private, in the district which it traverses, compensation for the loss of traffic which its working when finished may occasion on these pre-existing roads?

A right of way-leave, such as that belonging to the pursuer, however valuable, is simply a right to levy a rent or toll for the use of or for passage over a private road. The rent or way-leave may be exacted from one or more persons or companies, or it may, like a pontage, be payable by such of the general public who choose to avail themselves of the bridge or way, but it is always, and essentially, simply a toll or payment for the use of a road or bridge, payable to the proprietor or proprietors thereof. Now, it is a very important and a very general question, whether a railway which, when made and in operation, will probably or certainly injure, lessen, or destroy the traffic on pre-existing roads or bridges, is bound to pay compensation therefor when, as in the present case, no part of the road or bridge itself is cut or physically interfered with or touched by the railway itself?

I am disposed to answer this question in the negative, at least in the general case, for probably exceptional cases may occur, and with these I do not deal. In general, I think I may say that a railway company is not bound to pay for the loss of traffic which its ultimate working after being constructed may occasion either to other railways, to canals, to public turnpike, or other roads, or to private roads or bridges, the property of private individuals or companies. The reason why the Legislature authorise the construction of a new line of railway is that additional accommodation and means of carriage and communication is required by and will be beneficial to the neighbourhood, the public, or the nation; and therefore it is that compulsory powers are granted to the railway company to acquire the land needed for its undertaking. It is of course a condition of such acquisition that private and individual proprietors shall be compensated and paid for the land which the railway takes from them for a public purpose, and in reality the public, through the railway company, pay such compensation, but it was never contemplated that the railway company, and through it the public (for in one shape or other—in railway fares or otherwise—the public must pay for all), should make good as a condition of getting its new and improved road or railway all the traffic which formerly passed over the old and inconvenient ways, public or private, which were in use in the district. It was the very inconvenience, circuitousness, or expense of these old roads which made the new railway necessary and expedient, and which induced the Legislature to authorise its construction, and it would really deprive the public of all the advantages contemplated if it had not only to make and pay for in railway dues the new road or railway, but also to keep up the traffic on the old roads or to pay for that old and superseded traffic as if it were still kept up.

Now, I think this principle is sufficient for the decision of the present case. The *solum* of the right-of-way or private road or railway belonging to the pursuers, and situated on their estate, has not been touched or taken or physically affected in any way by the Railway Company. The new railway does not touch it, but leaves it precisely as it was before. It may be used now and henceforth just as it was used before the new railway was made. All that the pursuers can say is, that the new railway gives such facilities of traffic to the coal owners in the mineral field of Haughhead that, instead of using the pursuer's private way as they did before, they will now use the new railway, to which they have direct access without the pursuer's leave, and will accordingly terminate, as they have power to do, the lease of way-leave which they formerly had from the pursuers. But this is just what may be said of every old road superseded by a new one. The old road will be deserted for the new and improved communication, and this is just what was intended. But it certainly does not follow that the public (for the public ultimately must pay through the Railway Company) is bound to pay the old tolls on the old roads just as it did before, although it no longer uses these old roads.

The loss of traffic of which the pursuers complain is not the direct act of the Railway Company. It is not the Railway Company who have made the new siding from the Haughhead colliery joining the new railway. This has been done by the Coal Company themselves, in virtue of a statutory right conferred on the Coal Company or the mineral owner, and which they are entitled to exercise without the consent and against the will of the Railway Company. It would seem rather hard that the Railway Company should be compelled to pay the pursuers for the consequences of what is not the act of the Railway Company, but the sole act of the pursuer's own tenants, over whom the Railway Company have no control. It can make no difference to the Railway Company whether the coal from Haughhead Colliery came upon the railway by the old way-leave railway or by the new siding. That is solely a matter of choice depending on the will of the coal owner, and with which the railway cannot interfere, and yet it is because the coal owner chooses to get to the railway in his own way that the Railway Company is asked to pay the pursuers for the way-leave which the coal-owner has chosen to abandon, and the right to abandon which the coal owner specially reserved to himself. For it is one of the conditions of the lease or contract of way-leave that it shall be terminable by the Haughhead coal owners at certain terms. It is difficult to see how the pursuers can claim from the railway company compensation for the coal owners doing the thing (that is, terminating the lease) which the pursuers themselves expressly contracted might be done.

The loss or disadvantage to the pursuers by the cessation of traffic on their private road or way-leave would have been precisely the same if, instead of the Caledonian Railway making the new branch in question, some other railway company had crossed the district and touched the Haughhead coal-field without taking any of the pursuer's lands at all. If an independent railway had been formed—say at the other side of the coal-field, and not near the pursuer's property, —and if it would have given a convenient market access for the coal, the way-leave from the pursuers would have become useless and would have been discontinued. It can hardly be main-

tained that in such a case the pursuers could have exacted compensation from the Railway Company, who had simply given a new and advantageous outlet for the mineral products of the district. I do not think it makes any difference that the branch railway now in question happens to pass through the pursuer's property and in close proximity to the *locus* of the private railway or way-leave on the pursuer's ground.

With these additional observations, I concur in the result at which both your Lordships have arrived.

The Court adhered.

Counsel for Pursuer — Kinnear — Pearson. Agents—Hamilton, Kinnear, & Beatson, W.S.

Counsel for Defenders—R. Johnstone—Mackintosh. Agents—Hope, Mann, & Kirk, W.S.

Tuesday, July 10.

SECOND DIVISION.

[Lord Young, Ordinary.

AITKEN AND OTHERS *v.* BAIRD AND OTHERS.

Landlord and Tenant—Lease—Capital and Interest.

In a lease for nineteen years of certain minerals it was agreed that the lessees should take over the pit and working plant at a valuation, "the amount of such valuation to be payable by the second parties by ten equal instalments, extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest in case of failure in the punctual payment thereof, at the rate of five per centum per annum, on the amount which may remain due until payment." The lessees were given power to pay up the whole sum at any earlier period which might be convenient to them. The lease further declared, that though the lessees should have instant possession, the property should not pass until the whole price should be paid. The valuation was made, the lessees took possession, and for three years the parties settled the termly payments on the footing that interest was due on the price so far as not paid, and not merely on each instalment after the term of payment. *Held* (1) (*diss.* Lord Justice-Clerk) that interest was only due on each instalment in event of its not being punctually paid at the stipulated term, and that the construction of the contract could not be affected by the actings of parties under it; and (2) that in an action by the landlord for arrears of rent and instalments the lessees were entitled to get credit for the sums of interest paid by them in error.

These were two actions at the instance of Andrew Aitken and others, trustees of the deceased Robert Baird, against William Baird and John Wotherspoon as individuals, and as sole partners of the firm of Robert Baird & Co., coalmasters.

On 1st July 1876 the deceased Robert Baird had granted a lease to the defenders of the coal and other minerals in his lands of Limerigg and Wester Drumclair. The lease contained the following provisions in regard to the plant, machinery, &c.:—"And it is hereby stipulated and agreed that the said William Baird and John Wotherspoon shall take over all the pits, engines, and machinery, workmen's houses and other buildings connected with the colliery, railways, locomotives, waggons, and other plant, both fixed and moveable (except the weighing-machine and house, and also the dwelling-house presently occupied by John Buchanan, weigher there, which shall be retained by the first party, and the lessees shall be bound to have all their coal, shale, and others, carried over said weighs, and also to give such assistance as may be necessary in repairing said weighing-machine whenever required), belonging to the said Robert Baird, situated at or connected with said coal-workings, at a valuation to be put thereon by Alexander Simpson, mining engineer, Glasgow, whom failing by a skilled person to be mutually chosen for that purpose; the amount of such valuation to be payable by the second parties by ten equal instalments, extending over a period of ten years, each of which instalments shall be payable at the term of Whitsunday yearly, and shall bear interest in case of failure in the punctual payment thereof at the rate of five per centum per annum on the amount which may remain due until payment, but the lessees shall have power to pay up the whole sum at any earlier period when it may be convenient for them to do so: Declaring that while the second parties shall be entitled to the use and occupation of said pits, engines, machinery, houses, buildings, locomotives, waggons, and other plant, fixed and moveable, as before specified, the same shall not be transferred to them or become their property, but shall remain and continue to be the property of the first party until the whole price and interest thereof shall be paid, when the same shall become the absolute property of the second parties, but no sooner."

The defender entered into possession under the lease, and the plant, &c., were valued by Alexander Simpson, mining engineer, at £19,682, 16s. 3½d.

The defenders had paid three instalments of the price of the plant, &c., and had also paid interest on the balance of the whole price remaining unpaid at the payment of each instalment.

These actions were brought, *inter alia*, on account of the defenders having failed to pay the fourth instalment and the interest on the unpaid part of the price.

William Baird and Wotherspoon lodged separate defences, and in the first action neither of them raised any question in reference to the capital sum, upon which interest fell to be paid in terms of the lease.

In the second action Wotherspoon, *inter alia*, pleaded—"(3) The defenders are not liable in the sums of interest concluded for, and, in particular, for the interest claimed on the balance of the amount of the valuations."

On a proof Mr Simpson deponed that when he valued the plant, &c., he knew nothing about the lease, and that he valued it as a going concern