and I think it is a fair reading of the statute that he is liable in one-third of the expense of maintenance.

Lord Lee concurred with the Lord Justice-Clerk and with Lord Young.

The Court pronounced this interlocutor:—

"Find in fact (1) that the lands of the defender referred to in the record front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length of 100 yards, and are unfeued and unbuilt upon; (2) that the work in respect of which the sum sued for is claimed by the Commissioners of Police was executed not in making new but in repairing existing footpaths *ex adverso* of the said lands: Find in law that in terms of the second branch of the 149th section of the General Police and Improvement Act 1862 the defender is liable for one-third of the cost of upholding the said footpaths, and no further, as long as the ground opposite to said footpath remains unfeued and unbuilt upon: Therefore recal the judgments of the Sheriff and the Sheriff-Substitute appealed against: Ordain the defender to make payment to the pursuer of the sum of £24, 4s. 1d. sterling, being one-third part of the sum sued for: Find no expenses due by either party to the other, and decern."

Counsel for the Pursuer—Comrie Thomson—MacNeill. Agent—Thomas Sturrock, S.S.C.

Counsel for the Defender—R. Johnstone—C. K. Mackenzie. Agents—Gibson & Strathern, W.S.

Friday, March 8.

SECOND DIVISION.

SIR ARCHIBALD D. STEWART *v.* HIGHLAND RAILWAY COMPANY.

Railway—Lands Clauses Consolidation (Scotland) Act 1845, *sec.* 120—"*Superfluous Lands.*"

Held that a piece of ground, acquired by a railway company under compulsory powers, which had not been used or disposed of by the company more than ten years after the completion of their works, for which they had no immediate use, and which could only be utilised if additional ground were acquired under special Act of Parliament, had become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 19) provides—"With respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:" . . . Section 120. "Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

In the year 1856 the Perth and Dunkeld Railway Company, in pursuance of the Perth and Dunkeld Railway Act 1854, and the Lands Clauses Consolidation (Scotland) Act 1845, gave notice to Sir William Drummond Stewart, heir of entail then in possession of the entailed estates of Grantully, Murtly and others in the county of Perth, that they required to purchase and take for the purposes of their undertaking certain portions of the said estate of Murtly and others, including, *inter alia*, one acre and one hundred decimal or thousandth parts of an acre or thereby, bounded on the south by the public road leading from Murtly to Dunkeld, and on the other sides by the adjacent portions of the said estate of Murtly, all as delineated and coloured red upon a copy of the Ordnance Survey map produced. The amount of compensation payable for the lands so taken having been fixed by a jury and duly paid, the land was subsequently conveyed by Sir William to the said railway company.

The Highland Railway Company were incorporated by the Highland Railway Act 1865 (28 and 29 Vict. cap. 168), and by that Act the Perth and Dunkeld Railway Company was united with the Highland Railway Company, and the latter company acquired the railway lines, stations, buildings, and works which had been constructed and the property which had been acquired by the former company under the Perth and Dunkeld Railway Act 1854. Section 2 of the said Act incorporated the Lands Clauses Consolidation (Scotland) Act 1845. The said land was used by the Highland Railway Company as a spoil bank when they were making their tunnel at Murtly, but it was never required or used by them for the purposes of their undertaking, and was not sold or disposed of by them.

In April 1888, more than ten years having elapsed since the expiry of the statutory period assigned for the completion of their undertaking, Sir Archibald Douglas Stewart, Baronet, heir of entail in possession of the estates of Grantully, Murtly and others in the county of Perth, and duly infeft therein conform to decree of special service in his favour as heir of tailzie and provision of his brother the late Sir William Drummond Stewart, Baronet, dated 22nd May 1871, and with warrant of registration thereon recorded in the division of the General Register of Sasines applicable to the county of Perth, 5th June 1871, raised an action against the said railway company to have it declared that the said piece of ground, not having been required or used by the defenders or their predecessors for the purposes of their undertaking prior to the date of citation to follow thereon, had become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845, and had vested in and become the property of the pursuer as owner of the lands

adjoining thereto in terms of the said Act.

The defenders stated in defence that they had in contemplation the doubling of their line at that part; that they would then require the portion of land in question as a spoil bank for the purpose of diverting the public road; and that they had retained the land in question solely because they saw it would be ultimately required for the purposes of the railway. They admitted, however, that they could not double their line without getting additional lands from the pursuer, which they could only do under a new Act of Parliament.

They pleaded that the land in question was not superfluous land within the meaning of the statute.

The Lord Ordinary (KINNEAR) on 27th July 1888 found, declared, and decerned in terms of the conclusions of the summons, and found the pursuer entitled to expenses, &c.

"*Note.*—The principle upon which it is to be determined whether land is superfluous in the sense of the Lands Clauses Act has been laid down by the House of Lords in the *Great Western Railway Company* v. *May*, L.R., 7 Eng. & Ir. App. 283, and according to that judgment the question to be considered is, whether at the expiration of the statutory period of ten years the land is required for the purposes of the undertaking? The piece of ground in dispute is separated from the existing line of rails by a public road, and it was stated at the bar that it was originally acquired and used by the promoters of the undertaking as a spoil bank, a temporary purpose which has come to an end. But the defenders allege that they have all along anticipated that in the natural development of their traffic it would be required for a more permanent purpose of their undertaking which they expect shortly to carry out, viz., the construction of a double line of rails between Stanley and Blair Athole, because in the event of their doubling the line as they propose, the ground will be required both for the purpose of diverting the public road above mentioned, and also for its former purpose as a spoil bank. It may be doubtful whether the latter purpose is sufficient to satisfy the conditions of the Act of Parliament. But if there was a reasonable prospect at the end of the ten years that the ground would be required for diverting the road in order to lay down a double line of rails, that would appear to me to be a purpose for which the company were entitled to retain it, provided that the construction of such a line were within the scope of the undertaking authorised by their Acts of Parliament. The defenders admit that in order to construct a double line they must obtain land from the pursuer, which they have no means of acquiring otherwise than by agreement with him; or, in other words, that the purpose for which they desire to retain the land is one which they have no power under the existing Acts to carry into effect. But a purpose which they cannot execute in the exercise of the powers conferred upon them by their Acts of Parliament cannot be within the scope of the undertaking sanctioned by those Acts.

"It is said that according to the judgment of the House of Lords in *Hooper* v. *Bourne*, L.R., 5 App. Cas., the burden of proving a title to the land as superfluous lies upon the claimant. But in the admitted circumstances of this case it appears to me that the burden has been discharged. It is admitted that the land has never been used except for the temporary purpose which ceased with the construction of the railway, and that the only purpose for which the company desire to retain it is one which they cannot execute without the pursuer's consent. But works which cannot be executed under the powers conferred upon the undertakers by their Acts are not part of the statutory undertaking. It follows that the purpose for which the land is required by the defenders is not a purpose of the undertaking, and that is sufficient to satisfy the definition of superfluous land."

The defenders reclaimed, and argued—The introductory words to section 120 defined the lands as those "which shall not be required for the purposes thereof"—that is, of the undertaking. So long as the company had any reasonable prospect of requiring them they were entitled to retain possession of them. It lay with the respondent to show that the railway company had no need of the lands here—*Betts* v. *Great Eastern Railway Company*, L.R., 8 Exch. 294, 3 Exch. Div. 182, H. of L. 49 L.J. Exch. 197 (Nov. 4, 1879); *Hooper* v. *Bourne*, February 9, 1880, 5 App. Cas. 1, *per* L.C. Cairns, 9; *North British Railway Company* v. *Moon's Trustees*, February 8, 1879, 6 R. 640. The company were not tied down to one line by their Act, and they had all along contemplated the necessity of making a double line, in which case they would require the land in dispute for the purpose of diverting the public road and as a spoil bank. The case of the *Great Western Railway Company* v. *May*, relied upon by the respondent, was the only reported case in which lands had been held "superfluous," but there the undertaking was complete. "Undertaking" was the whole scheme the company had in view, not the works for which lands might be immediately wanted — *Gardner* v. *London, Chatham, and Dover Railway Company*, December and January 1866-67, L.R., 2 Chan. App. 201, *per* Cairns, L.J., 216. The diversion of the road could be made by arrangement with the Road Trustees.

The respondent argued—He had discharged the *onus* which lay upon him. The lands had vested in him by the expiry of the ten years. The railway company had no reasonable prospect of requiring the lands, which was necessary to entitle them to retain possession of them—*Caledonian Railway Company* v. *City of Glasgow Union Railway Company*, July 2, 1869, 7 R. 956, *per* Lord Barcaple, Ordinary, 961. In the case of *Betts* the lands were found not to be superfluous, because there there were specific purposes unfulfilled which were within the powers of the company. Here the company could not make use of this piece of land as a spoil bank or otherwise without acquiring more land, which they could only do under a new Act of Parliament. The case of the *Great Western Railway Company* v. *May*, June 25 and 26, 1874, 7 Eng. & Ir. App. 283, referred to by the Lord Ordinary, was directly in his favour. It was further said that they required this piece of ground for the diversion of the public road, but that could only be during construction, the period for which had expired, and where "necessary" — Railway

Clauses Consolidation (Scotland) Act 1845, sec. 16; *Queen* v. *Wycombe Railway Company*, January 26, 1867, L.R., 2 Q.B. 310, *per* L.C.J. Cockburn, 320, and Lush, J., 325; *Tiverton and North Devon Railway Company* v. *Loosemore*, March 25, 1884, 9 App. Cas. 480, *per* Lord Bramwell, 508.

At advising—

Lord Justice-Clerk—The pursuer in this case asks to have it declared "that the portion of land . . . which was acquired by the predecessors of the defenders from the predecessor of the pursuer for the purposes of their undertaking, not having been required or used by the defenders or their predecessors for said purposes prior to the date of citation, . . . has become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845." The defence set up by the defenders is, that there is a reasonable probability of their requiring the land in question for the purposes of their undertaking. There is no doubt that if that were made out it would be a good answer to this declarator. Now, the only use that has ever been made of it has been as a spoil bank. It has never been used in any other way. It is not in immediate contiguity to the line of railway, but is separated from it by the public road. It is moreover not disputed by the Highland Railway Company that they are unable to make use of this piece of land unless they obtain additional powers and acquire additional land.

In that state of the facts I think the proper view to be taken is that the land, not having been used for thirty years, and not being capable of being used without new powers, and not having been disposed of to others, does fall under the provisions of the Act 1845.

The defenders say, but not when, that they propose to double their line at that place, and that then they will require the ground, not for their line, but for the purpose of diverting the public road; but that, again, is an end which they cannot accomplish without getting fresh powers from Parliament. Even if they did obtain those powers, it is not disputed that they could not accomplish their object without taking additional land from the proprietor, who now wishes to have it declared that this portion of land has reverted to him.

In these circumstances I am of opinion that the pursuer is entitled to the declarator sought.

Lord Rutherfurd Clark—I am of the same opinion. I am satisfied with the judgment of the Lord Ordinary, and with the grounds upon which that judgment is based.

Lord Lee concurred.

Lord Young was absent when the case was argued.

The Court adhered.

Counsel for the Pursuer—Sol.-Gen. Darling, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for the Defenders—D.-F. Mackintosh, Q.C.—Low. Agents—J. K. & W. P. Lindsay, W.S.

Friday, March 8.

SECOND DIVISION.

[Sheriff of Dumfries.

CRAWFORD *v.* THE PORTPATRICK AND GIRVAN JOINT COMMITTEE.

Reparation—Railway—Custody—Secure Place.

Certain cattle escaped from a yard at a railway station in which they were enclosed until the owner should obtain authority from the local authority to put them on trucks, strayed along the line, and were killed. In an action against the railway company by the owner for damages in respect of their loss, it was proved that the fence of the yard was defective, but that the cattle had been taken from the pens and placed there by the pursuer's own servant, who had left them there for a night notwithstanding that he was warned by the defenders' servants that the yard was not intended for such a purpose. It was further proved that the cattle were under the charge of the pursuer's servant, and not of the defenders. The Court *assoilzied* the defenders.

On the evening of 4th June 1887 Thomas Crawford, cattle-dealer, Belfast, arrived with 56 cattle at Stranraer by steamer from Larne. The railway from Stranraer pier to Newton-Stewart was the property and under the management of the Portpatrick and Girvan Joint Committee. He desired to have the cattle forwarded by rail from Stranraer to Newton-Stewart. It was necessary as a condition to have a permit from the local authority. Crawford sent his son, a lad of nineteen, to get the permit, and he himself left Stranraer by the train. During this time the cattle had been put in pens belonging to the railway company close to the line, and used for keeping cattle in until they were trucked. The son did not return until the last cattle train for the night had left Stranraer. The cattle were then driven out of the pens, and put into an enclosure adjoining them, in which there was water, and in which young Crawford gave them hay. The fence round this enclosure or yard was composed of sleepers, with the exception of a part next the railway, at which it was composed of posts and moveable wooden bars fitting into notches in the posts. Young Crawford having fed the cattle left them, and went away for the night without leaving anyone in charge. During the night a number of the cattle got out of the enclosure and got upon the railway line, with the result that six were killed and two injured by a passing train.

Crawford brought an action against the railway company in the Sheriff Court at Stranraer for £46 as the value of the cattle killed and injured.

The pursuer averred that the defenders had taken possession and charge of the cattle at Stranraer, and put them into their enclosure, and that the cattle escaped in consequence of the defective condition of the fence of the enclosure.

The defenders averred that the yard or enclosure was used only for the loading of horses,