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Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.]

GLASGOW CORPORATION v.
CALEDONIAN RAILWAY COMPANY.

Road—Railway—Burgh—Maintenance of Roadway—Bridge Carrying Street Over Railway—Railway's Obligation to Maintain Road—District Annexed to City from County—Special Powers of City Authority as to Streets—"Public Highway"—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 39.

The Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, provides for "any turnpike road or public highway" crossed by a railway being bridged by the railway company, and enacts that such bridges with the approaches shall be maintained by the railway company.

A railway company, whose Special Act conferred power in certain cases to substitute for existing portions of road new portions which were to be subject to the same provisions as the existing portions, crossed with its lines certain roads which at the formation of the line were under a county local authority. The roads were bridged in terms of section 39 of the Railways Clauses Consolidation (Scotland) Act 1845, in places new portions of road being substituted for existing portions. Some years subsequently the district embracing these roads was annexed to a City whose Special Act vested the roads in the city authority and subjected them to its other Special Acts, which contained provisions as to streets after being put on the register of public streets being maintained thereafter by the local authority.

In an action by the City against the railway company to enforce the obligation of maintaining the roadway, *held* (1) that the Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, by its terms "turnpike road or public highway" applied to streets in a city as well as roads in a county district, and so still applied to the roads in question; (2) that the substituted portions were in the same position as the other portions of road; and (3) that the special powers of the transferees could not operate a release from its obligations to the railway company.

Road—Railway—Burgh—Maintenance of Roadway—Bridges Carrying Streets

Across Line—City Authority Owning Tramway System Using Bridges—Liability for Maintenance—Tramways Act 1870 (33 and 34 Vict. cap. 78), sec. 28—Railways Clauses Consolidation (Scotland) Act 1845, sec. 39.

A railway company was bound in terms of the Railways Clauses Consolidation (Scotland) Act 1845, section 39, to maintain the roadway upon bridges and approaches thereto which carried streets across their line. These roadways were also utilised by a tramway system owned by the corporation of the city in which they lay, the Tramways Act of 1870 being incorporated in their Special Act. In an action by the corporation to enforce against the railway company the obligation of maintenance of the roadway, *held* that the company's obligation was not to maintain the whole roadway, with a right of relief against the tramway, but was merely to maintain the portion of the roadway not falling within section 28 of the Tramways Act as incorporated in the Special Act.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 39, enacts—"If the line of the railway crosses any turnpike road or public highway, then except where otherwise provided by the Special Act, either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge, of the height and width and with the ascent or descent by this or the Special Act in that behalf provided, and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company, provided always that, with the consent of the Sheriff or two or more justices as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriageway, on the level."

Section 46—"If, in the exercise of the powers by this or the Special Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether 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 operations, 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."

Section 49—"If the road so interfered with . . . cannot be restored compatibly 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."

The Tramways Act 1870 (33 and 34 Vict. cap. 78), sec. 28, *inter alia*, enacts—"The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authorities shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid, as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway."

The Glasgow Corporation (Tramways and General) Order Confirmation Act 1901 (1 Edw. VII, cap. clxxix), which incorporates certain sections of the Tramways Act 1870, by sec. 7, *inter alia*, enacts that for the purposes of that Act section 28 of the Tramways Act 1870 "shall have effect as if five feet were therein mentioned instead of four feet."

The Caledonian Railway (Garnkirk Station) Act 1847 (10 and 11 Vict. cap. lxxxii) by section 34, the Caledonian Railway (Additional Powers) Act 1872 (35 and 36 Vict. cap. cxiv) by section 53, the Caledonian Railway Company (Additional Powers) Act 1878 (41 and 42 Vict. cap. clxxiii) by section 51, and the Caledonian Railway (Further Powers) Act 1882 (45 Vict. cap. liii), by section 55, provide that nothing contained in them shall exempt from the provisions of any general Act relating to railways.

The Acts of 1872, 1878, and 1882 in their second section incorporate the Railways Clauses Act 1845 save where expressly varied.

The Act of 1872 in section 7 enacts—"The new lines of road authorised to be made by the two next preceding sections of this Act, and all other new portions of road authorised by the provisions of 'The Railways Clauses Consolidation (Scotland) Act 1845,' as incorporated with this Act, to be formed in lieu of roads altered or diverted, shall, as respects maintenance, management, and tolls (where tolls are leviable), and in all other respects, be held as parts of and be subject to the same provisions as the existing roads altered or diverted as aforesaid respectively."

The Act of 1878 in section 7 enacts—"The said diversions of roads and new piece of road shall respectively, as respects management, maintenance, and tolls (where tolls are exigible), and in all other respects, be held as parts of and be subject to the same provisions as the existing roads for which the same are respectively substituted as aforesaid; and all other new portions of road authorised by the provisions of the Railways Clauses Consolidation (Scotland) Act 1845, as incorporated with this Act, to be formed in lieu of roads altered or diverted, shall, as respects management, maintenance, and tolls (where tolls are exigible) and in all other respects, be held as parts of and be subject to the same pro-

visions as the existing roads so altered or diverted respectively."

The Act of 1882 in section 35 enacts—"The company may permanently stop up the portions of existing roads for which any new portions of road authorised by the provisions of the Railways Clauses Consolidation (Scotland) Act 1845, as incorporated with this Act, to be formed in lieu thereof, are respectively substituted; . . . and all such new portions of roads shall, as respects management, maintenance, and tolls (where tolls are exigible), and in all other respects, be held as parts of and be subject to the same provisions as the existing roads for which the same are respectively substituted. . . ."

The Glasgow Police Act 1866 (29 and 30 Vict. cap. cclxxiii) makes provision for having streets declared public streets on the application of the Master of Works or any proprietor, and enacts—"Section 289—Every public street, for the objects and purposes thereof and of this Act, and the public sewers for the drainage thereof, shall vest in the [Magistrates and Council]. . . . Section 310—Subject to the obligations hereinafter imposed on the proprietors of lands and heritages, [the Magistrates and Council] shall make provision for maintaining and, so far as thought expedient, for causing the public streets in a suitable manner, and for altering, repairing, and renewing the said causeway. . . . Section 315—The Master of Works may, by notice given in manner hereinafter provided, require any proprietor of a land or heritage adjoining any public street, to causeway one-half in breadth thereof opposite such land or heritage in a suitable manner to his entire satisfaction, unless previous to the passing of this Act such portion of street was assumed by the [Magistrates and Council] as in a sufficient state of repair. Section 316—On the completion of the said causeway, and its approval by the Master of Works, or by the magistrate or Dean of Guild, as hereinafter provided, the registrar shall make an entry thereof in the register of public streets, which shall *ipso facto* relieve the proprietor from liability for the future maintenance or renewal of the said causeway."

The City of Glasgow Act 1891 (54 and 55 Vict. cap. cxxx), section 27, enacts—"Subject to the provisions of this Act, and excepting as after mentioned, the lands, buildings, sewers, lamps, lamp-posts, pipes, mains, plant, and all other property, assets and powers of every description, vested in, held by, or due or belonging to any councils, commissioners, or authorities within the district added, shall from and after the commencement of this Act be by virtue of this Act transferred to and vested in, be held by, and be due and belong to the corporation, the police commissioners, or the parks and galleries trustees, or other transferees, as such property and assets would, if within the existing burgh, belong to or be comprised within the administration of any one of those authorities, and shall form part of the property and assets of the city for all the estate and interest therein of

such councils, commissioners, or authorities, and shall be held, received, and enjoyed by the respective transferees accordingly, and the powers, duties, and liabilities of such councils, commissioners, or authorities shall be transferred and attach to the respective transferees, and shall form part of the powers, rights, debts, liabilities, and obligations of the city, and be enjoyed, exercised, paid, discharged, and performed by the respective transferees." Section 35 (1)—
"All public roads, highways, streets, foot-paths, lanes, and courts in the district added, where vested in the several county councils, district committees . . . within the district added, or any of them, shall be and are hereby transferred to and vested in the police commissioners, and the same shall be subject to the provisions of the Police Acts."

The Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, sec. 44, enacts—
"The added areas shall, from and after the passing of this Act, be incorporated with and form part of the city and county of the city of Glasgow, and be disjoined from the county of Lanark, in the same manner and to the same effect, and for every purpose, as the area disjoined from the same county and incorporated with and annexed to the city by the City of Glasgow Act 1891."

On 8th November 1904 the Corporation of the City of Glasgow brought an action against the Caledonian Railway Company in which they sought declarator—"(*First*), that Broomfield Road, Cumbernauld Road, and Strathclyde Street, in the city of Glasgow, are public highways, and are respectively carried over the defenders' railway or railways by means of a bridge or bridges; and (*Second*), that the defenders are bound at all times to maintain at their own expense the portion or portions of the said Broomfield Road, Cumbernauld Road, and Strathclyde Street, carried over the defenders' railway or railways by means of a bridge or bridges, including in such maintenance in each case the immediate approaches of such bridge or bridges, reserving to the defenders any right of relief competent to them, if they any have, in respect of any obligation as to maintenance or repair imposed upon the owners of the tramway undertaking, or any others liable to them in relief in respect of such tramway undertaking, in so far as such tramway undertaking is constructed upon the bridge carrying the said Cumbernauld Road over the defenders' railway or railways, and the immediate approaches of such bridge."

The defenders pleaded, *inter alia*—"(3) The defenders not being bound to maintain the specified portions of said streets, all as condescended on, are entitled to absolvitor from the conclusions of the summons with expenses. (4) The said streets having been declared public streets within the meaning of the Glasgow Police Acts, the defenders are not under obligation to maintain any portion thereof. (5) Strathclyde Street not being a public highway when the defenders' railway was constructed, the provisions of the Railways Clauses Act

1845 do not apply to it. (8) In respect of the provisions of the defenders' Acts condescended on, the defenders are not bound to maintain the new portions of road substituted by them for the previously existing roads appropriated and used by them partly in the formation of the said substituted roads, and partly for the purposes of the said railway. (9) In respect of the obligation contained in section 28 of the Tramways Act 1870, the pursuers, as owners of the tramways in Cumbernauld Road, are directly responsible for the maintenance of the said road to the road authorities, who in this instance are the pursuers themselves."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (Low).

On 17th March 1905 the Lord Ordinary pronounced this interlocutor:—"Finds (1) that Broomfield Road and Cumbernauld Road in the city of Glasgow are public highways, and are respectively carried over the defenders' railway or railways by means of a bridge or bridges; and (2) that the defenders are bound at all time to maintain at their own expense the portion or portions of the said Broomfield Road and Cumbernauld Road carried over the railway or railways by means of a bridge or bridges, including in such maintenance in each case the immediate approaches of such bridge or bridges, except in so far as the owners of the tramway constructed in Cumbernauld Road are bound to maintain the foresaid portion or portions of said road, including as aforesaid: To the extent and effect of these findings, but to no greater extent and effect, finds, decess, and declares in terms of the conclusions of the summons as regards Broomfield Road and Cumbernauld Road: Appoints the cause to be enrolled for further procedure: Reserves in the meantime all questions of expenses, and grants leave to reclaim."

Opinion—"The main question raised in this case is whether public streets in Glasgow are public highways within the meaning of the 39th section of the Railways Clauses Consolidation (Scotland) Act 1845.

"By that section it is provided that [. . . quotes section *supra*. . .]

"It appears that three streets in Glasgow—namely, Broomfield Road, Cumbernauld Road, and Strathclyde Street—are carried over railways belonging to the defenders by means of bridges which were constructed by the defenders.

"The pursuers, the Corporation of Glasgow, accordingly seek declarator (1) that these streets are public highways which are carried over the defenders' railways by means of bridges; and (2) that the defenders are bound to maintain at their own expense the portions of the streets carried over the railways by means of bridges, including the immediate approaches to the bridges. In short, the pursuers seek to have it declared that the streets and bridges in question fall within the scope of the 39th section.

"The defenders argued in the first place that the section applied only to country

roads, and not to the streets of a town. They founded upon the words in the section 'any turnpike road or public highway,' and contended that the expression 'public highway' must be construed as referring only to highways *ejusdem generis* with turnpike roads. No doubt, if the only expression used had been 'public highways,' turnpike roads would have been included, although they were not specially mentioned, and there must therefore have been some reason for their special mention. I think that the explanation probably is that the Act goes on to make regulations in regard to bridges erected for the purpose of carrying railways over roads, and the regulations which are made for turnpike roads are different from those which are made for what are described as 'public carriage roads.' The conclusion which I come to upon reading the group of sections which commences with the 39th, and which fall under the general heading 'Interference with Roads,' is that the expression 'public highway' includes, at all events, public carriage roads of whatever kind they may be or wherever situated. There is nothing that I can find in any of the sections which excludes from the operation of the 39th section a public carriage road because it happens to be situated in a town or burgh.

"It is to be remembered, however, that the provisions of the Railway Clauses Act only become effective by being incorporated in the Special Act, and if a general rule laid down in the General Act is one which could not with justice be applied in a particular case, the Legislature may in the Special Act make such special provisions as may be suitable to the circumstances.

"It is therefore necessary to see whether the Special Acts which authorised the construction of the railways intersecting the streets in question contained special provisions which altered or modified the general rule laid down in the 39th section of the General Act.

"As regards Broomfield Road and Cumbernauld Road, which were admittedly public streets or public carriage roads at the time when the bridges were built, the defenders were unable to point to any provisions in the Special Acts which superseded or modified the general rule of the 39th section of the Railways Clauses Act.

"The defenders indeed founded upon the fact that as regarded some of the bridges they had been obliged to alter the line of the street, stopping up an old portion of the street, and substituting for it a new portion which was carried over the railway by a bridge. They were authorised by their Special Acts to make these alterations upon the streets, and it was provided in each case that the new portion of the road should, as respected management, maintenance, and in all respects, be held as part of, and be subject to the same provisions as, the existing road for which it was substituted.

"I do not think that these provisions, or what was done under them, prevented the 39th section of the Railways Clauses Act

from being applicable. The railways authorised by the Acts crossed public highways, and the defenders, as directed by the section, carried the highways over the railways by means of bridges, and it is in my opinion of no moment that what were carried over the railways were not the original highways but substituted highways, because the Special Acts declared that the substituted portions should in all respects come in place of, and be in the same position as, the original portions.

"I therefore do not think that what was authorised and done in the way of altering the line of the streets can relieve the defenders of the obligation to maintain the bridges and the immediate approaches thereto. These circumstances may be important in considering what are the 'immediate approaches' to the bridges, but that is a question which is not raised in this case.

"It further appears that until 1899 Broomfield Road and Cumbernauld Road were in the county of Lanark, and under the jurisdiction of the District Committee of the Lower Ward of that county, but in that year they were brought within the boundaries of the city of Glasgow, and the defenders refer to a variety of enactments by which the roads brought within the city are vested in the city authorities. I do not think that these enactments have any bearing upon the present question. I do not see how the mere transference of roads for administrative purposes from one local authority to another can, in the absence of express provision to that effect, relieve the defenders of the obligation laid upon them by the 39th section of the Railways Clauses Act.

"In regard to Strathclyde Street, which is also carried over a railway belonging to the defenders by means of a bridge, the position of matters is somewhat different. The defenders aver that when the railway was made and the bridge built, Strathclyde Street was a private street, and they plead that the street, not having been a 'public highway' when the railway was constructed, the provisions of the Railways Clauses Act do not apply to it. Now, I imagine that, although Strathclyde Street was a private street, it may nevertheless have been a public highway, and the defenders do not say that it was not so. On the other hand, the pursuers, while they admit that Strathclyde Street was a private street, do not aver that it was a public highway. I cannot tell by reading the Special Act under which the railway crossing Strathclyde Street was constructed how the matter really stood, and accordingly it seems to me that there must be inquiry.

"There is one other matter to which I must refer. The pursuers are the owners of tramways in Cumbernauld Road, and their statutory obligation is to maintain so much of the road upon which the tramways are laid as lies between the rails, and as extends eighteen inches beyond the rails upon each side. The defenders say that that obligation includes the bridges as well

as the other parts of the street, and I do not understand the pursuers to deny that that is the case. The pursuers have accordingly qualified the conclusions of the summons by reserving to the defenders any right of relief competent to them against the owners of the tramway in regard to the maintenance and repair of the road.

"I doubt whether the relative position of the parties is properly described by saying that the defenders' obligation is to maintain the whole of the roadways upon the bridges, with a right of relief as regards part thereof against the pursuers. The 28th section of the Tramways Act 1870, which is quoted in the defences, rather seems to render the owners of the tramway directly responsible for the maintenance of the road upon which the tramway is laid to the extent there defined.

"It therefore seems to me that all that the pursuers can ask is that the defenders should be found liable to maintain the roadways of the bridges and the immediate approaches thereto, except in so far as the owners of the tramways are bound to do so."

The defenders reclaimed, and argued—Section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 did not here apply. The roads and streets in question were public streets of the city of Glasgow, to maintain which the corporation was liable. The Glasgow Corporation (Tramways, Libraries, &c.) Act 1899, section 44, transferred Broomfield Road and Cumbernauld Roads from the county local authority to that of the city to the same effect as the area annexed to the city of Glasgow by the City of Glasgow Act 1891. That Act by its 35th section transferred all public roads, highways, streets, and footpaths in that area to the Police Commissioners, and declared them to be subject to the provisions of the Police Acts which the third section had defined as meaning, *inter alia*, the Glasgow Police Acts 1866 to 1891. Now, the Glasgow Police Act 1866 in its 316th section declared that after streets had been declared public streets, and enrolled in the register thereof, the proprietor was no longer liable for their maintenance, and by section 310 that the Magistrates and Council should make provision therefor. Moreover, the whole purposes of these streets had been changed by the transference. They had ceased to be highways in the sense of section 39, and their character was changed, *e.g.*, causeway had been substituted for macadamised road. There was no case of section 39 having been held to apply to a street in a burgh. The cases *Lancashire and Yorkshire Railway Company v. Borough of Bury* (1889), L.R., 14 A.C. 417; *Great Eastern Railway Company v. Hackney District Board of Works* (1883), L.R., 8 A.C. 687; and *Cameron v. Caledonian Railway Company*, March 12, 1904, 6 F. 763, 41 S.L.R. 414, were all distinguishable either in respect to the subject, the Special Acts in question, or the parties. Also apart from the Acts relating to the city of Glasgow,

section 7 of the Special Acts of 1872 and 1878, and section 35 of that of 1882, exempted the defenders from the burden of maintenance of the substituted roads—*Magistrates of Perth v. Earl of Kinnoull and the Caledonian Railway Company*, June 28, 1872, 10 Macph. 874, 9 S.L.R. 555. Further, if the supervening Tramways Act 1870 which was incorporated in the Glasgow Corporation (Tramways and General) Order Confirmation Act 1901 had by section 28 removed partially the burden of maintenance and transferred it to the tramway owners, then the total transference operated by the vesting of these roadways in the city of Glasgow under the provisions of the Glasgow Police Act 1866 had extinguished the entire obligation. As to Strathclyde Street, that was not a public highway when the Railway Company bridged it, nor was the contrary averred. It had only become a public highway in 1894 under the Glasgow Police Act 1866, which by sections 310 and 316 laid the burden of maintenance on the city authority. Previous to 1894 it had been a private street, and not subject to section 39 of the Railways Clauses Consolidation (Scotland) Act 1845. No matter for inquiry was averred, and no proof should be allowed as to Strathclyde Street. The Lord Ordinary's judgment should be recalled and the defenders assolizied.

Argued for the pursuers and respondents—Section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 applied and obliged the Railway Company to maintain these bridges and roadways. The words used in that section were "any turnpike road or public highway," and had been interpreted to include carriageways though not footpaths—*The Queen v. Bexley Heath Railway Company*, [1896] 2 Q.B. 74. In the case of the *Lancashire and Yorkshire Railway Company v. Borough of Bury*, *cit. sup.*, the railway company had been held liable though no additional surface of roadway was added to the liability of the road authority by their operations. The argument as to liability having been discharged by the vesting of the roads in the city of Glasgow was unsound—*Great Eastern Railway Company v. Hackney Board of Works*, *cit. sup.*, per Lord Watson. In that case a statute vesting the roads in a local authority was held not to relieve adjoining landowners from liability; similarly in the present case the liability under section 39 of the Railways Clauses Consolidation (Scotland) Act 1845 was not by transference extinguished. Nor was there anything in the urban character of these streets to displace the liability. The transference merely put the new authority in place of the old with all its rights of relief, and carried with it the Railway Company's obligation in respect of these roadways in terms of section 27 of the City of Glasgow Act 1891. Nor did the Special Acts of the Railway Company exempt them from liability under section 39. Sections 7 of the Special Acts of 1872 and 1878, and section 35 of the Special Act of 1882, plainly meant that the new roads should be dealt with as part of the old system, and should be as if no

diversion or alteration had taken place. These sections besides were qualified by section 53 of the Act of 1872, section 51 of the Act of 1878, and section 55 of the Act of 1882 respectively, to the effect that the company was not to be exempt from the provisions of any general Act relating to railways, and consequently not from the provision of section 39 of the Railways Clauses Consolidation Clauses (Scotland) Act 1845. Nor could the exemption claimed have applied to any bridge erected under a Special Act in 1847, which was also liable to the provisions of the general Railway Acts by its own special enactment. Further, the decisions in the cases of the *Magistrates of Glasgow v. The Glasgow and South Western Railway Company*, May 13, 1895, 22 R. (H.L.) 29, 32 S.L.R. 733; and the *Caledonian Railway Company v. The Corporation of Glasgow*, February 20, 1901, 3 F. 526, 38 S.L.R. 376, had laid it down that the city could not interfere with such bridges and their roadways as those in question, and so they must be under and maintainable by the Railway Company. As to Strathclyde Street, the averments were distinct that it was a public highway. The case of *Neilson v. Borland, King, & Shaw*, February 28, 1902, 4 F. 599, 39 S.L.R. 417, showed that the public use of it as a highway had no bearing on the duty of maintenance. The case of *Christie v. The Corporation of Glasgow*, May 31, 1899, 36 S.L.R. 694, was also referred to.

At advising—

LORD KINNEAR—This is an action at the instance of the Corporation of the City of Glasgow against the Caledonian Railway for declarator that the defenders are bound to maintain certain portions of roads or streets in Glasgow which are carried over the railway by means of bridges. The roads in question are three in number, the Broomfield Road, the Cumbernauld Road, and Strathclyde Street; and the Lord Ordinary has sustained the action as far as regards the first two with a certain qualification, and as regards Strathclyde Street has expressed his opinion that certain facts must be ascertained before judgment can be given, and has therefore continued the cause for further procedure. I am of opinion that his Lordship's interlocutor is right, and that we ought to adhere to it.

The facts as regards Broomfield Road and Cumbernauld Road are simple, and are not in dispute. The defenders' railways cross the lines of these two roads at various points, and at each of these points the road is carried over the railway by a bridge. When the bridges were originally constructed the roads were under the jurisdiction of the District Committee of the Lower Ward of Lanarkshire, but on the passing of the Glasgow Corporation Act 1899 they were brought within the boundary of the city, and the main question between the parties is whether the operation of this statute did or did not discharge an obligation to maintain the bridges which had been previously incumbent on the Railway Company. The pursuers' case

is founded on the 39th section of the Railways Clauses Consolidation Act 1845; and the first ground of defence, which was also the most strenuously maintained, assumes that that enactment effectually imposed the obligation in question while the roads were within the jurisdiction of the County Road Trustees. The 39th section provides that "if the line of railway cross any turnpike road or public highway, either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge . . . and such bridge with the immediate approaches and all other necessary works connected therewith shall be executed and at all times thereafter maintained at the expense of the company." It is not disputed that Broomfield and Cumbernauld Roads were public highways in the county of Lanark when they were crossed by the defenders' lines of railways, and it follows that the bridges by which they were carried over the railway had to be executed, and, if the Act remains operative, must still be maintained at the expense of the defenders. But it is said that this statutory liability was determined when the roads became public streets within the meaning of the Glasgow Police Acts. The first argument that was advanced in support of that proposition does not appear to me to have much force. It was said that the language of the enactment is not applicable to the streets of a burgh. If a bridge has been "executed" in terms of the statute, the bridge to be maintained is sufficiently identified as that so executed, whether a public street may properly be called a public highway or not. But I agree with the Lord Ordinary that the words are large enough to include all public carriage roads even when they pass through a burgh. I cannot see, therefore, that the application of the statute in terms is displaced because of the inclusion of the roads, of which the bridges in question form parts, within the municipal boundaries of the city. It is maintained, however, that the Acts of Parliament by which this inclusion was brought about have made so radical an alteration of the rights and liabilities involved in the maintenance of roads, as to make the 39th section of the Railway Clauses Act unworkable, and so to relieve the company of its obligations. As this argument was developed, it involved a distinction between the liability for maintaining the main structure of the bridge and for maintaining the surface of the roadway; for Mr Cooper conceded that notwithstanding the Glasgow statutes the defenders would still be liable to replace, for example, a defective girder, although they would not be liable for repairing the roadway. I find it extremely difficult to reconcile this view with the plain meaning of the Act. It was held in the *North Staffordshire Railway Company v. Dall*, approved by the House of Lords in the *Lancashire and Yorkshire Railway Company v. The Mayor of Bury*, that when a road is carried over the railway by a bridge the obligation to maintain the bridge includes the roadway,

for a bridge without a roadway is not for practical purposes a bridge; and accordingly the learned Judges of the Queen's Bench held that the provision applied to all necessary works including the stoning and metalling without which the road would be useless. If the enactment is repealed altogether by implication, the construction adopted in this decision will of course create no difficulty, but if, as is conceded, it is not repealed but is still operative at least in part, it seems to me that an exemption as regards one particular part of the bridge from the liability which the statute imposes in terms as regards the whole is not easily to be inferred. But I am of opinion that the statutes on which the defenders rely create no exemption and make no change whatever in the liability imposed upon them by the Railways Clauses Act. The enactment mainly relied on is the 35th section of the City of Glasgow Act 1891, by which it is provided that all public roads, highways, and streets, formerly vested in county councils or district committees within the district added shall be transferred to and vested in the police commissioners and shall be subject to the provisions of the Police Acts. I agree with the Lord Ordinary that the transference of roads for administration purposes from one local authority to another cannot relieve the defenders of their obligation to bear the expense of maintaining bridges. It is said that the new administrators as police commissioners have a more extensive authority than road trustees. But their additional functions can make no difference in the legal relation between them as administrators of the roads and the defenders. They are still creditors, just as the old road trustees were, and the defenders are still debtors in a specific obligation imposed by statute, which is neither enlarged nor diminished by the transference of the duty of managing roads to a body which is also charged with the duty of police commissioners. If they require the roadway of the bridges to be maintained in a more expensive manner than has hitherto been found necessary, the defenders may or may not have a right to object to a burden which may be beyond what was contemplated by the statute. But no question of that kind is raised at present, and if it arises it must be determined on the same principle as if it had been raised, as it might have been, by an extravagant demand of the former trustees. The suggestion that the new managers may call for a larger expenditure than the statute intended is no reason for relieving the defenders from the obligation which the statute imposes.

As to the second ground of defence—that the defenders, as regards some of the bridges, had been obliged to alter the line of the road, stopping up an old portion and substituting for it a new portion which was carried over the railway by a bridge—I agree entirely with the opinion of the Lord Ordinary, and I have nothing to add to what he has said.

This disposes of the question raised by the reclaiming note, so far as regards the roads which were admittedly public carriage roads at the time the bridges were built. As regards Strathclyde Street, the Lord Ordinary was unable to decide, upon the mere construction of the Special Act, whether this was or was not in fact a public highway when the railway was made; and he has accordingly entered the case to be enrolled for further procedure. I think this was the right order and that we ought to adhere to his Lordship's interlocutor.

The LORD PRESIDENT, LORD M'LAREN, and LORD PEARSON concurred.

The Court adhered.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—Cooper, K.C.—Orr Deas. Agents—Campbell & Smith, S.S.C.

Counsel for the Pursuers and Respondents—The Dean of Faculty (Campbell, K.C.)—The Lord Advocate (Shaw, K.C.)—M. P. Fraser. Agents—Hope, Todd, & Kirk, W.S.

Tuesday, March 20.

FIRST DIVISION.

[Lord Pearson, Ordinary.]

CLIPPENS OIL COMPANY, LIMITED v. THE EDINBURGH AND DISTRICT WATER TRUSTEES.

(See *ante*, July 6, 1905, 42 S.L.R. 698, 7 F. 914; February 22, 1901, 38 S.L.R. 354, 3 F. 1113; November 27, 1900, 38 S.L.R. 121, 3 F. 156; June 7, 1899, 36 S.L.R. 710, 1 F. 899; February 3, 1898, 35 S.L.R. 425, 25 R. 504; December 17, 1897, 35 S.L.R. 304, 25 R. 370.)

Interdict—Interim Interdict—Subsistence of Interdict.

Held (per Court of Seven Judges) that interim interdict having been granted in the Bill Chamber and the Note passed, the interdict subsisted till the Note was finally disposed of either by a judgment of the Lord Ordinary not reclaimed against, or by a judgment of the Inner House on a reclaiming note.

Limitation of Action—Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61)—Public Authority Acting with a View to Cripple Opponents—Relevancy of Averment.

In an action brought by a mineral company against water trustees to recover damages for wrongous interdict, *observed (per Lord President)*—“I do not think that to show that the defenders were trying to cripple the pursuer of set purpose would elide the provisions of the Public Authorities Protection Act if they were otherwise available.”