found in the father's repositories at his death. The sum of £5000 was paid over to Mrs Barr, who granted a discharge on 23rd February 1904.

It clearly appears from the evidence that this balance of £2000, though ostensibly paid out of a credit standing in name of Catherine, was, to the extent of £1653 and interest, paid out of moneys which originally belonged to the father, and which in the December previous had existed in the form of a debt due by the defender to his father on account. Admittedly this was a liquid debt, presently due, and bearing interest in favour of the father; and by a series of book entries, no one of which represented the passing of cash or of securities, the defender so arranged matters that the credit, which was originally in favour of his father, found its way into another account in favour of Catherine. Thus the payment by Catherine towards the £5000 which was required for the settlement with Mrs Barr was really made out of money or credit which had belonged to the father; and if that be the true view, the guarantee by the defender which was found in the repositories of the deceased remains unfulfilled, and the pursuer is entitled to insist for implement of it.

It is said that the documents themselves are conclusive in favour of the defender. I cannot assent to that view. There are here no documents of title properly so called; and it appears to me that the documents which do exist urgently demand explanation. The real defence here is donation; or, as it is put in answer 4 for the defender, "that on 24th December 1903 Robert Brownlee, senior, made a gift to his daughter Catherine of a sum of £1653, 8s. 6d., which was lying in the hands of the defender at interest." It is said that this money, originally the father's, was gifted by him to his daughter in order to enable her to make the contribution towards the settlement of Mrs Barr's claim; and that the defender's letter of guarantee was thereby rendered unnecessary, and was practically discharged. In such a case I have no doubt of the competency of a proof of the facts and circumstances in order to determine the question of donation. But it lies upon the defender to make good his position, and I think he has entirely failed to do so. On the question of the intention to make a gift the statements of the alleged donor and the alleged donee would in general be the best evidence. In this case we have only secondary evidence as to the intention of Mr Brownlee, the alleged donor, and so far as it goes it is adverse to the argument on intention. As to Catherine Brownlee, the alleged donee, her evidence conveys the impression that she knew nothing about it except what she was told by her brother. Then as to the documents on which the defender relies, these are, to my mind, highly unsatisfactory. They include an exchange of receipts, which gives an appearance of formality to the transaction. But the exchange of receipts in such circumstances, where no moneys or securities pass, may import any one of several things. There is not enough, in my opinion, to instruct the donation alleged; and whether the documents are regarded in themselves or in the light of the parole evidence I think the defender's case fails.

The Court adhered.

Counsel for the Pursuer (Respondent)—Hunter, K.C.—Morrison, K.C.—T. Graham Robertson. Agents — Dove, Lockhart, & Smart, S.S.C.

Counsel for the Defender (Reclaimer)—The Dean of Faculty (Campbell, K.C.)—Graham Stewart, K.C.—More. Agents—Davidson & Syme, W.S.

Friday, November 29.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

GLASGOW CORPORATION *v.* CALEDONIAN RAILWAY COMPANY.

(See *ante*, March 20, 1906, 43 S.L.R. 534, 8 F. 755.)

Road—Railway—Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 39—"*Public Highway*"—*Use by Public de facto but not de jure.*

A road dedicated to the use of feuars, who could, acting with their superior, close it at pleasure, is not a "public highway" within the meaning of the Railway Clauses Consolidation (Scotland) Act 1845, section 39, by reason of its having been for a period short of the prescriptive period unrestrainedly used by the public.

Road—Railway—Obligation to Maintain Roadway — Diversion of Private Road Specially Provided for in Railway Company's Act—Private Road Subsequently Taken Over by Local Authority—Caledonian Railway (Additional Powers) Act 1872 (35 *and* 36 *Vict. cap. cxiv.*), *secs.* 4 *and* 26 (3)—*Railway Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 39.

A railway company was by Private Act authorised to make and maintain a railway, and it was enacted that in constructing the railway certain provisions should be binding on the company, including a provision that a particular road might be diverted as shown on the plans and should be carried over the railway by a bridge of a certain width, the diverted portion of the road to be also of that width. The road was at the date of the railway's construction a private road, but was subsequently taken over by the Local Authority, who raised an action to have the company ordained to maintain the roadway on the bridge and approaches.

Held that the company was under no obligation to maintain the roadway,

inasmuch as (1) there was no such obligation by the Private Act; and (2) the road having been a private road at the date of the railway's construction, section 39 of the Railway Clauses Consolidation (Scotland) Act 1845 did not apply.

Opinion (*per* the Lord President) that there was no statutory obligation on the railway company to maintain even the structure of the bridge.

The Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), section 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."

The Caledonian Railway (Additional Powers) Act 1872 (35 and 36 Vict. c. cxiv), which by section 2 incorporates the Railways Clauses Consolidation (Scotland) Act 1845, except where expressly varied by the Act, enacts—Sec. 4—"Subject to the provisions of this Act, the company may make and maintain in the lines and according to the levels shown on the deposited plans and sections the railways hereinafter described, and all proper stations, approaches, works, and conveniences in connection therewith respectively, and may execute the other works and operations hereinafter mentioned. . . . The railways and other works and operations hereinbefore referred to and authorised by this Act are . . . A railway in this Act called Railway No. 2, . . . commencing by a junction with the company's Dalmarnock branch, . . . and terminating on the southern side of the road or street called London Road, . . . all in the City of Glasgow. . . ."

Section 26—"In constructing Railway No. 2 the following provisions shall be binding on the company, who shall construct the works hereinafter specified in manner hereinafter directed. . . . (3) The road or thoroughfare numbered on the deposited plan 4 in the parish of Calton may be diverted as shown on the plans, and shall be carried over the railway by a bridge not less than 40 feet wide between the parapets, and the diverted portion of road shall not be less than 40 feet between the fences. . . ."

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."

The conclusions of the summons, so far as regarded Broomfield Road and Cumbernauld Road, were disposed of on March 20, 1906. [Reported *ante*, 43 S.L.R. 534, 8 F. 755.]

The defenders, *inter alia*, pleaded—"(5) Strathclyde Street not being a public highway when the defenders' railway was constructed, the provisions of the Railway 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."

The *facts* of the case appear from the opinion (*infra*) of the Lord Ordinary (SALVESEN), who, after a proof, on 23rd October 1906 assoilzied the defenders from the conclusions of the summons in so far as they related to Strathclyde Street.

Opinion.—"The only conclusion which remains undisposed of in this action is that relating to Strathclyde Street. The pleadings on both sides are singularly meagre. The pursuers aver that Strathclyde Street is a public highway of the City of Glasgow, but there is no averment that at the time when the defenders obtained the private Act of 1872, under which the bridge to which the action relates was constructed, Strathclyde Street was then a public highway. If I had been determining a question of relevancy in the first instance I should have been prepared to dismiss the conclusions of the actions so far as Strathclyde Street was concerned, because, in my opinion, section 39 of the Railways Clauses Consolidation Act does not impose an obligation on the Railway Company to maintain in all time the surface of the roadway which is carried on the bridge, if at the time when the railway bridge was made the road which it crossed was a private road. On the other hand, the defenders do not say that in 1872 Strathclyde Street was not a public highway, their only averment being that it was a private street maintained by the owners of property fronting or abutting thereon, an averment which is not in the least inconsistent, as Lord Low pointed out, with Strathclyde Street (at that date) being also a public highway. Both parties, however, concurred in asking a proof, and I think I must now decide the case with reference to the evidence that has been adduced, and not with reference to the

pleadings in the case, which might easily have been amended had attention been called to their defective nature.

"The first question which I have to solve is the meaning of the words 'public highway,' used in section 39. There is no definition of 'public highway' in the statute, nor is there any case which decides what kind of road will answer the description. Both parties are agreed that it must be a carriageway, because it has been held that the section does not apply to a footpath—*Dartford*, L.R., 1898, App. Cas. 210. The pursuers maintained that if such a carriageway is *de facto* open to the public it answers the description of being a public highway, while the defenders contend that not merely must it be open to the public, but that it must be a road over which the public have a right to pass. I prefer the defenders' definition. A public right to use a carriage road belonging to private proprietors may be acquired by prescriptive use, by express grant, or by dedication, but I am unable to see how a private road can be described as a public highway which, although *de facto* used by the public with consent of the proprietors, may at any time be closed to the public. I proceed, accordingly, to consider whether in 1872—which is admitted to be the crucial date—Strathclyde Street was a public highway in the sense which I have indicated.

"There is really no substantial controversy between the parties as to the facts although they differ widely as to the inferences to be drawn. Prior to 1854 a carriage road existed substantially on the line of Strathclyde Street as it now exists. It led from Dalmarnock Road to a street which is now called Swanston Street, which also communicates with another part of Dalmarnock Road. Both roads were entirely on the private property of the Dalmarnock Trustees. At that time Swanston Street was known as 'the coal road,' having apparently been originally formed in order to give access to a coal pit then being worked on the Dalmarnock estate not very far from the Clyde. There was a line of rails on the road, used by the hutchers which conveyed the coal from the pit. Opposite Guthrie's farm there was a gate which went right across the road, and which was always closed on Sundays, but was open the rest of the week. There seems also to have been a gate at the other end. Strathclyde Street was then known as 'the field road,' and apparently passed through agricultural land. It may originally have been a farm road, although its origin has not been ascertained in this process. In the earliest Ordnance Survey it is described as an occupation road; and in 1858, when the defenders obtained their first Act of Parliament to construct a railway across it, it is again so described in the book of reference. In the disposition by Mr Wilson of Dalmarnock in favour of the Caledonian Railway Company, dated 24th November 1868, it is spoken of as a private road which 'may be altered, shut up, or otherwise used by the proprietors of the subjects under description at pleasure, as soon as, and at any time after, the tack of the adjoining ground and offices in favour of Mr James Buchanan comes to an end, by expiry of the time therein stipulated or in consequence of a sale of the ground or otherwise.' I cannot doubt, therefore, that prior to 1868 Strathclyde Street was a private road belonging to the proprietors of Dalmarnock estate. It is also in favour of this contention that the original railway crossed what is now Strathclyde Street on the level, although this, of course, is by no means conclusive. In 1854, however, the owners of Dalmarnock estate commenced to feu the ground fronting Strathclyde Street. The earliest feu-contract was one in favour of Muir, Brown, & Company, who took a feu of six acres for the erection of a factory. The northern boundary of this feu is described in the feu-contract as 'the centre line of a contemplated street of 50 feet wide, and about to be formed of its proper breadth (so far in the meantime as bounding the ground thereby disponed) along which it extends 248 feet or thereby.' It appears from the same feu-contract that the road was at that time only 15 feet wide. It is quite obvious from this contract that the proprietors of the estate intended and expected that the ground fronting the proposed street would be taken off for industrial purposes. This expectation was not immediately realised. The next feu that was given off was one in April 1863, and the northern boundary of this feu is 'the centre of a proposed street of 50 feet in breadth.' Access is given to the ground 'by the road presently in use,' leading in both directions from the conclusion of Hamilton turnpike road to or near the ground hereby disponed. In 1864 Muir, Brown, & Company took a further feu of two acres of ground with a northern boundary in the same terms. In 1865, 1868, and 1870 further feus were granted, in the last of which the boundary is given as 'the centre line of street to be formed, 50 feet in breadth from building line to building line.' From the parole evidence it appears that by 1872 all these feus had been covered with buildings used for manufacturing purposes, and that the road in question was in daily use by some hundreds of workmen who were there employed. No doubt also it was used by members of the general public, whom there could be no reason to exclude, having in view the character of the district and the number of people who resorted to it for business purposes. Further, in 1870 the road was taken over under the Glasgow Police Act of 1866 as a private street, and the usual assessment notices were from that time onwards issued to the proprietors on both sides. It then became subject to the jurisdiction of the Magistrates of Glasgow for the purposes of the Act of 1866, so far as that Act applies to private streets (I was referred especially to sections 303 to 308, 311, 318, 344, and 347), and for all practical purposes this was a highway used by the public just like any of the other streets in the City of Glasgow. Further, it may be conceded that it was very unlikely indeed that it would ever be

closed to public traffic in view of the desire of the proprietors to promote more extensive feuing and the character and use of the buildings which had already been created.

"All this, however, is not inconsistent with the road in question remaining a private road in the sense that it was one over which the public had acquired no legal rights. It was decided in the case of *The Kinning Park Commissioners*, 4 R. 528, that a private street within burgh may yet remain the property of the owners, and may be closed to the public, although it has been used by the public for many years, short of the prescriptive period. I have already indicated that I am unable to see how a public right can be acquired except by express grant, by dedication, or by prescriptive use. It is not alleged that there was ever any express grant in favour of the public, and it is plain that in 1872 the road had not existed long enough to have enabled the public to acquire a right of way over it. Nor do I find any evidence of dedication to the public. It was argued by the pursuers that dedication to a body of feuars was equivalent to dedication to the public. In the present case for practical purposes it may have been so, but in law I do not think it was. That was indeed expressly decided in the *Kinning Park* case, where the street which was closed had been dedicated to the feuars on both sides for purposes of access to their feus, and I fail to see how it can affect the legal question whether the body of feuars is a small or a large one. The right to use the road conferred by the titles is confined to the feuars and tenants on the estate; and although such a contingency was highly improbable, I can see no reason why they should not in 1872 have combined to exclude the public, or even agreed to shut up the road entirely. The road in other words was, as Mr Colledge describes it, an estate or feuing road, from which the public were not excluded simply because at that time no interest had emerged which would make that desirable. I accordingly reach the conclusion that Strathclyde Street was not in 1872 a public highway within the meaning of the section founded on.

"It was further contended that the defenders were barred from maintaining that the road was not a public highway by the book of reference which they lodged relative to the Act of 1872, and more especially the book of reference lodged relative to the Act of 1888, under which they obtained further powers. In the book of reference of 1872 the road in question is described as being occupied, *inter alios*, by the public. That seems to have been accurate enough in point of fact; but if the Railway Company had believed that the road was under public administration, the public body administering it would have been entered as occupiers, and not the public on whom no notice was or fell to be served. So far as it goes the entry in 1872 seems to me in favour of the defenders. In 1888, however, which was six years before the road was taken over as a public street, the defenders in their book of reference described the road as being occupied by the public and the Magistrates and Town Council of Glasgow. In a sense that may have been accurate too, because the Magistrates under the Act of 1866 had certain powers already referred to with regard to the administration of the road as a private street; and they also appear to have been owners of gas and water-pipes in the road. In 1888, however, there was no question as to the maintenance of the road, which was being done entirely at the expense of the frontagers, including the Railway Company. And even if I were satisfied that there was an error in the book of reference, I do not see how that can affect the Railway Company's legal rights or throw upon them a burden of which, as owners, they had been relieved once and for all when Strathclyde Street was taken over as a public street by the City of Glasgow.

"One other argument for the pursuers remains to be dealt with. They pointed out that the bridge in question remains the property of the defenders, notwithstanding that the street which it now in part supports has been taken over by the City. They contended that the obligation to maintain the bridge therefore remains with the Railway Company; and that it was impracticable to distinguish between the structure of the bridge and the surface of the roadway, which they considered was merely a part of the bridge itself. I confess that I do not see the supposed difficulty. In many parts of the City of Glasgow the *solum* of the streets belongs to the proprietors on each side, and may be, and in many cases no doubt is, occupied as cellars; yet no practical difficulty arises in ascertaining the liabilities of the respective proprietors in maintaining the roadway. But the very distinction which the pursuers regard as impossible has already been successfully drawn by the House of Lords. In the case of the *Glasgow and South-Western Railway*, 22 R. (H.L.) p. 29, it was held that although the Glasgow Magistrates as Public Water Commissioners had authority to lay a line of water pipes in a road which at two places was carried on girder bridges belonging to the Railway Company, it was *ultra vires* of the Commissioners to carry pipes through the stone abutments of the bridges, and sling them from the girders. Lord Watson said—'From beginning to end of the clause there is no power given to go beyond the soil and pavement of the bridge'; and he distinguishes between such an operation and one involving serious interference with the structure of the bridge. In short, the maintenance of the surface of the roadway is an entirely separate obligation from the maintenance of the bridge which supports it.

"I accordingly reach the conclusion that the defenders fall to be assoilzied from the only undisposed of conclusions of the action, being those relating to Strathclyde Street."

The pursuers reclaimed, and argued—The Lord Ordinary had erred. The Railway Company were under obligation to

maintain this roadway, (1) because the road was a "public highway," and section 39 of the Railway Clauses Consolidation (Scotland) Act 1845 applied; and (2) because, if that contention were wrong, there was a statutory obligation under their Special Act of 1872, which authorised the building of the bridge. 1. The road was a "public highway." The company's own Act of 1872 recognised the public interest in the road, and proceeded on the basis of its being a public highway, and they could not challenge that now. Besides, they were right in so doing. It was a "highway"—*Dartford Rural Council* v. *Bexley Heath Railway Company*, [1898] A.C. 210, Lord Herschell at p. 215. The real test of "public" was use by the public. Now Strathclyde Street had, prior to the Special Act, been subject to continuous public use for many years. In 1870 it had been taken over under the Glasgow Police Act of 1866, technically no doubt as a "private street," and this change recognised the right of the public in the street by invading the rights of private ownership, by putting under municipal control cleaning, lighting, cleansing, paving, and the removal of obstructions. The use of the public at the time of the passing of the Special Act might be temporary, but it was sufficient that it existed, and it was not necessary it should have been an indefeasible right. *Kinning Park Police Commissioners* v. *Thomson & Co.*, February 22, 1872, 4 R. 528, 14 S.L.R. 372, was distinguished, being under a different statute, and also in that the Dalmarnock feuars could not have closed a "private street" of Glasgow as happened in the *Kinning Park* case. The *Magistrates of Glasgow* v. *Glasgow and South-Western Railway Company*, May 13, 1895, 22 R. (H.L.) 29, 32 S.L.R. 733, had no bearing here. (2) The company were further under obligation to maintain the roadway of this bridge and approaches, under their Special Act. That Act authorised them to "make and maintain" the railway, and this bridge was by section 26 (3) one of the conditions. That gave rise to a contract to maintain the bridge. And the duty of maintaining the bridge applied also to its approaches—*Addie's Trustees* v. *The Caledonian Railway Company*, July 7, 1906, 43 S.L.R. 769; and also the maintenance of the roadway—*Corporation of Glasgow* v. *Caledonian Railway Company*, March 20, 1906, 8 F. 755, Lord Kinnear at p. 763, 43 S.L.R. 534; *North Staffordshire Railway Company* v. *Dale*, 8 E. & B. 836; *Lancashire and Yorkshire Railway Company* v. *The Mayor of Bury*, L.R., 14 A.C. 417.

Argued for the respondents (defenders)—The argument on the Special Act 1872, section 26, was here put forward for the first time. That clause, being inserted at the instance of the Dalmarnock Trustees for the protection of their interest as proprietors, negatived the road being a public highway, and it could not be said that the road being provided for, showed it to be a public highway, since the Act contained a complete code for both private and public roads. The real question was, what was the meaning of "public highway" in the sense of section 39 of the Railway Clauses Act? The true test of that was the power to close the road at the date the bridge was made. This could have been done here by the superior and feuars together. The road was neither a turnpike nor a statute labour road, and the pursuers did not prove public use for forty years. There was consequently no right in the public to use the road, and section 39 did not apply, as it referred to a road which the public had a right to use. A "public highway" must be public *de jure*, not merely *de facto*, to come within the section. As to the Special Act, if there was any obligation to maintain the roadway, which was denied, it was in favour of the Dalmarnock feuars, and if the creditor in the obligation changed the contract was at an end. There was in general no obligation to maintain a substituted private road. That was the duty of the former proprietor—*Magistrates of Perth* v. *Earl of Kinnoull and Caledonian Railway Co.*, June 28, 1872, 10 Macph. 874, 9 S.L.R. 555. As to the obligation to maintain the roadway going with that to maintain the structure of the bridge, Lord Kinnear's dictum (8 F. 756) lost its force when the case of *Magistrates of Glasgow* v. *The Glasgow and South-Western Railway Co., ut sup.*, was considered. Nor did *Lancashire and Yorkshire Railway Co* v. *Borough of Bury*, and *North Staffordshire Railway Co.* v. *Dale* apply, the creditor in the obligation having changed. *Kinning Park Police Commissioners* v. *Thomson*, see esp. Lord J.-C. Moncreiff at p. 530, was in point. The Lord Ordinary's judgment should be affirmed.

At advising—

LORD PRESIDENT—The question in this case is whether the Caledonian Railway Company are bound to maintain the highway which goes over their bridge in Strathclyde Street. The case, as argued before the Lord Ordinary, seems to have turned entirely upon whether the words "public highway," as used in section 39 of the Railway Clauses Act, do or do not apply to a road or street in the position of Strathclyde Street. That depends on whether the expression "public highway" means public *de jure*, or means a highway to which, as at the date, the public are *de facto* admitted. Upon this matter I agree with the Lord Ordinary. I think we must take the word "public highway" as meaning public *de jure*, because I think that is the only thing that squares with the general conception of the Railway Clauses Act. The Railway Clauses Act, of course, is an Act of general application which is framed with the view of being read into special Acts which shall hereafter come into being.

When a railway goes through the country it is quite certain that it will meet roads, and these roads must be in one of two conditions. They must either be public roads in the full sense of the term—that is to say, public roads *de jure;* whether these roads were turnpike or whether they were statute labour does not matter—or they must be private roads. In the case of a railway

meeting a private road it would, of course, be necessary, quite apart from the question of a road, for the railway company, to take the land, because, quite apart from the question of the road as a road, the soil belongs to the proprietor *a cœlo usque ad centrum*, and if the railway company want to occupy that soil, at whatever height of the stretch that comes *a cœlo ad centrum*, they must of course take the land. Accordingly, I think it follows from that quite clearly that there is no necessity for making any special provision as to what railway companies should do when they cross private roads as roads. Of course the effect of taking a person's road, and going through it and blocking it up, may be of great moment to the proprietor in question, and his interests are safeguarded in the Act in other ways; in particular, in two ways—in the first place, there are the sections which give compensation for injurious affections, but more than that there are all the sections which deal with what are known as accommodation works. I only mention that to show that I have not forgotten it, and merely in order to exclude that *fasciculus* of sections which, beginning with the 16th section of the Scottish Act—and there are corresponding sections in the English Act—deal with the interference which railways may make with roads, not with the view of permanency, but with the view of construction of the line. Those stand by themselves upon another basis. But passing from private roads to public roads, there is, of course, nobody from whom to take the surface of the road; the surface of the road does not belong to anyone who can be compensated and paid. Probably at different periods of legal history there have existed different theories as to the actual property of the *solum* of public roads, and I am not sure that even at this modern time the legal theory in England and in Scotland is quite the same. But however that may be, I think I may say without doubt that no one ever heard of a road authority being compensated for the surface of a public road being taken, and accordingly it was necessary to make some provision that public roads should not be interfered with, and that provision is represented by section 39. It seems to me, therefore, that upon the construction of the general scope of the Act, section 39 was only meant to deal with public roads in the fullest and proper sense of the word—*de jure* public roads. That, of course, only leaves the question of fact as to whether this was a public road or not. The Lord Ordinary inquired into the whole matter, and I think has come to a conclusion that cannot be avoided, that this road at the time this railway was authorised was not a public road, although no doubt it was a road which was used by large numbers of the public, and no doubt practically would always be so, but still and none the less it seems to me the legal position of the road was that if the superior of the ground and the whole of the feuars had chosen to come to an agreement they might have shut up the road if they wished, either replacing it by another or not as seemed good to them. Accordingly, on the ground on which the Lord Ordinary has put his judgment, and so far as the case was argued before him, his judgment was perfectly right.

But there is another aspect of the case which was argued before your Lordships, but which was not, I think, argued before the Lord Ordinary, and which, I confess, has given me a great deal more trouble to make up my mind upon than the other, and that is this—this particular bridge owes its existence to a special provision of the Act of 1872 under which it was made (Caledonian Railway (Additional Powers) Act 1872 (35 and 36 Vict. c. cxiv). First of all there is what I may call the ordinary works clause in section 4, and one of the works is a railway called Railway No. 2, which is the railway upon which admittedly this bridge stands. Then in sec. 26 of the same Act there comes the following provision—"In constructing railway No. 2 the following provision shall be binding on the company, who shall construct the works hereinafter specified in manner hereinafter directed." Then certain works, with which I need not trouble your Lordships, are specified; and then sub-section 3 says—"The road or thoroughfare numbered on the deposited plans 4 in the parish of Calton may be diverted as shown on these plans, and shall be carried over the railway by a bridge not less than 40 feet wide between the parapets, and the diverted portions of the road shall not be less than 40 feet wide between the fences." The bridge which is there referred to is admittedly this bridge over Strathclyde Street; and accordingly the question is whether the fact of this particular bridge being a special work enjoined by the Act of Parliament does not impose upon the Railway Company, quite apart from the general sections of the statute, the duty to maintain. The 4th section of the Act, the works clause, says that the company may make and maintain the works after mentioned, and undoubtedly this is one of the works after mentioned. But I think it is quite certain that, although at one time it was held both in this Court and in England that such a provision created a contract between the company and anybody who could show an interest that the works should be carried out, that doctrine was long ago upset, and the law in this Court was laid down, first in the case of *Lord Blantyre*, 1853, 16 Dunlop 90, and was approved by the House of Lords in several cases, and especially in the case of *Edinburgh, Perth, and Dundee Railway Company* v. *Philip*, 1857, 2 Macqueen. 514. It is not merely well settled, I think, that as regards construction the powers are permissive merely, but I notice there is quite a recent case in which that has been in terms applied not only to the construction but to the maintenance of a work once constructed. I refer to the case *Reg.* v. *The Great Western Railway Company*, 1893, reported in 62 L.J., Q.B. 572. Accordingly, upon those authorities it is, I think, quite clear that the Railway Company are not

bound to maintain in respect of the works clause. Clause 26, however, is not permissive. That clause is an obligatory clause on the Railway Company if they construct railway No. 2 at all. They need not construct railway No. 2, but if they do then clause 26 is obligatory. Therefore it is quite certain that they were bound, whether they liked it or not, if they diverted the road, to carry it by this bridge over the railway; and the whole question therefore comes to be, what is the effect of the omission of the word "maintain?"

So far as I can discover, and I have searched with considerable diligence the authorities, this is a new question. I have not been able to discover any case in either England or Scotland where that question arose as in the case of a work which was specially enjoined by the Special Act. I have not found a case where the thing in question is a bridge specially enjoined by the Special Act and crossing a private road. There are plenty of cases where the bridge specially provided for crosses a public road, but then, of course, the peculiar question does not arise, because it is perfectly obvious that the general sections apply. But upon the best consideration the only conclusion I can come to is that the omission of the word "maintain" is fatal to the construction of the pursuers. It seems to me that the very anxiety with which in the general statute the word "maintain" is always put in shows that if it were not there there would not be an obligation of maintenance. "Maintain" is put in not only in section 39, but it is put in also in all the clauses that deal with accommodation works. In a clause of this sort I think that the person who was stipulating for the work, who, I suppose, would be the proprietor, must fairly be taken as *proferens* of the clause, and that the clause must be construed literally according as it stands. I am not omitting the consideration that I think this argument really logically leads to this, that the Railway Company are not bound to maintain the structure of the bridge any more than they are to maintain the roadway. I say that notwithstanding the concession on the part of the Railway Company's counsel in one part of the argument that they were so bound. I do not think that concession ought logically to be made. But I do not think that fact in any way shocks me, for this very good reason, that it would be perfectly evident that the Railway Company would be bound to maintain the structure of the bridge, not because they were made to by the terms of the obligation, but for their own security. If they allowed the bridge, being an overhead bridge, to get out of order and become in a dangerous condition, it is quite evident that they would subject their own property to grave risk, and subject themselves to very grave risk of damages if through the falling of any portion of the bridge anybody who was using their railway was hurt. Therefore I do not think that the absence of an actual clause binding them to maintain the structure of the bridge very much matters. Upon the whole matter, and I found the point one of some difficulty upon which to make up my mind, I have come to the conclusion that in a doubtful case we must take the Act as we find it, and inasmuch as there is an obvious distinction made between making and maintaining in other sections where we find making and maintaining, this section must be read literally as it stands. Consequently here there is no obligation upon the Railway Company to maintain this bridge upon the ground of the special clause, because maintenance is not there expressed, and there is no obligation in the general clause because this bridge is not over a road to which the general clause applies. The fact that there may be bridges to which an obligation of maintenance on the part of a railway company does not apply seems to me to be recognised—although I do not put too much stress upon this argument—by another statute—namely, the Abandonment of Railways Act 1850 (13 and 14 Vict. cap. 83), which in section 22 deals with the matter thus:—"Be it enacted that, where the line of any railway so authorised to be abandoned shall have been wholly or partially laid out, and any road shall have been carried across such line of railway by means of a bridge or tunnel over or under such railway, which bridge or tunnel the company to whom such railway belonged would, in case the same had not been abandoned, have been liable to keep in repair, then in every such case, except where such bridge or tunnel shall, with the permission of said Commissioners, be by such company removed, and such road restored to the like or an equally convenient and good state as the same was in before it was interfered with by the makers of such railway, to the satisfaction (in case of difference between such company and the owner or persons having the management of such road) of the Commissioners, such company shall pay to the owner of such road, if it be a private road, or to the trustees, surveyors of highways, or other person having the management of such road if it be a turnpike or other public road, a sum of money, to be determined by arbitration as after mentioned, in lieu and discharge of their liability to keep such bridge or tunnel, and also the roadway over the same, in repair." Now, I think that is quite consistent with the view that I have taken, because, in the first place, it distinguishes between the case of public and private roads, and then in all these things it distinguishes between the cases where the company would, if the railway had not been abandoned, have been liable to keep it in repair and cases where it would not. Accordingly, I think, it is fair to say that it was in the contemplation of Parliament when it enacted that section that there might be bridges in just the condition I have come to the conclusion this one was, namely, a bridge over a private road which the Railway Company were not under obligation to repair; and I remind your Lordships that that bridge could not be an

accommodation bridge, because, so far as an accommodation bridge is concerned, there is always the obligation to make and maintain. My conclusion therefore is that this special point does not disturb the result arrived at by the Lord Ordinary.

LORD M'LAREN—I am of the same opinion. I agree with your Lordship that the difficulty in the case is that there are no precedents to guide us as to the construction of the Caledonian Railway Company's private Act. Under the works clause the company, of course, were under no obligation to make the railway No. 2 over which this bridge is constructed. But then if they did decide to exercise the power to make the railway, it was obligatory upon them to construct the bridge. The clause authorising the company to construct the bridge, from its form and substance appears to be of the nature of what is called a protection clause—a clause possibly drawn, or at any rate suggested, by the proprietor whose interests it was intended to safeguard. Therefore I think it must be taken that this protection clause represents all that has been claimed from the company for the interference with the continuity of the road by the railway being run across it. Now, as the Act only puts the company under obligation to construct, and says nothing about maintenance, it follows, as I think, that no action can be brought by the City to compel the company to maintain the road. What would happen in the case of a railway being abandoned seems to be quite clear, but, of course, we have not that point before us. It is only useful by way of illustration of what I venture to think is the conclusion to be drawn from the two clauses of this Private Act which are under consideration.

LORD KINNEAR and LORD PEARSON concurred.

The Court adhered.

Counsel for the Reclaimers (Pursuers)—The Dean of Faculty (Campbell, K.C.)—The Lord Advocate (Shaw, K.C.)—M. P. Fraser—Crawford. Agents—Campbell & Smith, S.S.C.

Counsel for the Respondents (Defenders)—Clyde, K.C.—Cooper, K.C.—Orr Deas. Agents—Hope, Todd, & Kirk, W.S.

Saturday, November 16.

EXTRA DIVISION.

(Before Lord M'Laren, Lord Pearson, and Lord Ardwall.)

[Lord Mackenzie, Ordinary.

HARPER *v.* STUART.

Servitude—Aqueduct and Aquæhaustus—Prescription—Change in Mode of Exercising Right.

The tenant on an estate (which comprised the lands afterwards forming the estates of A and B) laid an underground box-drain, which carried underground water, to a ditch which also contained other water. He also made a conduit from the ditch at a point 13½ feet below the point where the box-drain entered the ditch. The box-drain and ditch were wholly on estate A; the conduit from the ditch ran underground for a few feet in estate A to the boundary, and thence through estate B. The purpose of the conduit was to bring for the use of estate B, originally for a mill but subsequently also for domestic purposes, water from the ditch. A was disponed by the proprietor to a purchaser in 1860; B was disponed by him to another purchaser in 1861. In the dispositions no servitude over the one estate in favour of the other was created. From 1861 to 1906 the box-drain carried the underground water to the ditch. From 1861 to 1898 the conduit was used, but in that year the owner of B ceased to use it, and in lieu thereof placed and used a cistern on A, through which by means of pipes (laid in a line to the south of the conduit) he drew water directly from the box-drain. Circumstances in which *held* (1) that the owner of B had no right either by prescription or by implied grant to a servitude of aqueduct over A beyond the ditch, but (2) that the owner of B was entitled to add the use of the water from 1898 to the prior use from 1861 to 1898, although the method of user was not identical, and that therefore he had by prescription acquired a right to take the water from the ditch, but that only to the extent and in the manner of his use during the first period.

Question whether a servitude as to underground water in an artificial drain, whether it comes from springs or by percolation, can be constituted by prescription, so as to prevent the owner of the lands through which the water flows from diverting it by lawful operations on his own lands.

On 21st August 1906 Frank Vogan Harper of Dunlappie, Forfarshire, brought an action of suspension and interdict against Mrs Amy Clara Page or Stuart of Lundie, Forfarshire, in which the complainer craved the Court "to suspend the proceedings complained of, and to interdict, prohibit, and discharge the said respondent and all others acting by the authority of her or her factors or agents, from interrupting, diminishing, or polluting, or in any way interfering with the supply of water to the house, offices, cottages, and estate of Dunlappie, belonging to the complainer, drawn from two or more springs situated on the respondent's estate of Lundie, near the eastern corner therof, and in particular through a well also situated on said estate, all as indicated on the plan to be produced in process; from removing or in any way interfering with the piping and cisterns or receiving-boxes or any of them placed or laid down by the complainer or his authors