

[27th May, 1842.]

The MONKLAND and KIRKINTULLOCH RAILWAY COMPANY,  
*Appellants.*

WILLIAM DIXON of Govan Colliery, and MESSRS WILLIAM  
DIXON and COMPANY of Calder Iron Works, *Respondents.*

*Statute. — Railway. —* Where a statute for the construction of a railway declared, that it should not prevent the owners or occupiers of ground through which the railway might pass from carrying any railway or other road, which such owner or occupier was authorized to make, across the main railway, “ within the lands of such owner “ or occupier,” *held*, that the privilege was not confined to the state of the ownership or occupancy at the date of the act.

THE Monkland and Kirkintulloch Railway was formed under the powers given to the appellants by an Act of the 5th Geo. IV. cap. 49. passed in the year 1824.

The 65th section of that statute declares, — “ Provided “ always, and be it enacted, that it shall be lawful for the owners “ and occupiers of the respective lands or grounds through “ which the said railway shall be made, and his, her, and their “ servants and workmen, cattle and carriages, at all times to pass “ and repass directly, over and across such part of the said railway “ way as shall be made in and upon the said lands or grounds “ respectively, not damaging or wilfully obstructing the same, “ or the passage thereof, without payment of any toll or tonnage “ for the same, provided they shall not pass along any other part “ of the said railway: Provided also, that it shall be lawful for “ the occupier or occupiers of the respective lands or grounds “ through which the said railway shall be made, and his, her, “ and their servants, having authority in writing for all or any “ such purposes from the said company of proprietors or their “ committee, to ride, lead, or drive any horse, mule, or ass, cow,

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“ or other neat cattle, sheep, swine, or any other beast, along  
 “ the said railway, as far only as the lands in his or her own  
 “ occupation shall extend, for the purpose of occupying the same  
 “ lands, such person or persons not damaging or wilfully ob-  
 “ structing the said railway, or the passage thereof.”

The 79th section enacts, — “ That after ten days’ notice in  
 “ writing given to the proprietors of the said railway, it shall  
 “ and may be lawful for any body politic, corporate, or collegiate,  
 “ or any other owner of any grounds adjoining the said railway,  
 “ to lay down a branch or branches from his or her lands or  
 “ grounds, to communicate with the said railway, and to make,  
 “ at his, her, or their own expense, in such manner as shall be  
 “ agreed upon by and between the proprietors of the said rail-  
 “ way and such party or parties, and in case they cannot agree,  
 “ then in such manner as shall be settled by two or more Justices  
 “ of the Peace for the said county of Lanark, such openings into  
 “ the ledges or flanches of the said railway, not injuring the  
 “ same, as may be necessary and convenient for effecting such  
 “ communication or crossing, without the said company being  
 “ entitled to receive tonnage-rates for the passing of minerals,  
 “ goods, or other things along such branch or branches, but  
 “ without prejudice, nevertheless, to the receiving of such ton-  
 “ nage-rates for the passing of such minerals, goods, or other  
 “ things along the said railway.”

The 80th section declares, — “ And be it farther enacted, that  
 “ nothing herein contained shall be construed to prevent any  
 “ owner or occupier of any ground through which the said rail-  
 “ way may pass, from carrying, at his or their own expenses,  
 “ any railway or other road, or any cut or canal, which such  
 “ owner or occupier is authorized to make in his or her lands or  
 “ grounds, across the said main railway, within the respective  
 “ lands or grounds of such owner or occupier.”

And the 81st section declares, — “ Provided also, and be it  
 “ farther enacted, that if any person or persons shall make upon

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“ his, her, or their own lands or grounds, any branch or branches  
 “ running parallel or collateral with the railway hereby autho-  
 “ rized to be made, which shall join the said last-mentioned rail-  
 “ way, (otherwise than for crossing the same,) it shall be lawful  
 “ for the said company of proprietors to demand and take for  
 “ every waggon, cart, or other carriage travelling along such  
 “ branch or branches, on joining and using the said main rail-  
 “ way, the same rates of tonnage for the distance travelled by  
 “ such waggon, cart, or other carriage, upon such parallel  
 “ or collateral railway, as would have been leviabie, for such  
 “ waggon, cart, or other carriage, for travelling the like distance  
 “ upon the said main railway.”

The respondent, William Dixon, was the owner of the lands of Garturk, which were occupied under him by the respondents, Messrs William Dixon and Co. of whose firm he was a partner. The line of the railway intersected these lands.

In 1831 the appellants purchased from the respondent Dixon, under the powers of the statute, a portion of these lands necessary for the formation of the railway at this point, and obtained from him an ordinary conveyance.

In the year 1836, the respondents obtained from Sir William Alexander a lease of the lands of Rochsholloch, which contained very valuable minerals. These lands adjoined the lands of Garturk, but neither were intersected by, nor adjoined the appellants' railway.

In the year 1838, the appellants presented a petition to the Sheriff of Lanarkshire, setting forth,—“ That one part of the  
 “ said railway extends along or near the north side of the Calder  
 “ Iron-Works in the parish of Old Monkland, and there passes  
 “ through and intersects the grounds of Easter and Wester  
 “ Garturk, belonging to William Dixon, Esq. of Govanhill, or  
 “ to Messers William Dixon and Company of Calder Iron-  
 “ Works. That the petitioners have received notice that the  
 “ said William Dixon or William Dixon and Company intended

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“ to enter upon the petitioners’ grounds and railway, where the  
 “ same intersect the said lands belonging to them, and to make  
 “ and form a branch railway across the railway belonging to  
 “ your petitioners. That your petitioners have good reason to  
 “ believe that it is the intention of the said William Dixon or  
 “ William Dixon and Company, in making and forming the  
 “ said branch railway, not to confine the same within the said  
 “ lands or grounds belonging to them, but to extend it to lands  
 “ lying beyond the same, belonging to the Right Honourable  
 “ Sir William Alexander or others. That, while the said  
 “ William Dixon and William Dixon and Company are en-  
 “ titled by the 80th section of the said statute, to carry a railway  
 “ across the petitioners’ railway, within their respective lands or  
 “ grounds, so as to communicate between one part of the same  
 “ and another, yet they have no right to enter upon your peti-  
 “ tioners’ property and railway, and form across the same any  
 “ railway or other road which is to extend beyond the lands or  
 “ grounds belonging to them. That, notwithstanding thereof,  
 “ the object and intention of the said defenders, in proposing to  
 “ form the said cross railway is, that they may extend the same  
 “ to lands lying beyond those belonging to them, and may  
 “ thereby convey ironstone and other minerals to their works  
 “ called the Calder iron-works, to the loss and prejudice of your  
 “ petitioners, by whose railway the said minerals would otherwise  
 “ be transported, and contrary to the provisions of the statute  
 “ passed in their favour hereby founded on, and herewith pro-  
 “ duced. That the said William Dixon and William Dixon  
 “ and Company, having declined to give your petitioners any  
 “ undertaking — that the railway proposed to be executed by  
 “ them as aforesaid shall not be extended beyond the said  
 “ grounds belonging to them — the petitioners have no remedy  
 “ but to apply to your Lordship.”

Upon this narrative the petition prayed the Sheriff, after notice to the respondents, and advising any answer they might

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put in, to “ interdict, prohibit, and discharge the said defenders,  
 “ jointly and severally, from making and forming any railway or  
 “ other road across the railway belonging to your petitioners,  
 “ excepting always, and reserving to the defenders, right to  
 “ carry a railway or other road across your petitioners’ railways  
 “ within the said lands or grounds belonging to the defenders,  
 “ in terms of the provision before referred to; and, in the mean-  
 “ time, to interdict, prohibit, and discharge the defenders from  
 “ entering upon your petitioners’ grounds and railway to the  
 “ effect of forming any railway or other road across the same, so  
 “ as to extend to, or communicate with, any lands or grounds  
 “ other than those belonging to the defenders as aforesaid; to  
 “ find the defenders liable in L.10 sterling, or such other sum,  
 “ less or more, as shall be found to be the expenses hereof, and  
 “ of the procedure to follow hereon; or to do otherwise in the  
 “ premises, as to your Lordship shall seem proper.”

An interim interdict was granted upon this petition, and thereafter the respondents put in answers, in which they maintained, — “ 1. The respondents have, at common law, the  
 “ undoubted right of forming railways on their own lands, and  
 “ of extending the same into the lands of such other proprietors  
 “ as may consent thereto, or of connecting them with such other  
 “ railways as may be lawfully formed on the lands of such  
 “ adjoining proprietors. 2. These rights, which the respondents  
 “ enjoy at common law, are in no respect diminished, restricted,  
 “ or taken away, by the statute founded on by the petitioners.  
 “ 3. The respondents, as owners and occupiers of lands through  
 “ which the petitioners’ railway passes, are expressly declared  
 “ entitled by that act, to carry such private railways across the  
 “ petitioners’ railway, without paying any dues for the use  
 “ thereof. 4. Even if the respondents were not entitled to carry  
 “ their proposed railway beyond their own lands, the petitioners  
 “ have no right to interfere with their proceedings, until they  
 “ shall have transgressed such prescribed limits.”

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Replies, condescendence and answers, and minutes of debate, were put in for the parties. On advising these pleadings, the Sheriff, on 7th May, 1838, pronounced the following interlocutor: — “ Having considered the minutes of debate, and re-  
 “ considered the whole process, finds, That by sect. 80 of the  
 “ act founded on by the pursuers, owners or occupiers of any  
 “ ground through which the Kirkintulloch railroad passes, are  
 “ entitled to make railroads across it, within the respective lands  
 “ of such owner or occupier: Finds it admitted that the  
 “ defenders are proprietors of land at the point where the cross  
 “ railroad is intended to be made: Finds this proved by lease  
 “ No. 21 of process, that they are occupiers of the lands of  
 “ Rochsolloch: Finds, therefore, that under the above clause of  
 “ the act, they are entitled to make the proposed cross railroad,  
 “ and continue the same to the grounds occupied by them at  
 “ Rochsholloch: therefore recalls the interdict, dismisses this  
 “ action with expenses, of which allows an account to be given  
 “ in, and remits the same to the auditor to tax and report, and  
 “ decerns.”

The appellants reclaimed against this interlocutor, and on the 28th June, 1838, the Sheriff pronounced the following interlocutor, adding the subjoined note: — “ Having resumed consi-  
 “ deration of this process, with the reclaiming petition for the  
 “ pursuers, and answers thereto, for the reasons assigned in the  
 “ note below, recalls the interlocutor complained of, declares the  
 “ interdict perpetual, finds the defenders liable in expenses, of  
 “ which allows an account to be given in, and remits to the  
 “ auditor to tax and report, and decerns. *Note.*— The Sheriff-  
 “ substitute is now convinced that he took an erroneous view of  
 “ the clause of the act upon which the interlocutor now recalled  
 “ was founded; and he is perfectly satisfied that clause can bear  
 “ no such interpretation. It has reference solely to the owners  
 “ or occupiers of land through which the railroad was to pass,  
 “ and with the very equitable view of preventing the injury of

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“ property to a greater extent than was absolutely necessary for  
 “ the railroad ; and it now appears that the doctrine laid down  
 “ in the former interlocutor would have the effect of authorizing  
 “ any individual to cross the pursuers’ railroad by another, and  
 “ continue the same as far as they could obtain a right so to do  
 “ from neighbouring proprietors, and this might easily be done  
 “ by a lease, and in this way great damage would be inflicted on  
 “ the pursuers. The grounds of the above interlocutor are the  
 “ following :— The only right which the defenders have to cross  
 “ the railroad in question, the property of the pursuers, flows  
 “ from the act of Parliament in process. The right there given  
 “ of crossing said railroad is expressly restricted to railroads  
 “ made within the lands or grounds of any owner or occupiers  
 “ of grounds through which it passes. Now the railroad  
 “ belonging to the pursuers does not pass through the lands of  
 “ Rochshollock, and therefore the defenders are not entitled to  
 “ carry their railroad beyond the limits of the ground belonging  
 “ to them, and through which the railroad passes, and then con-  
 “ tinue it to the lands, the occupancy of which has been acquired  
 “ only lately.”

The respondents appealed to the Sheriff-depute, and on the 24th July, 1838, the following interlocutor was pronounced :—  
 “ Having advised with the Sheriff, who considered the interlo-  
 “ cutor appealed from, and reviewed the process, adheres thereto,  
 “ for the reasons stated in the note to the last interlocutor of the  
 “ Sheriff-substitute, and dismisses the appeal. *Note.*— The  
 “ whole question here turns upon the import of the clause, which  
 “ provides, ‘ That nothing contained in the act shall prevent any  
 “ owner or occupier of any ground through which the railway  
 “ may pass from carrying any railway, or other road, or any cut  
 “ or canal which such owner or occupier is authorized to make  
 “ in his or her lands or grounds, across the said main railway,

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“ within the respective lands or grounds of such owner or occu-  
 “ pier.’ There can be no doubt, that the construction which  
 “ the Sheriff-substitute has latterly put upon this clause, is the  
 “ well-founded one. The power of crossing the main railway,  
 “ by other railways, is here expressly limited to the proprietors  
 “ of the ground through which the first-mentioned railway passes.  
 “ The power of forcibly compelling the proprietors of the main  
 “ railway to admit a second across it, is limited to the proprietors  
 “ of lands, and within their lands, and the Court is not autho-  
 “ rized to extend the power to any class of persons, but those  
 “ specified in the act of Parliament.”

The respondents carried the case by advocacy to the Court of Session, and on the 18th of February, 1840, the Lord Ordinary, Jeffrey, pronounced the following interlocutor, adding the sub-joined note:—

“ The Lord Ordinary having heard the counsel for the parties  
 “ on the closed record, and whole process, and made *avizandum*,  
 “ advocates the cause; alters the interlocutors of the Sheriff com-  
 “ plained of; and finds, that according to the true meaning and  
 “ just construction of the 80th section of the statute in question,  
 “ nothing more is required than that the point of crossing the one  
 “ railway with the other, shall be wholly within the lands of the  
 “ party by whom the most recent of these railways is constructed,  
 “ and that no limitation or restriction is thereby imposed on the  
 “ common law right of the owner or occupier of such lands to  
 “ continue or extend the said new railway into any adjoining  
 “ properties where he may have leave to carry it; and, therefore,  
 “ recalls the interdict granted by the Sheriff; sustains the defen-  
 “ ces against the original action, at the instance of the said com-  
 “ pany; assoilzies the complainers from the whole conclusions  
 “ thereof, and decerns; Finds expenses due both in this Court  
 “ and before the Sheriff; allows an account thereof to be given  
 “ in, and remits to the auditor to tax and to report.”



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“ *Note.*— This is conceived to be the natural and obvious reading  
“ of the section as it stands. But when the whole structure and  
“ policy of the statute in its context, and all its relative provisions, is  
“ attended to, it seems to the Lord Ordinary that no other construc-  
“ tion can be even plausibly maintained.

“ By the 65th section, which is the first that bears upon the pre-  
“ sent question, and is of leading importance as to the construction,  
“ the most ample powers are given to the owners and occupiers of  
“ lands traversed by the company’s railway to cross it at all points,  
“ and at their pleasure, not only by themselves, workmen and cattle,  
“ but expressly ‘with horses and carriages.’ The words are, ‘that it  
“ ‘shall be lawful for them and their servants, workmen, cattle, and  
“ ‘carriages, at all times, to pass and repass over and across the said  
“ ‘railway (not damaging or obstructing the same) without payment  
“ ‘of any toll or tonnage for such passage,’ &c. Now, under this  
“ section, it is thought to be clear, that the owners or occupiers might  
“ carry any ordinary road across the railway, at any point within  
“ their lands, since they could not well cross it with carriages in any  
“ other way; and as it would be palpably absurd to suppose that  
“ there was any thing in this general permission, out of which a pro-  
“ hibition to exercise their common law right of forming roads on  
“ their own lands could be construed. But, if this be perfectly clear,  
“ is there the slightest ground for holding that the roads so to be  
“ carried across the railway at pleasure must necessarily be roads be-  
“ ginning and terminating within the lands, belonging to the party who  
“ makes the crossing? There is not a word in this 65th section, at  
“ all events, upon which the possibility of such a limitation having been  
“ intended can be rested. There is nothing importing a limitation to  
“ roads wholly within the same property, or for the mere use or con-  
“ nection of its several parts. The words, on the contrary, are quite  
“ general, ‘to pass and repass with cattle and carriages over and  
“ ‘across the said railway, at all times;’ and, of course, as there is  
“ no limitation, for all purposes, and in all respects, as freely as they  
“ might have passed over the same space or area before it was occu-  
“ pied by the railway of the company. If the immediate owner,  
“ therefore, had his neighbour’s leave to prolong his roads into this

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“ property, or if these roads fell at either end, and within his own  
 “ lands, into public or market roads, it is thought to be sufficiently  
 “ clear that he might use them for the purpose of such communica-  
 “ tion, just as freely after he had taken them across the Company’s  
 “ railway under the broad and ample permission now cited, as he  
 “ might have done before that railway came into existence.

“ But if this would certainly be true of any ordinary use of passage,  
 “ or of any metalled or paved road, which the owner might construct  
 “ for the purpose of such passage, why should it not be true also of  
 “ any railroad which, in the exercise of his unquestionable common  
 “ law right and privilege, he might have chosen to make for the same  
 “ purpose? Or why, it may be asked, was a separate and dis-  
 “ tinct provision made for the right of crossing by such railroads?  
 “ These questions, the Lord Ordinary thinks, are most material, and  
 “ the answers to them seem to him to bring out and lead naturally to  
 “ the view by which the true construction of the statute in this  
 “ respect may be best ascertained. He is of opinion that, under the  
 “ 65th section, the adjacent owners might have made railways to  
 “ cross that of the company, as freely as roads of any other descrip-  
 “ tion; and he thinks that this is distinctly recognized and intimated  
 “ by the subsequent special provision of the 80th section, the true  
 “ object and purpose of which, in his apprehension, was mainly to  
 “ secure the continuance of that right, and to save it from the risk of  
 “ being brought into question by any rash or too extensive construc-  
 “ tion of the section immediately preceding; and, accordingly, it does  
 “ not purport or profess to confer any new or special powers on the  
 “ adjacent proprietors, but merely to guard against the possibility of  
 “ their existing and acknowledged powers being narrowed or chal-  
 “ lenged by a misunderstanding or misconstruction of the preceding  
 “ enactments, the proviso in that 80th section being expressly, ‘ That  
 “ ‘ nothing herein contained shall be construed to prevent the owners  
 “ ‘ or occupiers of grounds through which the said railway may pass,  
 “ ‘ from carrying any railway or other road,’ (here classing them to-  
 “ gether, and bringing both within the benefit of the 65th section,)  
 “ ‘ which he may be authorized to make on his lands, across the said  
 “ ‘ main railway, within the respective lands of such owner or occu-

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“ ‘pier.’ This of itself seems sufficiently conclusive. But to see  
“ clearly the true import and object of the provision, it is necessary  
“ to look back to the 79th or immediately preceding section, while  
“ the general policy of the act as to the rights of adjoining pro-  
“ prietors, and the small extent of monopoly it meant to give to the  
“ Company, are conclusively illustrated by the 81st or immediately  
“ succeeding section. The whole three, in short, are connected, and  
“ ought to be read together, as bringing out the mind of the Legis-  
“ lature on the whole subject of discussion.

“ The 79th gives adjoining proprietors right to lay down branch  
“ railways, to communicate with or fall into that of the Company, and  
“ that in the amplest and most comprehensive manner, and without  
“ subjecting them to any payment or contribution, but only requiring  
“ that they shall give previous notice to the Company, and agree with  
“ them, or by referees, as to the nature and construction of the open-  
“ ings by which the junction with the main railway is to be effected,  
“ and also that they shall pay the regular tonnage duties for the com-  
“ modities which may be brought by such private branches into the  
“ main work.

“ Then follows the 80th section, already recited, providing substan-  
“ tially, as the Lord Ordinary understands it, that, though duties are  
“ thus to be charged upon goods actually coming into and passing for  
“ some way on the main railway from private adjacent ways, this shall  
“ never be construed as derogating in any degree from the rights con-  
“ ferred by the 65th section, of proprietors merely crossing the said  
“ railway with carriages on their grounds, without any payment of  
“ tollage or tonnage whatever, and that whether they cross by private  
“ railways or roads of any other description.

“ And then finally, and to shew how little it was intended to re-  
“ strain the adjoining proprietors from having private railways, even  
“ in situations which might interfere or compete with that of the  
“ Company, and to what a very small extent their interests as to such  
“ competition are protected, comes the 81st section, by which it is  
“ enacted, that if any adjoining proprietors shall make railways on their  
“ own grounds, running parallel with that of the Company, ‘and which  
“ shall join the said Company’s railway otherwise than for merely

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“ ‘crossing the same,’ then, and in that particular case, the owners  
“ shall be chargeable with tonnage-duties for the space their goods  
“ have come on the private railway, previous to falling into the main  
“ one, as if they had passed all along on the latter. Now, from this  
“ enactment, it is quite plain, 1st, That if proprietors choose to con-  
“ struct railways for their own use, closely adjoining and absolutely  
“ parallel to that of the Company, they are at full liberty to use them  
“ to any extent, and for all purposes, exactly as if there was no public  
“ work in the neighbourhood; provided they never at all join, fall  
“ into, or come into actual contact with that of the Company. And,  
“ 2d, That, if after running parallel to that railway for any distance,  
“ on one side of it, they choose merely to cross it, in order to run  
“ parallel to it again on the other side, they are at full liberty to do this  
“ also, without payment or contribution of any sort or description.  
“ It is conceived, however, to be quite plain that, in regard to those  
“ parallel private railways, by which alone any injurious competition  
“ with the Company could be occasioned, there is not a word in the  
“ act by which the adjoining proprietors, from one end to the other of  
“ the Company’s line, could be restrained or precluded from exercis-  
“ ing their undoubted common law right of joining together to make  
“ one continued private railway to the whole extent of that line, and  
“ accommodating each other with the use of it for their mutual benefit  
“ or convenience. By the statute, in short, no monopoly of power to  
“ interfere with the ordinary rights of property in their vicinage is  
“ conferred on the Company, except singly as to such private rail-  
“ ways as, after running for some way parallel to theirs, do at last fall  
“ into it, and are not ‘merely carried across.’ With regard to all  
“ other such ways as do not at all touch it, or touch it only to cross  
“ —for the two cases are plainly held to be altogether identical—  
“ there is no restraint or limitation whatever, either as to the right to  
“ make or to use them, in any number or direction that may be pre-  
“ ferred; and exactly as if there had been no public work of the sort  
“ in the neighbourhood. It is a cardinal maxim, indeed, and rule of  
“ law, that none of the natural and inherent rights of property shall  
“ ever be held to be taken away by implication, or without the clear  
“ and express enactments of a statute; and if it be undeniable that

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“ private railways may be made and used, and continued to any extent, close to that of the Company, and even in the same direction, (provided they do not actually touch it,) without any right of interference on their part, it seems quite impossible, when all the provisions about crossing are considered, to doubt that the same unlimited common law right extends to such ways as merely cross the main line, but do not use it in any way as a means of conveyance. There is not only the general permission to cross at pleasure in the 69th section recognized and expressly extended to railways, as a means of crossing in the 80th, but in the 81st, where certain burdens are laid on such parallel railways as fall into that of the Company, there is an express exemption of those that only fall into it ‘merely for crossing the same,’ which last are thus put precisely on the same footing with those which do not touch it at all; as to which last there can be no question that the adjoining owners, and their neighbours, are under no restraint whatever, but may extend, and connect, and combine their operations as they severally please, or can jointly agree, exactly as if the Company’s railway had no existence.

“ If there was nothing else in the case, indeed, but the apparent want of intelligible interest in the Company to insist on such a limitation as they contend for, this alone would be sufficient (where there was the least doubt on the words) to exclude the supposition that it could have been intended to impose such a limitation. Commodities carried on a railway crossing, (and in this case nearly at right angles,) that of the Company, plainly could never have gone by that public railway, even if the other had not existed; and being destined for places in a totally different direction, the means or facility of their conveyance to such places must obviously be matter of absolute indifference to the corporation; and, therefore, when we see that they are not in any way protected from the competition of private ways going in the very same direction with theirs, it is certainly the most unlikely of all things, that they should have stipulated for, or the Legislature have granted, an interference with the common law rights of property, to prevent an incomparably slighter, or rather entirely imaginary interference.

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“ The whole argument for the respondents is based upon the assumption, that, being proprietors of the space occupied by their railway, the right to cross it by any party must necessarily be considered as a servitude merely ; and that as this is given only to the owners of the grounds through which it passes, so it must be considered as given for the exclusive use or benefit of the grounds, which are to be viewed as the *dominant tenement*, and cannot therefore be extended or communicated to any adjoining properties in conformity with the decision in the case of Scott and Bogle, 6th July, 1809. (15 *F. C.* 397.)

“ There is some ingenuity, certainly, in thus attempting to analyze the right of the complainer into certain technical elements, and insisting on dealing with it as falling exclusively under these denominations. But it is impossible, by any such device, to disguise the fact, that the question is one of a mere statutory construction, and must be decided according to what is ultimately held *tota re respecta*, to have been the true meaning and intention of the Legislature. To that question, accordingly, the Lord Ordinary has exclusively addressed himself, and has stated the grounds on which, he thinks it should be determined. It may be an element, perhaps, in that determination, that the right claimed by the Company is of the nature of or akin at least to a right of servitude, and that it may therefore be held probable *in dubio* that it was not intended to give it except for the use of a dominant tenement. But beyond this the suggestion and the law of predial servitudes has plainly no operation, and can never exclude the consideration of all the other elements by which the true intention may be established. Even looking upon it as the new constitution of a servitude, it appears to the Lord Ordinary that it is not so properly a servitude of using a way across the Company's railroad, for the service of the adjoining property, as a servitude of making and repairing a crossing for the continuation of a road to be used for all legal purposes, and as freely as if there had been no such obstacle to be crossed. The words are merely that the owner ‘ shall not be prevented from carrying any railway or other road across the said main railway, within the lands or ground of the said owner or occupier.’ Not a word being said of

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“ the use to be made of it, or any reference to the special service or  
 “ benefit of the said property lands. The fact that the road so to be  
 “ carried across is described in the act as a road which the owner  
 “ must ‘ have been authorized to make on his own grounds,’ cannot  
 “ possibly import such a limitation. If it was to be described at all,  
 “ it could not possibly receive any other description. Being neces-  
 “ sary to be carried across the main railway within his own grounds,  
 “ it must necessarily have been within them at both sides of the  
 “ crossing; and therefore no more ample or comprehensive ‘descrip-  
 “ tion could have been devised for giving the greatest possible exten-  
 “ sion to the privilege conferred, than to say that it should apply to  
 “ all roads (railways or others) which the owner might have con-  
 “ structed, or be entitled to construct, on his own lands. By the  
 “ words of the act, the road must have been on the grounds of the  
 “ owner at the crossing; and as it is he alone who is thereby entitled  
 “ to make the crossing, the only correct description of the road in  
 “ relation to the matter in contemplation, was that of a road existing  
 “ on both sides of the crossing within the limits of these grounds.  
 “ But this can never warrant an inference that it could not lawfully  
 “ be carried beyond these limits. In truth, however, the Lord Ordi-  
 “ nary cannot consider this as a grant of servitude at all, and least of  
 “ all, *servitus itineris ubi prædium servit prædio*. It seems to him, on  
 “ the contrary, as expressed both in the 65th and the 80th sections, and  
 “ in the exceptions of the 81st, to be no more than a mere statutory  
 “ declaration that the Company’s railway shall be no obstacle to the  
 “ continuation of any road, new or old, which exists, or may be legally  
 “ formed, in a direction to cross that railway; and that the owner  
 “ of the lands where the crossing is required, may effect such crossing  
 “ accordingly at any point or points of his own property. There was  
 “ no thought, it appears to him, of any limitation as to the extent, or  
 “ use, or connection of the road so to be carried across; and as there  
 “ are undoubtedly no such limitations expressed in the act, he cer-  
 “ tainly sees no ground upon which they should now be inferred, or  
 “ supplied as by implication.

“ As the complainer seeks only to extend his railway, for his own  
 “ individual use, into an adjoining property in which he has a right

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“ to the minerals, the Lord Ordinary has limited his findings so as  
 “ only to justify or affirm his right so to extend it. It may be seen,  
 “ however, from the preceding observations, that he would be inclined  
 “ to affirm it to a much greater extent, and to sanction the commu-  
 “ nication and prolongation of it for the use of any neighbours with  
 “ whom he might make an agreement, and who might all use it for  
 “ their joint accommodation, — the statute requiring no more than  
 “ that the actual crossing should be made by the owner of the grounds  
 “ within which it is effected. But as the decision of the present case  
 “ requires no such findings, and as there are expressions in the 65th  
 “ section which might raise a doubt upon the point last mentioned,  
 “ he would be understood as having formed no judicial opinion beyond  
 “ what is expressed in the judgment.”

The appellants reclaimed against this interlocutor to the Inner House, and on the 18th July, 1840, the Second Division of the Court pronounced the following interlocutor: — “ The Lords  
 “ having resumed consideration of the cause, and heard counsel  
 “ for the parties, adhere to the interlocutor of the Lord Ord-  
 “ nary submitted to review, refuse the desire of the reclaiming  
 “ note, and decern: Find additional expenses due; allow ac-  
 “ counts thereof to be given in, and remit the same, when lodged,  
 “ to the auditor to tax and report.”

The appeal was against these interlocutors of the Lord Ordinary and the Court.

*Mr Pemberton and Mr Kelly for appellant.* — The right asserted by the respondents, and given effect to by the interlocutors of the Court below, is to make a railway, crossing that of the appellants, which may be carried throughout the length of Scotland, and be used by any or every body for any or every purpose. But both on a legal and a grammatical construction of the 81st section of the appellants' statute, it is plain that it was never intended



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to confer upon them any such right; all that was intended by the legislature in that section was to give parties holding lands intersected by the railway, every reasonable enjoyment of them consistent with the use of the railway, by permitting them to make, for the use of their own lands, a railway road, or canal, to be confined to the limits of these lands; unless this be the correct construction of the 80th section there is no meaning which can be affixed to the words, “within the respective lands or grounds of such owner or occupier.”

It is not pretended that what the respondents were attempting to do, was under the powers given by the 79th section, that section was intended for another and very different purpose, the connecting of branch lines with the trunk line of the respondents, which, instead of causing injury or obstruction to the appellants, would contribute to their advantage and emolument. But it is avowed, and not attempted to be concealed, that their operations are carried on under the 80th section, as giving them a right to cross the railway of the appellants at a tangent, either with a railway or a canal, and to cause to the appellants all the necessary obstruction to the use of their railway, which the accomplishment of such a purpose must necessarily occasion, and that without making to the appellants any compensation for so doing, although these operations are not for the enjoyment of the respondent's own lands, but for the purpose of general trade and communication.

The appellants have purchased the land on which their railway is formed, and as to the ground which they have so acquired, though for a special purpose, they are entitled to all the rights which the law confers on ordinary proprietors, unless in so far as the statute expressly and indubitably limits these rights. It will not be implied that the respondents can have any right to come upon the lands of the appellants, to do them such injury as has been suggested, without making any compensation for so doing;

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but this is the construction which by implication from the words used, they desire to put upon the 80th section of the statute. It is plain, however, that the legislature never intended to authorize such injustice, and reason and common sense, as well as the correct legal construction of the section, shew, that all that was intended was to give to proprietors, the entirety of whose lands was disturbed, a right of communication between the parts intersected.

[*Lord Brougham.* — You say a railway or canal to his own close.]

Yes. Like the usual case of a road for the use of a particular estate. The party may use the road for the purposes of the estate, but if he use it for any other, he is a trespasser. That was decided in *Scott v. Bogle*, 15 *F. C.* 397. The effect of this 80th section was to create in favour of the respondents a statutory servitude road over the railway of the appellants for the use of the adjoining lands, and no more.

[*Lord Cottenham.* — I understand the party limits his claim to going to lands of which he has got a lease.]

No. They carry it the full length expressed in the opinions of the Judges in the Court below; *vide* 2 *D. B.* and *M.* 1470. They say we are not entitled to object to the making of their railway, whatever use they may put it to.

[*Lord Brougham.* — You consider your railway as your property, not as an easement.]

Undoubtedly. We are as much the proprietors of the land on which it is formed as any other proprietor of any other land.

[*Lord Cottenham.* — Do you hold, that by “any ground through which the said railway may pass,” was confined to lands in the possession of the party at the time of the passing of the act? If a party at that time were lessee of lands on one side of the railway, and owner of lands on the other, would he be entitled to use the powers given by this 80th section?]

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We are not prepared to say, but perhaps, if necessary to answer such a case, should answer it in the affirmative; for what was intended was to give parties such reasonable enjoyment of their lands as should be consistent with the use of the railway.

[*Lord Cottenham.* — The question is not raised by the petition as to the use sought by the respondents being to make a railway to any where, but merely to particular lands, of which they are lessees.]

But when you have passed the principle sanctioned by the statute, it is difficult to restrain the argument.

[*Lord Brougham.* — The interdict prayed by you is against making a railway beyond respondents' lands.]

Perhaps so; but the true effect is to prohibit them making a railway within their own lands to communicate with others.

[*Lord Cottenham.* — If you were to get your interdict in the terms you ask for it, you would get very little.

*Lord Brougham.* — You ask that they may be prohibited from doing a lawful act with an unlawful intention, but how do you know what the intention is?]

The prayer is against communicating with other lands.

[*Lord Cottenham.* — The prayer must be taken with reference to the preceding statement in the petition, and that treats the lands of Sir William Alexander as if the respondents had no interest in them.]

*The Solicitor-General and Mr Anderson* appeared for the respondents, but were not called upon.

LORD COTTENHAM. — My Lords, I think that the petition of the appellants must be dismissed, because the present complaint is upon the facts as they appear before us, that the defenders, who have the lands through which the railway originally passed, are now become lessees of the adjoining land; and unless the

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appellants can make out that the object of this clause was only to protect land held as one estate at the time the original railroad was made, and which was divided by making that railroad, then the appellant's case fails; because what he asks is, that the party may be interdicted from making a railway crossing the main railway, communicating with the land which he now holds of Sir William Alexander. It appears to me, that this 80th clause cannot be confined to that estate, which was divided by the railway at the time the railway was made, because it is obviously intended for the convenience of those who may be occupiers, and from time to time occupiers of the land, partly on one side, and partly on the other side of the principal railway, and that without reference to the title under which it is held; the fact of the occupation of the two sides of the railway being that which entitles the party to the convenience and benefit of crossing it. There is nothing in the 80th clause confining it, and the justice of the case requires that it should not be confined. However the grounds may be stated in the reasons of the learned Judges, we are confined to that which, on the facts, is in contest between the parties; and confining myself to the case as it stands on the facts, I think the party is not entitled to the interdict on the facts he states in his petition, which are the only facts with which we have to deal. Therefore I move your Lordships that the interlocutor of the Court below be affirmed with costs.

*Lord Brougham.* — My Lords, I entirely agree with my noble and learned friend. I had some doubt at first whether this section meant the state of the property at the time the act passed, or generally, but that doubt is now removed. Certainly, there is one part of it which was not formerly so understood in the making of canals; for supposing one party to make a canal, and another party to have a right to dig a canal across it, would be most inconvenient; however, we cannot enter into that.

*Lord Campbell.* — The only question, it seems to me, is, whether

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you are to confine the right given by the section to the state of the ground at the time the act passed or not. If you are to confine it to the state of the ground at the time the act passed, then the analogy would arise between the act and the intendment. If you are to read this as owner and occupier from time to time of any ground, and at all times thereafter, then the analogy fails; and it being allowed that these parties are the lessees of the adjoining ground, I think that ground is within the meaning of the section of the act of Parliament.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed, with costs.

DAVID CALDWELL — GRAHAME MONCRIEFF, & WEEMS,  
Agents.