back, called to them, "Why don't you come on?" Was not that practically a statement that there was plenty of room for them? And if those on board the "Tyne" were told by those in authority to come on, what had they to do but to obey that order or to yield to the suggestion which was so made. Supposing it had not been the harbourmaster at all, but a stranger, a man of some skill, who had stood in the position where the harbourmaster was, and who had shouted "You are all right, there is plenty of room" (which was practically what the harbourmaster did), the "Tyne" would have been quite right in acting as she did. It is, no doubt, quite true that as the "Tyne" came further on they found it was not possible to avoid a collision. The moment they found that, the master of the "Tyne" reversed his engines. What more could he do? I agree entirely with what my noble and learned friend opposite (Lord Herschell) has said on this point. I think they acted reasonably and prudently, and I also agree in thinking that even if in the flurry of proceedings such as then occurred it could have been said that everything was not done that a careful and prudent man would have done, the result would not have been different.

Looking at the whole case, I agree with your Lordships in thinking that the decision of the Lord Ordinary, who saw the witnesses and was well able to judge of the value of the evidence and the testimony of the harbourmaster where it differed from that of other persons, was sound, and I give great weight to the circumstance, as your Lordships have done, that he saw the witnesses and could judge from their demeanour and their mode of giving evidence in deciding as to the value to be put upon their testimony.

LORD JAMES—For the reasons which have been very fully stated I concur in the view that the decision of the Court of Session should be reversed and judgment given for the appellant.

Ordered that the judgment appealed from be reversed, and that the interlocutor of the Lord Ordinary be reversed.

Counsel for the Appellant—Pyke, Q.C.—Aitken. Agents—Pritchard & Sons, for Wallace & Pennell, W.S.

Counsel for the Respondents—Aspinall, Q.C.—Salvesen. Agents—Thomas Cooper & Co., for Beveridge, Sutherland, & Smith, S.S.C.

Tuesday, February 22.

(Before the Lord Chancellor (Halsbury), and Lords Watson, Herschell, Shand, and James.)

CALEDONIAN RAILWAY COMPANY *v.* TURCAN AND OTHERS.

Railway—Acquisition of Lands Forming Private Road or Access—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *sec.* 90—*Railways Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. c.* 33), *secs.* 42, 46, 49, *and* 60.

The Lands Clauses Consolidation (Scotland) Act 1845, by section 90, provides—"No party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or building or manufactory if such person be willing and able to sell or convey the whole thereof."

Certain warehouses and other business premises abutting on a courtyard had an access from the public street owned and used in common by the proprietors of the buildings.

The promoters of a new railway served a notice to treat upon one of the proprietors for the acquisition of the access only.

Held (*aff.* the judgment of the Second Division) that the access was not a road within the meaning of the Railway Clauses Act 1845, sec. 46, but was part of the "house or building or manufactory" of the proprietor to which the provisions of section 90 of the Lands Clauses Act 1845 as to severance were applicable.

Railway—Severance—Assessment of Compensation where Promoters Agree to Grant Servitude of Access over Lands Acquired — Caledonian Railway (Edinburgh, Leith, and Newhaven Extension Lines) Act 1890 (53 *and* 54 *Vict. c. clxvii.*) *sec.* 13.

The Caledonian Railway Special Act of 1890 provides by section 13 that notwithstanding the provisions of section 90 of the Lands Clauses Consolidation (Scotland) Act 1845, the owners of scheduled lands of which a portion only is required for the purposes of the undertaking, may be required to sell or convey that portion only, "if such portion can, in the opinion of the jury, arbiters, or other authority to whom the question of disputed compensation shall be submitted, be severed from the remainder of such properties without material detriment thereto."

The Caledonian Railway Company, under powers conferred by the above Act, served a notice to take a part of certain lands consisting of a private road or access, 70 feet long by 30 feet wide, to warehouses and other buildings, the owners of which were also owners in common of the access.

Question—Whether in determining if the access could be severed from the

remainder of the properties without "material detriment thereto," the arbiter ought to have regard to the circumstance that the promoters proposed, and were willing to grant an undertaking, that the railway would be carried over this access on a girder bridge, and that, apart from this, the access would not be interfered with.

Ayr Harbour Trustees v. *Oswald*, July 23, 1883, 10 R. 472, *aff.* 10 R. (H.L.) 85; and *in re Gonty and Manchester, Sheffield, and Lincolnshire Railway Company*, August 4, 1896, L.R., 2 Q.B. 439, *commented on.*

The appellants in 1890 obtained a private Act of Parliament, under which they were authorised to purchase and take certain lands in the parish of South Leith, including property belonging to the respondents, marked on the deposited plans and described in the book of reference by the numbers 106 and 109. The property in question consisted of a warehouse (No. 106) belonging exclusively to the respondents, on the west side of a courtyard, the east and south sides being occupied by buildings belonging to Messrs Lawson. To this courtyard there were two accesses—one, about 70 feet long by 30 wide, was from Manderston Street Leith; the second, longer and narrower, led into Leith Walk. The courtyard and the accesses were the joint property of and were used in common by the respondents and Messrs Lawson. No. 109 consisted of the courtyard and the access from Manderston Street.

On 24th July 1893 the appellants served a notice upon the respondents to treat, in the usual terms, intimating that part of the above properties, consisting of the said access from Manderston Street, would be required for the purposes of their undertaking. The respondents intimated by a counter notice that they would not sell the access by itself, but would require the company to take the whole of the property. They also intimated that they desired the question of disputed compensation, including the question whether the portion of the lands and buildings proposed to be taken could be severed from the remainder of their property without material detriment, should be settled by arbitration in terms of the appellants' special Act of 1890, and of the Lands Clauses Consolidation (Scotland) Act 1845.

The latter Act provides by section 90—"That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or building or manufactory, if such person be willing and able to sell or convey the whole thereof." By section 13 of the appellants' Act of 1890 it is provided—"Whereas in the exercise of the powers of this Act it may happen that portions only of the lands, buildings, or manufactories shown on the deposited plans may be sufficient for the purposes of this Act, and that such portions may be severed from the remainder of the said properties without material detriment thereto: Therefore notwithstanding section 90 of the Lands Clauses Consolidation (Scotland) Act 1845, the owners of and other persons interested in the lands, buildings, or manufactories described in the first schedule to this Act annexed, and whereof portions only are required for the purposes of this Act, may (if such portions can in the opinion of the jury, arbiters, or other authority to whom the question of disputed compensation shall be submitted, be severed from the remainder of such properties without material detriment thereto) be required to sell and convey to the company such portions only without the company being obliged or compellable to purchase the whole or any greater portion of such properties, the company always paying for the portions taken by them and making compensation for any damage sustained by the owners of such properties and other persons interested therein by severance or otherwise."

A statutory submission was thereafter entered into between the parties, without prejudice to certain legal contentions put forward by the appellants, for the purpose of having the following questions submitted for the determination of the arbiters' decision, namely:—(1) The question whether or not the portion of land, containing 232 square yards, above mentioned, could be severed from the remainder without material detriment; (2) the amount the appellants were to pay for said lands in the event of its being found that they could be severed from the remainder without material detriment, and that they were not bound to take the whole; and (3) the amount of purchase-money payable to the respondents for the whole of the lands in the event of its being found that the appellants were not entitled to take only the portion of land specified in the notice to treat.

The reservation of legal questions was contained in article fourth of the minute of agreement to submit to arbitration, which was as follows:—"(*Fourth*) It is hereby provided and declared that these presents are entered into and the matters submitted to the determination of the arbiters as aforesaid, without prejudice always to the contentions and protests of the second party, that the said portions of land or property specified in the said notice to treat and relative plan are not parts of the foresaid lands and buildings marked with the Nos. 106 and 109 of the said parish and county on the said deposited plans and books of reference within the meaning of the said Lands Clauses Consolidation (Scotland) Act 1845, and more particularly section 90 thereof, and that the said portions of land or property specified in the said notice to treat and relative plan are not subject to the provisions of section 90 of the said Lands Clauses Consolidation (Scotland) Act 1845; and that in any event the said portions of land or property are not by reason of the second party's use thereof for the purposes of the said Caledonian Railway (Edinburgh, Leith, and Newhaven Extension Lines) Act 1890, subject to the

provisions of that section, which contentions and protests, notwithstanding anything herein contained, shall be reserved entire to the second party, and with all powers competent to the second party to follow forth their said contentions and protests by all competent process; but declaring that the first party shall not be taken as in any way admitting the validity of the second party's said contentions or protests, and reserving the first party's answers thereto."

After sundry proceeding in the reference, the oversman, upon whom it had been devolved, issued his award on 18th April 1895, finding (1) that the portion of land in question could not be severed without material detriment to the remainder; (2) that in the event of its being found, contrary to his view, that the appellants were entitled to take only the portion, the compensation payable for same and for injury to the remainder of the land was £2270 sterling; and (3) that in the event of the appellants being bound to take the whole lands and buildings belonging to the respondents, the amount of purchase-money and compensation payable was £10,000. The appellants having refused to implement this award the present action was raised by the respondents for payment of the sum of £10,000 with interest from the date of the award.

The respondents contended that the only question really at issue between the parties was whether the appellants were bound to take the whole lands in terms of the counter-notice, or only the portion which they desired to take. That question fell to be determined, according to the special Act, by arbitration, and it having been held by the oversman that the portion proposed to be taken could not be severed without material detriment to the remainder, it had been finally decided that the appellants are bound to take the whole property. The amount of compensation had also been finally fixed.

The case made by the appellants was alternative. In the first place, they contended that the portion of ground referred to in their notice was a road within the meaning of the Railway Clauses Act, sections 42, 46, 49, and 60, and that the only right which they competently acquired was the right to carry their railway over the road in question by the construction of a bridge. On that assumption they maintained that they had not acquired the absolute property of the ground, but were bound to leave it open and maintain it as an access to the respondent's property, and that they were not liable to pay compensation, but that their only liability was to substitute a road equally convenient with that which is crossed or to restore it. Alternatively, they contended that they are bound to give an accommodation road, thus escaping the more onerous obligation to pay compensation in terms of the 90th section of the Lands Clauses Act.

The Lord Ordinary (Low) on 1st December 1896 granted decree against the appellants for the sum sued for. His Lordship's note was as follows:—

Note.—"This is an action for payment of the sum of £10,000, being the amount fixed by arbitration as the purchase-money and compensation due to the pursuers for certain lands which the defenders have taken for the construction of a railway.

"Two of the subjects scheduled by the defenders were marked on the Parliamentary plans as Nos. 106 and 109. The former number, I understand, represents the pursuers' warehouse, and the latter number the courtyard of the warehouse and an access or road leading out of the courtyard into Manderston Street.

"The defenders served a notice to treat upon the pursuers in the ordinary terms, intimating that the portion of No. 109, consisting of the access to the courtyard, was required, and would be taken and used for the purposes of the special Act. I may add that the notice includes the whole of the access.

"The 13th section of the special Act is in the following terms:—[*His Lordship read the section.*]

"The position taken up by the pursuers was that the access could not be severed from the remainder of the properties without material detriment thereto, while the defenders' contention was that the 13th section of the special Act did not apply, in respect that the subjects did not fall within the scope of the 90th section of the Lands Clauses Consolidation Act.

"After some difficulties in regard to the terms of the reference, a minute of agreement was entered into between the parties, whereby it was declared that the questions submitted to the arbiters were:—[*His Lordship read the questions*].

"The oversman, upon whom the submission devolved, found that the ground taken could not be severed from the remainder of the property without material detriment thereto, and he fixed the amount of the purchase-money and compensation payable to the pursuers by the defenders under the third head of the reference at £10,000. That is the sum sued for.

"The 90th section of the Lands Clauses Act provides — [*His Lordship read the section*].

"The only ground upon which the defenders argued that that section was not applicable to this case was that the ground in regard to which the notice was given consisted entirely of a road. They contended that in no case has a railway company power to acquire a road, or a portion of a road, absolutely, and that a private road is not a subject which the owner can be called upon to 'sell or convey,' and therefore does not fall within the scope of the 90th section.

"The defenders referred to the fasciculus of sections in the Railway Clauses Act 1845, beginning with the 39th, and also to the 60th section of the same Act, which deals with accommodation works, as containing the whole rights and obligations of a railway company in regard to roads. The

argument was, if I rightly apprehend it, that if a railway crosses a road the only obligation upon the company is (under sections 46th and 49th) to provide a new road equally convenient with that crossed, or to restore the road, if that is possible, or (under section 60th) to give an accommodation road.

"In this case the defenders say that they propose to cross the road in question by a bridge, so that the road can be restored when the works are completed.

"I think that the first difficulty which the defenders have to meet is their own notice to treat. That was a notice founded upon the powers of compulsory purchase given to them, and contained an intimation that the portion of the lands referred to constituting the road 'are required, and will be taken and used.' The service of the notice constituted a contract for the sale and purchase of the ground, and the only thing remaining to be done was to have the purchase-money and compensation settled. How, after having exercised their compulsory powers to purchase the ground, the defenders can maintain that it is not ground which the pursuers can be required to 'sell or convey,' I do not understand.

"It may be (I express no opinion) that the fact that the defenders propose to carry the railway over the road by a bridge was one which the arbiter was bound to take into consideration in fixing the amount to be paid, but that merely affects the question of amount, and does not make the defenders the less the purchasers of the ground. I do not doubt that they are going to carry this railway over the road by a bridge, but I can find nothing in the general Acts, and it was not said that there was anything in the special Act, which would prevent the defenders running an embankment across the road if they deemed it to be advisable to do so.

"In regard to the 41st and 49th sections of the Railway Clauses Act, I think that they have no application to the present case.

"In the first place, I doubt very much whether the ground taken by the defenders is a road at all within the meaning of these sections. I do not think that it is any more a road than the courtyard is. It is just that part of the property next to the street which has been left open to give an access to the business premises, as the courtyard has been left open for the purpose of loading and unloading goods and so forth. But even if the access is a road, it is a road which has been scheduled, and which the defenders have been authorised to purchase by the special powers given by their Act. I am of opinion that the sections relied upon in the Railway Clauses Act do not apply to roads which the company are authorised to take, and have taken, under the powers of their special Act, and that was the view of the majority of the Judges in the case of *Campbell* v. *Edinburgh and Glasgow Railway Company*, 17 D. 613.

"In that case the Railway Company had scheduled and taken a private road, which was marked No. 46 on the Parliamentary plan, and one of the questions raised was whether they were bound to provide a substitute road in terms of section 46 of the Railway Clauses Act. Lord Curriehill, who was one of the majority, said, 'It appears to me that the clause of the Railway Act has no reference whatever to the present question. By special Act obtained by the railway company they are authorised by section 12 to enter upon, take and use the lands delineated on the relative plans, and described in the books of reference. Now, what is the meaning of power to take lands? That means, under the Lands Clauses Acts, power to acquire as the property of the promoters of the undertaking. Taking is acquiring as your property. . . . The moment the respondents serve the notices the purchase is complete, from which neither party can resile. As soon therefore as they serve these notices I hold that they purchased No. 46, which is part of the lands and others referred to in the notice. . . . That being the case, the question is whether, under a different Act of Parliament, the General Railway Act, section 46, the company are bound to make a new road in place of the one which they have taken and purchased under the Lands Clauses Act. Now, when I read section 46 of this Act I find no provision as to a road which has been "taken." I find provision as to roads with which other things are done, but none as to making any provision for roads which are taken under the Lands Clauses Act.'

"I have quoted at some length from Lord Curriehill's opinion, because what he says is in terms applicable to the present case. The Lord President and Lord Neaves took the same view of the scope of the 46th section of the Railway Clauses Act as Lord Curriehill did, and although Lord Deas dissented, I am not aware that the soundness of the view taken by the majority has ever been questioned.

"In regard to the provisions of the Railway Clauses Act in regard to accommodation works, I fail to see how they in any way assist the defenders' contention.

"The defenders also argued that the arbiters were bound to take into consideration, in fixing the amount to be paid for the ground, that the access would not be shut up, as the railway was to be carried over it by a bridge. That is not among the questions reserved in the minute of agreement and submission, and I cannot deal with it in this action. I apprehend that if the defenders desire to raise the question they must take proceedings to have the decree-arbitral set aside."

This decision was affirmed by the Second Division on 11th March 1897, when the following opinions were delivered:—

LORD YOUNG—The pursuers in this action were proprietors of certain subjects in Leith, scheduled by the defenders the Caledonian Railway Company, and with respect to a portion of which a notice to take was given by the Railway Company. In the Parliamentary plan these subjects are scheduled as Nos. 106 and 109. The Lord Ordinary

explains quite correctly that No. 106 represents the warehouse belonging to the pursuers, and No. 109 the courtyard of the warehouse and an access or road leading out of the courtyard into Manderston Street. The notice to take was limited to No. 109—that is to say, the road leading from the street to the courtyard and to the warehouse. The notice to take is in the usual terms of a notice given to a proprietor by a railway company to take land or house property; but it is maintained by the defenders the Caledonian Railway Company here that that is not the true position of it—that their notice is inaccurate as a notice to take, because they were not entitled to give the notice to take, that is to say, to become the purchasers of a road, and that it ought to be dealt with only as a notice that they intended to do what they are at liberty to do, to carry their railway over it, and that clause 90 of the Lands Clauses Consolidation Act has no application to it. The 90th section of the Lands Clauses Act in question provides, as the Lord Ordinary says, quoting the only passage which is of any importance here—"That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or building or manufactory if such person be willing and able to sell or convey the whole thereof." The controversy really between the parties is whether, when the Railway Company gave notice to take No. 109, the road leading from the street to the warehouse, the pursuers—the proprietors—were entitled to say—"That is part of my warehouse and courtyard, and it cannot be taken without materially diminishing, being detrimental to, the value of the whole, and so you must under clause 90 take the whole." The Railway Company, on the other hand, can say—"It is not a case which falls under clause 90 at all, because that does not apply to a road. We cannot take a road. A road leading from a street into a warehouse is not a thing which can be taken." They were required, however, in the view adverse to this maintained by the pursuers, to take the whole; and then they not being able to agree as to their obligation to take the whole, either upon that legal view which I have referred to or upon the particular circumstances of the case, that taking a part —the part which they wished—namely, the road, would not be so detrimental to the remainder of the property as to make it incumbent upon them to take the whole, it being provided by clause 13 of the special Act, which also is referred to by the Lord Ordinary on page 2 of his note, and is in these terms, as he quotes it—[*His Lordship reads*].

Now, the parties very properly and reasonably, without prejudice to any legal question between them, submitted to arbitration the price to be paid—the compensation to be made—on the footing of the Railway Company being obliged under these provisions to take the whole, not merely the road to which the notice was limited, but also the warehouse and the courtyard, in the view that the road could not be taken without detriment to the warehouse, and also to determine, with reference to the condition in clause 13, which I have just read, whether the road could be taken *separatim* from the rest of the property without material detriment to it; and if so, then to determine what was the fair price or compensation to be paid upon that footing, the Railway Company always being at liberty to maintain, notwithstanding the terms of the reference, that the road did not fall within clause 90 at all, and that they could not give notice to take the property of a road, and that therefore they must, without reference to the opinion of the arbiter, have the price or compensation awarded upon the footing that they were only going to take the road, and were not obliged to take any more, and that they had intimated that they only meant to carry their railway over it, and were quite willing, notwithstanding the notice to take which they had given, to limit themselves to that use. Well, the oversman in the arbitration, a member of the bar, Mr Jameson, determined, so far as his opinion went, that there was a good notice to take the road—as far as his opinion went—a good notice to take it from the proprietors and make it the property of the Railway Company, they paying duly to the pursuers and any others having right to it for their right which they were obliged to convey. He also gave his opinion that that part of the pursuers' property could not be separated from the remainder without material detriment. Under clause 90 alone, in his view, they would be bound to take the whole; under clause 13 they were bound to take the whole, unless he was of opinion that the part they wanted could be separated from the rest without material detriment thereto, which he was of opinion could not be done; and therefore, taking clause 90 and clause 13 together, he fixed the price to be paid by the Railway Company for the whole of the pursuers' interest in the property scheduled, namely, both 160 and 109, at £10,000. And if that is a good award, and proceeds on a correct view of the legal rights of the Caledonian Railway Company, the pursuers are entitled to have decree for the £10,000, the Railway Company taking absolutely from him his property in the warehouse and courtyard and also in the road.

Now, the matter was argued before the Lord Ordinary, who was of opinion that the views of the Caledonian Railway Company in the first place, that this being a road was not a subject which could be taken, as they professed to take it under their notice—he was of opinion that that was not sound; that they did by their notice take it; and that they were under their statutes entitled to take it, and did take it by their notice. In that I entirely concur, and in the argument which was repeated to us, and which had been addressed to the Lord Ordinary, and I do not see even any plausibility for the contrary view. Indeed, if there was anything in it at all it would apply to this case:—A man has a house near a road, and

has a bit of a garden before the house, and a road leading up to the house. Well, that is a road. They cannot take the property of that, and if they give a notice to take the road the proprietor cannot say—"You can't take that without material detriment to my property—so material that you must really take the whole and deal with it as your property. You have scheduled it all, and are at liberty to take it all." The reply is—"Well, this is a private road; it leads to your house, and it may lead to your neighbour's house, whose property I am also taking, but it cannot be taken by the Railway Company." Now, that appears to me to be simply and absolutely ridiculous.

Well, then, it follows under clause 90 that if the road cannot be taken without material detriment to the rest of the property—that is to say, "if the road leading to the warehouse cannot be taken without material detriment to the warehouse, you must take the warehouse along with it and proceed to deal with it as your property." Whether it could be taken without detriment was referred to the arbiter, and he decided that it could not, and therefore I entirely concur in the arbiter's view expressed in his opinion, although I repeat it was still open for the company to maintain their legal argument, but I concur in the opinion he expresses and also in the judgment of the Lord Ordinary proceeding on his opinion, which is in accordance with that of the arbiter. And therefore, really concurring in the views and grounds of judgment stated by the Lord Ordinary in his note, I am of opinion that the Railway Company here have taken and are now the proprietors of the road; that it cannot be separated from the rest of the property without material detriment thereto, and that the Railway Company must accordingly take the whole property, and that at the price fixed by the arbiters to whom it was referred. The result is, that I think the judgment of the Lord Ordinary should be adhered to, and with expenses.

Lord Moncreiff—I am of opinion that the judgment of the Lord Ordinary is right, and that he has taken a correct and sound view of the statutory provisions and of the decisions mentioned in his note.

By notice to treat dated 24th July 1893 the defenders' company purchased and took from the pursuers the piece of ground coloured pink on the plan. That piece of ground forms the main entrance from Manderston Street, Leith, to the pursuers' business premises and warehouses. It leads from the street into a courtyard adjoining the north block of buildings belonging to the pursuers. The only other entrance to the premises is from Leith Walk by Whitfield Lane. By section 90 of the Lands Clauses Act 1845 it is enacted—"That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house, building, or manufactory, if such party be willing and able to sell and convey the whole thereof." If that were the only statutory provision to be considered, the defenders would be bound to take the whole of the pursuers' premises if it were proved or admitted that the access formed part thereof.

I may observe at this point that there is no question that the access does form part of the pursuers' premises. It is not a road; it is simply part of the ground adjoining the pursuers' warehouses, which is at present used as an access from Manderston Street. It is only 70 feet long by 30 feet wide. The decisions put it beyond doubt that such an access is part of the building in the sense of the 90th section, just as if it were the front hall or vestibule of a mansion.

But under section 13 of the company's special Act—Caledonian Railway Company (Edinburgh, Leith, and Newhaven Extension Lines) Act 1890—it is provided that—[*His Lordship read the section*].

It is further provided by the same section that if the jury or arbiter decide that the portion in question cannot be severed from the remainder of the property without material detriment, the company may at any time within one month from the date of such final decision withdraw their notice to treat for the portion required by them. With this, however, we are not concerned; the notice has not been withdrawn.

The parties referred to arbitration the question whether the portion coloured pink can be severed without material detriment, and the oversman's determination on that point is that it cannot.

I do not understand that the defenders maintain that it can be severed without detriment if they retain the unrestricted use of the ground and shut up the access, but they ask us to find that, in deciding as to whether the ground can be severed without material detriment to the remainder of the property, and as to the amount to be paid in respect of severance, the oversman is bound to take into consideration the fact that they now offer to give or leave for the pursuers in perpetuity an access to Manderston Street under their line.

I am of opinion that this question is settled adversely to the defenders in the case of *Oswald* v. *Ayr Harbour Trustees*, 10 R. 472 (Court of Seven Judges), and (H. of L.) 10 R. 85.

Two questions have to be considered. First, whether it is competent to treat a notice to take absolutely as if it were a notice to take subject to a servitude in favour of the proprietor, and whether a proprietor whose land is taken compulsorily is bound to have his compensation fixed on that footing. Secondly, whether a railway company has power to bind its successors by granting such an obligation. In my opinion both questions must be answered adversely to the defenders; and although the decision in *Oswald* v. *Ayr Harbour Trustees* proceeded mainly on the second ground, it is plain that the learned Judges were impressed with what Lord Blackburn calls the "technical" difficulty of deciding in favour of the Harbour Trustees on the first question. I think the question is more than technical, and I agree

in the views expressed by Lord Young, 10 R. 489.

We were referred by the defenders to a case which probably was not reported at the date of the Lord Ordinary's judgment—*Gonty* v. *Manchester, Sheffield, and Lincolnshire Railway Company*, August 4, 1896, L.R., 2 Q.B. (Court of Appeal) p. 439. The case is certainly very much in point, because the Court held upon a case stated, that the arbiter, in determining under corresponding clauses whether there would be material detriment to property arising from the taking of a portion, was entitled to take into consideration the sufficiency of an access which the company offered to give through the portion taken. But I confess I cannot reconcile that decision with *Oswald* v. *Ayr Harbour Trustees*, or with the English case of *Mulliner* v. *Midland Railway Company*, January 21, 1879, L.R., 11 Ch. Div. 611. In *Gonty's* case the decision of the House of Lords in *Oswald* v. *Ayr Harbour Trustees* was not referred to either in argument or the opinions of the Judges. They do refer to *Mulliner* v. *Midland Railway Company*, and while they do not exactly question the authority of that case, they endeavour, I think not successfully, to distinguish it. Now, that case was referred to with approval by Lord Blackburn, 10 R. (H. of L.) 87, as deciding that it was *ultra vires* of a railway company to grant such an easement over ground taken compulsorily for the purposes of their undertaking.

Two other cases were referred to in the opinions of the judges in *Gonty's* case, viz., *The Grand Junction Canal Company* v. *Petty*, June 26, 1888, L.R., 21 Q.B.D. 273; and *Foster* v. *London, Chatham, and Dover Railway Company*, December 3, 1894, L.R., 1 Q.B. 711. These were not cases under the Railways and Lands Clauses Acts. As I read them, all that was decided was that the use which the companies permitted to be taken of ground which they had taken compulsorily was for the time, and in a question with the opposite party, not inconsistent with the purposes of their undertaking; it was not decided that, if subsequently such use were found to be inconsistent with the purposes of the undertaking, it might not be withdrawn. In neither case did any question arise as to whether a proprietor whose land is taken compulsorily is bound to accept such an easement in reduction of the compensation due to him.

In the present case the ground was purchased absolutely. The pursuers could not have refused to sell absolutely, and I think they are not bound to accept, as in diminution of the detriment suffered and compensation due, an undertaking which the defenders may or may not be able to carry out in perpetuity.

As to the defenders' argument on the 46th and following sections of the Railway Clauses Act, I think, in the first place, that the portion taken is not a road in the sense of those sections. But further, those clauses do not refer to lands which have been purchased and taken; they relate to roads which have been interfered with by the operations of the company. In such cases the roads are to be restored or a substitute provided, but no price is to be paid. They do not relate to the case of land purchased, and accordingly in the case of *Campbell* v. *Edinburgh and Glasgow Railway Company*, 17 D. 613, it was held that the proprietor was not entitled to call on the Railway Company to form a substitute road for one the *solum* of which they had purchased and taken.

On the whole matter, assuming as I do that the matter is competently before us (the question being raised in the same manner as in the case of *Oswald*), I think we should affirm the interlocutor of the Lord Ordinary.

LORD JUSTICE-CLERK—I concur with both your Lordships in the opinions you have delivered. I think it is clear this notice was given to take this land just in the ordinary way, and to maintain now that it is a road, and that therefore they have no power to take it, is, I think, out of the question. It is a piece of ground the proprietors could use for any purpose they chose. They have another access to the property, and if they chose to build a house or warehouse or workshop on this piece of ground they were entitled to do so, and it would not interfere with the property. The Railway Company had given notice that they were to take the road, and it became a question of fact, and nothing else, before the arbiter, whether it could be separated from the rest of the property without detriment. The arbiter decided that question of fact in the negative, and accordingly it seems to me to follow the ordinary rule, that where that is the fact the company are bound to take the whole property. I agree with what has been said by your Lordships, and in holding that the judgment should be affirmed with expenses.

LORD TRAYNER was absent.

Against this judgment the Caledonian Railway Company appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR — Various questions might arise in this case, and as to some of them I wish to reserve any opinion I might come to until they arise in the form in which it might become necessary to decide them. At present, in my view, several of the questions argued before us here are not ripe for decision, because they do not arise.

The only point which I think arises here is, whether or not, in the first place, this is a road within the meaning of the statute. The word "road" is used loosely of course; the expression in the statute is "private road," which does import, no doubt, some kind of road over which there may be private rights, which are not open to all Her Majesty's subjects, and dealing with that, speaking broadly, the legislation is, if a road is taken, or rather interfered with,

which is the language of the statute, it must if possible be restored or some substitution made. But it appears to me that the foundation of all the proceedings incident to that condition of things is that it should be a road within the meaning of the statute. I am very clearly of opinion that the piece of land in question here is not a road. The piece of land with which we are now dealing is part of the curtilage of the house; it is just as much part of the house as the hall. I think Lord Moncreiff uses the very language that I have adopted—that it is part of the vestibule of the house, and just as much part of the house as if it were a separate room in the house. It is true here that that piece of ground is held by two persons in common. It is a right as between themselves that either could put an end to, I suppose, in pursuance of whatever arrangements they thought proper to make, or they might both convey it to somebody else or use it for any purpose they pleased. It seems to me it would be an abuse of language to describe that as a road, any more than in the various cases which have been put in the course of the argument by various members of your Lordships' House, where it is suggested that a man's path going down his front garden, by means of which he gets down to his front gate, is no more a road than any other part of his house. In truth, it is not separated from the rest of his holding or the rest of his property at all. For convenience he may, if he pleases, together with his neighbour, use this for a particular purpose, but the rights of each of them go over the whole area. It is not a road, therefore, in any sense at all, and therefore under those circumstances it appears to me that the question which would arise if it were a road within the meaning of the statute does not arise here. My view therefore is—and I act upon that view—that it is not a road at all, and therefore the foundation of that part of the proceedings fails.

Then the next question is, assuming it not to be a road, whether or not the question which has been before the arbiter is finally decided by the decree-arbitral. The question appears to have arisen under the limitations of the section of the Scotch Act corresponding to that in the English Act, sections 90 and 92 respectively, which provide that where you take part of a house or other building which is within the protection of that statute, you must take the whole of it. Now, upon that subject I cannot forbear saying that these sections, which have introduced a new qualification to the general law as it existed for a great number of years, because occasionally a railway company has had to take a very small piece of something that was in no sense a house, or part of a house in the ordinary sense, and had been compelled to take the whole, have been regarded as somewhat of an abuse, and various private Acts have from time to time contained something to relieve them from that obligation. I cannot forbear saying that when these questions are considered in the Committees of either House, it would be very well if the parties could provide for such a case as we have had before us, and could place definitely before the Committees of the House what they really mean to do, because I confess that having looked at the two sections, specimens of which have been brought before us, I am wholly unable to understand exactly what the proviso means. The proviso is of a character which appears to enact one thing in the earlier part of it, and then to say it is not to operate in the remainder. That also is one of the questions, if it should ever become necessary to construe the proviso, upon which I wish to reserve my judgment. At present I throw it out for the consideration of the parties, and in the interest of all persons concerned in such questions as these, that it would be well if these sections in private Acts introduced as qualifications of the general law should be made intelligible so that the parties should understand what rights they really have, and whether (to put it in a concrete form) a railway company, taking part of a person's property in a case where there was undoubtedly deterioration caused to the remaining part of the property, but where the railway company could by proper arrangements minimise the amount of the injury they did, would be entitled to claim credit for that, and so to diminish the amount of compensation to be awarded. I think that would be a very sensible course of legislation, and I throw it out to the parties, because this is a conspicuous example where it has been argued such a question has arisen. As I say, I reserve my opinion as to whether or not, notwithstanding the great obscurity in it, that could be successfully done under this section. I think that no one would doubt that if there is such a power in the section as it stands, it might be made very much clearer by future legislation.

I come lastly to the question whether that point does call for decision here. As I say, I desire to reserve my opinion upon that point. I think it does not arise here, and I think it does not arise for this reason, that I think the arbiter has done what by law he was entitled to do—he has received the evidence, he has considered the evidence, and he has decided adversely to the present appellants. I do not mean, for the reasons I have given, to express any opinion whether he was right or wrong in what he has done, because whether he is right or wrong, the state of the law, as I understand it, is that we are not entitled to review his decision. The parties have selected him as the judge both of law and fact, and if he be ever so erroneous in the decision at which he has arrived it is conclusive upon the parties. In this case, therefore, all I say on that point of the case is that I am not entitled to review the decision of the arbiter; his award is final; and whether his award is right or wrong in point of law, it is a matter with which I am not entitled to deal.

Under those circumstances it appears to me that the appellants wholly fail here, and I move that the appeal be dismissed with costs.

LORD WATSON—I am of the same opinion upon all the points which it is necessary to decide in this case, because a number of questions have been argued before us which I think it quite unnecessary either to entertain or to give judgment upon.

At the outset of his argument it humbly appeared to me that the Lord Advocate had rather omitted to notice the fact that the Arbitration Act of 1889 is confined to England, and has no application to Scotland. If it had, I do not think it would be a national misfortune.

The first question which arises in the case is, whether this road or piece of ground, call it what you like, which is included in the notice to take given by the company, is in the strict sense of the Railway Acts a road and nothing else. And the next proposition, which, in order to the success of the appellants upon this point it is necessary for them to make out, is that being a road it is not part of the entire property which is occupied by the respondents for the purposes of a warehouse. Upon that point I cannot say that I entertain any doubt. I think it is (though we do not use that expression in Scotland) part of the curtilage of the house. I think it is simply a part of the property which the owners at present by mutual consent find it convenient to use for the purpose of getting access to the street which abuts upon the property at that point, and therefore being an integral part of the property, it brings the Caledonian Railway Company within the sweep of sec. 90 of the Lands Clauses Act.

Then the next point which it is necessary to consider is this—By the special Act of 1890, sec. 13, sec. 90 is qualified to this extent, that a railway company may escape from its incidence if it be found that the ground as to which notice has been given to take "may be severed from the remainder of the property without material detriment thereto." That is a point which the arbiter has decided against the Railway Company, and I am not aware that any material objection has been offered to that finding beyond this, that in the course of his address to the arbiter the learned counsel for the company made this proposal, that the company should, in their use of the subject as to which they had given notice to take, confine themselves simply to passing a girder bridge across it at such height above the *solum* as would enable the owners still to use the way or the ground as an access to the street.

Whether the arbiter did right or did wrong in declining to take that circumstance into consideration in valuing the subject which notice was given to take I do not think it necessary at present to make any comment beyond this, that the case of *The Ayr Harbour Trustees* v. *Oswald* does not appear to me to have any application to the circumstances of the present case, and for this reason, that all that was there decided was that the undertaking which the public trustees were there tendering—an undertaking to bind their successors in office in all time to come—was one which the House held to be beyond their power, and amounting practically to an abrogation of the rights given to those successors by express statutory enactment. Another question remains behind, which I will not attempt to solve, although Lord Blackburn expressed an opinion favourable to the appellants upon that point, and the English case of *Gonty* seems to me to point in the same direction.

But the important question remains behind, that assuming the arbiter went wrong, what jurisdiction has this House or the Courts below to interfere with his finding? By the law of Scotland, whether rightly or wrongly, the arbiter or oversman, who is appointed in the terms of the deed of agreement under which Mr Jameson acted, is made judge of law as well as of fact, and he is not liable to have his decision reviewed, reversed, or modified, unless the parties undertake to show what has not been attempted here, either that he was guilty of misconduct in his office, or that he exceeded the bounds of jurisdiction conferred upon him by the terms of the submission. In these circumstances I see no alternative except to assent to the judgment which has been proposed by the Lord Chancellor.

LORD HERSCHELL—I am of the same opinion.

I think it clear that the plot of land in question was within section 90, and that it was not a private road within the meaning of section 49. On that point I shall add nothing to what has already been said.

Other questions have been argued before your Lordships which undoubtedly are of very considerable and general importance, inasmuch as they turn upon the construction and effect of a section which is to be found in this particular private Act, but not in this Act only but in various other railway Acts. The question is, What considerations the tribunal is entitled to take into account in determining whether the portion of land required for the purposes of the Act can be severed without detriment to the remainder? Can the arbiter or the tribunal, whatever it be, which has to answer that question, take into account the actual use which it is proposed to make of the land taken by the Railway Company and the rights which they are prepared to continue in respect of it, or to grant in respect of it, to the person whose land it was? Upon that point our attention has been called to a decision of the Court of Appeal in England. In my view, without expressing any opinion upon the determination of that case, it does not conflict, as has been supposed, with the case of *Oswald* v. *The Ayr Harbour Trustees*. I will not repeat, but I entirely give my assent to the remarks which have just been made by my noble and learned friend Lord Watson about *Oswald's* case.

Another question arises with respect to the general Act, and that is, whether in such a case as the present section 68 [section 60 of the Scotch Act] is ap-

plicable, and whether, therefore, it was a case in which under the provisions of section 68 there was an obligation on the Railway Company to give access underneath the railway if they could do so? I do not express any opinion upon the construction of that section; I merely call attention to the fact that the section in question was the ground of the decision of one of the learned judges in *Gonty's* case, and undoubtedly I do not think it can be disputed that if what is suggested be the true effect of section 68, that would be an element to be taken into account in answering the question under such a provision as that contained in section 13 of the private Act.

As to all those points I reserve my opinion. I express no opinion on them at the present time, because it appears to me that they do not arise before this House, inasmuch as the arbiter, whether he has rightly decided or wrongly decided, is supreme. There is no power to review his decision, whether he has made a mistake in law or whether he has made a mistake in the facts, and consequently it is impossible for your Lordships to entertain the bulk of the arguments which have been addressed to you on behalf of the appellants by the Lord Advocate.

LORD SHAND—I am of the same opinion and I shall only add, in concurrence with the view expressed by my noble and learned friend on the Woolsack, that it seems to me it would be desirable that those interested in such questions should endeavour to obtain legislation more clearly defined than section 13 of the private Act here—a section which, as I understand, is now commonly inserted in many statutes, and to consider whether such a case as we have now had before us should not be specially provided for.

LORD JAMES—I concur in the view already expressed that this appeal should be dismissed, and I do so upon the two grounds which have been already mentioned—first, that it appears to me that this is not a road—it is part of the premises—it is really curtilage and not road; and secondly, for the reason just stated by my noble and learned friend Lord Herschell, that the decision of the arbiter is supreme, and we cannot review that decision either upon a point of law or of fact.

Ordered that the appeal be dismissed with costs.

Counsel for the Appellants—The Lord Advocate, Q.C.—Clyde. Agents—Grahames, Currey, & Spens, for Hope, Todd, & Kirk, W.S.

Counsel for the Respondents — Cripps, Q.C.—Salvesen. Agents—Stibbard, Gibson, & Company, for Boyd, Jameson, & Kelly, W.S.

Friday, February 25.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Herschell, and Shand.)

MACFIE *v.* CALLANDER AND OBAN RAILWAY COMPANY.

(*Ante* July 16, 1897, vol. xxxiv. p. 828, and 24 R. 1156.)

Railway — Superfluous Lands — Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 120.

The proprietor of lands adjoining brought an action against a railway company for declarator that two plots of land, distinguished as plot A and plot B, which had been acquired by the company under the powers of a special Act, not being required for the purposes thereof, had become superfluous lands within the meaning of section 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and had vested in him as at 17th July 1892, the date prior to which the company was bound to sell superfluous lands under the said section.

The pursuer maintained that the defenders were barred from pleading that the lands were required for the purposes of the undertaking by the following circumstances—As regards plot A, the directors of the company had, subsequently to 17th July 1892, resolved to sell part of it, and had remitted to their secretary and solicitor to carry out the sale, but on their learning that the sale was illegal it was not carried out. As regards B, the directors prior to the said date considered various proposals for the purchase of parts of it, but declined them on the ground that the price offered was too small. After the said date they let portion of B on lease for five years.

Held (*aff.* the judgment of the First Division) that the actings of the directors, although relevant as evidence on the question of fact whether the lands were, as at 17th July 1892, required for the purposes of the undertaking, did not operate as a bar to the company pleading that the lands were so required.

Opinion (by Lord Watson) that the plea of personal bar was inapplicable to a claim arising under section 120 of the Act.

London and South-Western Railway v. *Blackmore* (1870), L.R., E. & I. App. 610, *distinguished and explained.*

Evidence on which *held* (*aff.* judgment of the First Division) that the plots in question were required for the purposes of the undertaking.

The case is reported *ante ut supra.*

The pursuer appealed against the judgment of the First Division.

At the conclusion of the argument for the appellant, counsel for the respondent not being called on, their Lordships delivered judgment as follows:—