

CALEDONIAN RAILWAY COMPANY, APPELLANTS.
OGILVY RESPONDENT.

8 *Vict. c. 19.* 8 & 9 *Vict. c. 33.*

1856.
27th, 29th, and
30th March.

Railway—Level crossing—Damages.—Damages are not recoverable for stoppages and other mere inconveniences incident to the crossing of a public road by a Railway *on the level*, under the sanction of Parliament.

A level crossing in such a case, is a grievance to be endured without complaint by private persons from a consideration of the benefit gained by the public.

Hence where a Railway passed within a few yards of a gentleman's lodge, across a public road forming the chief access to his residence,—although he was liable to constant stoppages by the closing of the gates on the level crossing,—although the passing of trains frightened his horses and terrified his visitors, “particularly ladies,”—*held* by the House of Lords (reversing the decision of the Court of Session) that these annoyances did not ground a claim of damages against the Railway Company.

Held likewise, that the inconvenience felt in such a case, is one to which all the Queen's subjects are exposed, and for which no particular or individual remedy exists.

Held, moreover, that it is a mistake to regard the proximity of a level crossing as injurious to an estate or residence, within the meaning of railway legislation.

Verdict, ultra vires.—Acquiescence.—Under the Railway and Lands Clauses Consolidation Acts, where the Sheriff and Jury in awarding damages go beyond their authority, the power of setting matters right is not excluded.

Where the verdict was for “severance and level crossing,” but without distinguishing how much was to be for “severance” and how much for “level crossing,” it being

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impossible to reduce the verdict *quoad* the level crossing alone—it was overturned *in toto*.

Where it is *pars Judicis* to point out to the Jury that they are going beyond their province, the defect of authority cannot be cured by acquiescence.

THE Appellant had purchased in 1835 an estate called Clove, in Dumfriesshire, for 9,650*l.* He had moreover laid out 2,500*l.* on the house and grounds. And he resided on the premises with his family.

In October 1845, the Caledonian Railway Company served him with a notice that their line would pass through his property, and that they were ready to treat with him for compensation. The Appellant gave in a claim, of which the most remarkable item was as follows:—

For injury done to the *amenity* of the property as a *residence* by the railway entering the grounds so near the house, thereby laying open the place, and destroying or impairing its privacy and retirement, and interfering with future plans and improvements £200 0 0

For very material injury done to the place as a residence, and deterioration to the amenity and value of the house and policy by the railway crossing the approach to the lodge and gate on the level immediately in front of, and within a few yards, of the gate, whereby the present *free* and *open* communication with the high road at a very short distance is cut off, and all access prevented without a constant liability to very great inconvenience, interruption, and delay. The impossibility of communicating with the high-road without crossing the railway, *will render it also dangerous and alarming to ladies and others passing to and from the house, from the risk of the startling of horses when detained in a narrow road facing the barrier, by the passing and noise of the engines and trains* 300 0 0

The Company refusing to accede to this claim the matter was referred to arbitration; but the reference failed, in consequence of the arbiters not having made

their award within the Statutory period. The Company meanwhile had taken possession and completed their railway; the Appellant's claim remaining unadjusted.

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In May 1848, the Appellant served the Company with a notice under the 36th Clause of the General Lands Clauses Act, claiming 2,500*l.* The Company offered 850*l.* This offer was not accepted; and the Company thereupon called upon the Sheriff to summon a Jury, in order to assess damages in the usual manner. The trial commenced on the 3d June 1848, and lasted several days. The Jury assessed the damage for the level crossing and severance at 560*l.*, and 360*l.* for land and freestone. The Company, however, refused to settle; and the Respondent thereupon extracted the decree, and gave them a charge to enforce execution. Upon this the Company presented a suspension, which they followed up by an action of declarator and reduction, contending that the verdict could not be supported, for that it awarded damages in respect of an injury which did not entitle the Respondent to compensation. The Company further urged that their Act authorized what they had done, and that the General Statutes gave no sanction to the Respondent's claim.

The Respondent, on the other hand, contended that the verdict was binding, and could not be set aside.

The Court of Session decided in the Respondent's favour, following their own precedent in *The Scottish Central Railway Company v. Cowan's Hospital* (a). Hence this Appeal.

Sir *Fitzroy Kelly* and Mr. *Rolt* for the Appellants.

The claim of compensation in this case is altogether novel. Does the Appellant suffer any damage beyond

(a) 12 June 1850. 12 Dunlop. 999.

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that to which the general public are subject? He does not. The case is directly within the authority of *The King v. The Bristol Dock Commissioners* (a); where Lord *Ellenborough* said: "Here the injury, if to any, is to all the King's subjects." So in *The King v. The London Dock Company* (b), where Lord *Denman* said: "The inconvenience complained of is common to every inhabitant of the neighbourhood, but it is the *necessary* consequence of a lawful act done by the Company." To the same effect is *The Queen against The Eastern Counties Railway Company* (c). It is true that in *Smith v. The North-western Company* (d), Lord *Cottenham* said, that the proper course in such cases was by Injunction. But that authority was overruled by Lord *Truro* in the case of *Gatke* (e), where an Injunction sought was refused. The Claimant must proceed in the mode pointed out by the Act of Parliament, and a Court of Equity ought not to interfere. In *The South Staffordshire Company v. Hall* (f), Lord *Cranworth* adopts the same view. *The Queen v. Eastern Counties Railway* (g). The works of the Company, in the present case, do not injuriously affect the Respondent's lands within the meaning of the Statutes. With respect to the trial, it was altogether *ultra vires*. And we have never acquiesced in it.

The *Solicitor General* (h), Mr. *Anderson*, and Mr. *Sandford* for the Respondents.

The level crossing, though not actually touching the Respondent's property, is yet in such close proximity that it damages it most seriously. Severance was an injury for which compensation might be claimed. A level crossing which endangered access

(a) 12 East, 429. (b) 5 Ad. & Ell. 173. (c) 2 Rail. Ca. 736.
(d) 5 Rail. Ca. 717. (e) 6 Rail. Ca. 371. (f) 6 Rail. Ca. 389.
(g) 2 Rail. Ca. 736. (h) Sir R. Bethell.

was an injury of the same kind as severance, and ought to be dealt with in the same manner. This question has already been decided in the case of the *Cowan Hospital* (a) The Legislature throws on the Company the obligation of making other communications substitutionary for those taken away.

[The LORD CHANCELLOR: The landowner might bring an action and show that the injury was within the provisions of the Act of Parliament. All that the Jury decide is, that if the injury be within the Act, the damages shall be so much.]

But in the present case all objections of this sort are waived or cured by the appearance of the Company before the Jury. *Corrigal v. The London and Blackwall Railway Company* (b). The same doctrine holds in Scotland. The judgment therefore on the merits is unassailable.

[The LORD CHANCELLOR: The North Kent Railway crosses the entrance to Woolwich on a level, and yet none of the inhabitants have ventured to complain. The same thing occurs at Liverpool, at Hull, and at various other places.]

[The Lord ST. LEONARDS: There is a level crossing by a railway near my house in the country. This is an inconvenience—a great inconvenience, no doubt; but no one affected by it has ever thought of seeking compensation.]

We contend that damages would lie in England. In *Greasley v. Codling* (c) it was held, that the being delayed four hours by an obstruction in a highway, and the being thereby prevented from performing a given journey as many times in a day as if the obstruction had not existed, was an injury sufficient to render

(a) 12 Dunlop, 999.

(b) 5 Mann. & Gr. 219.

(c) 2 Bing. 263.

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the obstructor liable in damages. *Rose v. Miles* (a),
Rose v. Groves (b), *Wilkes v. Hungerford Market* (c).

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The LORD CHANCELLOR (d) :

My Lords, I should have been extremely sorry if your Lordships should, on any technical grounds, have felt yourselves precluded from expressing your opinion, and giving your judgment upon the main question, namely, the merits of this case ; because those merits involve a question of considerable importance ; namely, whether a proprietor, who holds land adjoining a newly constructed railway, can, under the clauses of the General Act and the Special Acts, which give him a right of compensation in respect of any injurious effect upon his lands, claim from the company compensation, because at a short distance from the entrance to his grounds the railway traverses an important public road upon a level.

The map which both parties here have referred to, and which we may take therefore as accurately representing the state of the ground, shows that at a short distance (whether of forty-nine yards or fifty-nine yards is immaterial) from his gate, the railway does traverse upon a level a public road which, though not the only approach, is yet the most common and the best approach to his house. He claimed compensation, and the Sheriff's Jury returned a verdict for 300*l.* in respect of land and freestone, and for 560*l.* in respect of severance and level crossing, but without distinguishing how much had been assessed for the severance, and how much for the level crossing. The question is, whether it was competent to the Sheriff to give any redress in respect of this level crossing ; and,

(a) 4 Maule & Sel. 101.

(b) 5 Mann. & Gr. 613.

(c) 2 Bing. N.C. 281.

(d) Lord Cranworth.

my Lords, I am of opinion that no compensation can be claimed or legitimately given on this head of complaint.

These Acts of Parliament are, as unfortunately is too often the case, loosely worded—but the construction that is put upon this expression, “injuriously affected,” in the clauses in the Act of Parliament which gives compensation for injuriously affecting lands, certainly does not entitle the owner of lands which he alleges to be injuriously affected, to any compensation in respect of any act which, if done by the Railway Company without the authority of Parliament, would not have entitled him to bring an action against them. I purposely guard myself by putting it in that way, because I am far from admitting that he would have a right of compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment, but a right of action. And the necessity of so guarding myself is made apparent by one of the last cases quoted by Mr. *Anderson*, the case of *Greasley v. Codling*, which, if the law be applicable to a railway, would certainly entitle everybody who is stopped for a minute while the gates are shut to an action for damages; because it would be said, under the authority of that case, which I think is a very correct decision, that where an act is done, such as shutting gates across a public road without the authority of Parliament, that gives the parties a right of action. If therefore the Act of Parliament did not mean to exclude the right of compensation in some cases, in which, if the Act had not passed, there would have been redress, every person who is stopped for a moment while the gates of a railway are shut at a level crossing, would be entitled to an action.

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But, I apprehend, it is clear that in these Acts of Parliament the Legislature means to authorize these public companies, for the convenience and advantage of the public, to do acts with regard to which they are not only relieved in respect of what they are doing from indictments at the instance of the public, or, speaking more properly, at the instance of the Crown, but they are also entitled to do them without being liable to redress at the suit of individuals. That cannot be better illustrated than by the case which has been put by Mr. *Anderson*, that they are authorized to have a railway upon a crossing having gates to prevent persons passing along the road at times when it would be dangerous by reason of trains being near at hand. That necessarily, therefore, occasions a stoppage to persons, which, if there were not an Act of Parliament, would entitle them to bring an action against the Railway Company. It is clear that the Legislature meant to exclude any right of action in such a case as that.

Now, my Lords, that being the case, suppose that, without any Act of Parliament having been passed for making this railway, certain speculators had taken upon themselves to make a railway across a public road, and had erected gates, certainly the owner of the estate might, with respect to any detention occasioned to him by the closing of those gates, bring an action against the makers of the railway, and, as he might do this *toties quoties*, he would probably have more frequent rights of action than other subjects of Her Majesty. But it would only be a more frequent repetition of the same damage; it would not be any damage different from that which might be sustained by any other subjects of Her Majesty; for all attempts at arguing that this is a damage to the estate is a

mere play upon words. It is no damage at all to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it.

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It appears to me, therefore, clear by the Acts of Parliament, and by the intention of the Legislature, that there is no right of compensation whatsoever; for, except for any actual detention, no right of action would have existed if the making of the railway had not been authorized by Parliament, and the detention caused by the necessary closing of the gates is certainly made lawful by the Act.

My Lords, I consider this to be not only clear upon principle, but clear also upon the authority of the cases relating to this subject. The cases enunciating this principle are not indeed very numerous, and for this reason I take it that in the Courts of England it has been assumed that the principle is perfectly clear. It was so assumed in the case of the *South Staffordshire Railway Company v. Hall*. It is also adverted to by Lord *Truro* in *Gatlke's* case. The same principle was also expressly referred to by Lord *Cottenham* in the case of the *London and North-western Railway Company v. Smith*; and the circumstance, that in many of those cases the Judges have expressed an opinion that there would probably be a right of compensation, not only affords no argument in favour of the Respondents, but is an argument against them—because the grounds upon which the right of compensation in those cases has been put, are grounds upon which, in this case, do not exist. In the case of the *South Staffordshire Railway Company* against *Hall*, there was a railway traversing a private road between a public road and a house, interfering with

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the easement which was possessed by the owner of that property. *Gattke's* case I think was something of the same sort. Then there was the case of *The Queen v. The Eastern Counties Railway Company*, where compensation was held to be legitimately claimable. That was a case in which the owner of the land, having his land adjoining what was, before the passing of the Act for making the railway, a public road, with a gate that let him out into the public road, was by the making of the railway deprived of that road, and his gate was a gate up in the air, so to say. It was of no use to him—and therefore he was materially damaged. These were all cases of special and peculiar injury. It was the same in a case which was before me, and I think Lord *Truro* also, of a tunnel that was being made close adjoining a public house where deposits of wine and beer were kept—the proprietors of the house were damaged by the making of this tunnel. That was a personal and private injury to the land, and consequently, to the owner of the land.

Upon the merits of this case, therefore, I confess that I entertain no doubts whatever. I should have had more hesitation in moving your Lordships to decide at once against the decision of the Court of Session without hearing the reply, were it not that it is clear to my mind that in the case now under your Lordships' consideration, the learned Judges, though apparently unanimous, were not really so; and that they acted in the way in which they did act because a former case, namely, *Cowan's* case, bound them, very legitimately, to decide in conformity with what had been decided before: Lord *Cuninghame* saying that the only reason that he decided in the way that he did was, that his views, which had been very clearly expressed against the

doctrine in Cowan's case, had been overruled, and that he felt himself bound to defer to the decision which was pronounced in that case. The learned Judges seem, I think, to have very much distrusted the accuracy of the former decision, but they held themselves bound by it. I must say that in the doubts which were expressed by Lord *Cunninghame* I entirely concur; I feel no hesitation in saying that the view then taken was inconsistent with all the string of authorities, to which there is no exception whatever in this country, and which are founded upon principles as applicable to the law of Scotland as to the law of England.

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My Lords, that would dispose of the case, were it not that two or three points having the character of points of form, have been raised, with which it becomes necessary to deal—though there is nothing in them which precludes your Lordships from doing justice to the merits of the case. There have been three points raised. In the first place, it is said that this question is not open to your Lordships at all; for that by the Act of Parliament (a) the decision of the Sheriff is made absolute and final, subject to no review whatever. The language of the 139th section of the Lands Clauses Consolidation is “such judgment shall in no case be subject to review by suspension, or advocacy, or by reduction upon any ground whatever.” It is impossible that the Legislature could have meant literally that nothing should ever enable you to question a judgment of this sort by the Sheriff. Suppose the Sheriff's judgment had been, that for the value of the land they assessed 100*l.*, and because the Railway Company had damaged

(a) The Lands Clauses Consolidation Act, 8 & 9 Vict. cap. 19.

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a house they assessed 1,000*l.* more. That would be absurd. What jurisdiction had they to assess any value for the house? It would be clear that in that case they would be doing something *ultra vires*, and I never can believe that that clause can be meant to apply to cases where, on the face of the proceeding, the Jury are doing something that they have no authority whatsoever to do. In the first place it may be observed that if this Section is construed quite literally, it only applies to cases where there has been originally a proceeding before the Sheriff Substitute, and that proceeding has been taken by appeal before the Sheriff. Those are the only cases in which the "judgment shall in no case be subject to review by suspension, or advocacy, or by reduction on any ground whatever." I should, however, be loth to take so narrow a ground as that, because I think, even in the case which I have supposed, if the directions of that clause had been strictly complied with, and there had been a proceeding first before the Sheriff Substitute, taken then before the Sheriff, and the Sheriff had made his judgment, if it appeared upon the face of it that he was adjudicating upon something which he was not authorized to adjudicate upon, this Section never could be said to have the effect of ousting the jurisdiction of some Court or other to set that matter right.

Then, the next objection is this:—that this error assuming it to be an error, was acquiesced in. Now, my Lords, it is a very well known rule of all Courts, that persons do not give jurisdiction as it were—do not enable Tribunals to pronounce judgments, only because such persons do not properly object in matters in which it is the duty of the Court itself to see whether it has or has not jurisdiction. I do not look into all that passed before the Sheriff, for that is not

properly before us; but, upon looking at the proceedings which are before us, it is very doubtful in what mode this Company could have taken an objection to the proceedings. For it is to be observed that the first claim is made in November 1845, by the Respondent, Mr. Ogilvy, in which he seeks compensation under five different heads:—First, the value of his land; secondly, compensation for severance; thirdly, compensation for the injury done to what he calls the amenity of the property as a residence. That is a legitimate subject of compensation—residential injury is always considered in these cases; fourthly, very material injury done by this level crossing; and, fifthly, injury done by works having the effect of debarring him from working a quarry. Under these five different heads of claim, he demanded 2,716*l.* It was attempted to get that demand settled, not by a Jury, but by Arbitration. How it was that that Arbitration went off we do not know, but no award was made; the matter dropped, and three years afterwards (I suppose the making of the railway was delayed a long time) a new claim is sent in, under which he simply claims 2,500*l.* sterling as compensation for the land taken, and for those different heads of damage. Now, if that was the only document upon which the parties were proceeding, there was nothing to distinguish what damage, *ultra* the value of the land, he was going for at all. But not to be too nice upon this point, let us suppose that to be coupled with the preceding claim of 2,716*l.*, and that there was notice to the parties upon the face of the claim, that a portion of what he claimed was for this level crossing, in respect of which there was no right to compensation; what course was the Company to take? Where a party was claiming the large sum of 2,716*l.*, and in respect of 2,400*l.* of that he certainly is entitled to

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what he claims, if he has put the items right, it was an idle proceeding to say,—I admit that you are entitled to compensation in respect of the 2,400*l.*; but I say that you have no right to compensation in respect of the 300*l.* It would all be properly discussed before the Sheriff, because it was his duty to have pointed out to the Jury, that in respect of one of those five heads of demand they had no right to give compensation at all. If he had done that, the matter would have been settled. If, by the course which he took, he added in any respect to the costs, that might afford a very legitimate ground for warranting the Sheriff (it would have been his province, or the province of any Court afterwards,) to take care to set the matter right, in point of costs, as far as could be done. When the witnesses were called it made no difference asking a few more questions. There was no additional cost to be incurred in proving the level crossing. The whole matter was before the Jury. Some more questions might have been asked, and it was the duty of the Sheriff to point out to the Jury; and to the parties, if necessary, that he had no power of directing the Jury to assess any compensation in respect of one head of claim put forward.

My Lords, there is one other point of form that was insisted upon by Mr. *Anderson*, which is, that these proceedings were not so conducted as to enable the parties to raise this point. And his argument arises in this way, under one of the clauses of the Act, viz., the clause which directs the finding of the verdict by the Jury, it is expressly provided that the Jury shall separately assess what they give for the value of the land, and what they give for compensation. That they have done. The Jury find “that the sum to be paid by the complainers to the said George Ogilvy on account of damage sustained by his estate of Clove from

the said Company is 360*l.* for land, and freestone ;” that is, for land, and the soil of the stone underneath ; “and for severance and level crossing of the parish road, the sum of 560*l.* sterling.” Now, he was certainly entitled to some compensation for the severance of another bit of land at the left-hand side, and Mr. *Anderson’s* argument is that the Railway Company ought to have pointed out to the Sheriff that the Jury should assess how much they gave for severance damage, and how much they gave for injury by the level crossing. I do not think that the verdict would have been bad if it had split out into every separate head ; but there is nothing in the Act of Parliament which imposes the duty upon the Jury, or the Sheriff, or the parties to make it so. They state distinctly that that for which they give 560*l.* sterling is “severance and level crossing.” It is a great misfortune that we are unable to say how much they gave for level crossing, and how much for severance. If they had done that, then, undoubtedly, we should have been able to reduce the verdict *quoad* so much as they gave for level crossing, and to award the rest ; but they do not do that ; therefore, I do not think it is any matter that at all destroys the verdict or disentitles them to have the question set right. It is certainly to be hoped that they will settle it among themselves without any proceedings before the Sheriff or any other proceedings of any other character. But if that cannot be done, your Lordships have only to decide what is the legal right of these parties ; and it appears to me to be clear that there is no matter of form standing in the way of our deciding that the Sheriff first, and the Court of Session afterwards, have fallen into an error in supposing that this level crossing was a subject for compensation at all ; that it is a *damnum sine injuriâ* ; that so the Sheriff ought to have told the Jury ;

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that the verdict, which upon the face of it is bad, is a verdict which cannot stand, but which ought to be overturned ; and that consequently the interlocutor of the Court of Session ought to be reversed.

•Lord
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opinion.

Lord ST. LEONARDS :

My Lords, I entirely concur in the motion which my noble and learned friend has proposed to your Lordships, both upon the question of what may be called form (but there is no doubt something of substance even in that), and also upon the question of merits. As regards the question of form, the most material one is that which was first argued by Mr. *Anderson*, that the Appellant might have had an action for suspension and interdict, and that in that case the question would have been decided before it had gone to a Jury. Now really that is only analogous to what has been already overruled in this country ; for in the case which has been referred to, Lord *Cottenham*, in the first instance, granted an injunction to stay the proceedings ; whether it was a case in which the parties were entitled to compensation or not, I think nobody pretends now to maintain that that was a proper decision. Equity has no such jurisdiction. The Act of Parliament gives a remedy, and upon the Act of Parliament the question must be tried. It is quite clear that no equitable jurisdiction is required, for all that equity could do would be to substitute something else for the provisions of the Act of Parliament. The Act of Parliament has directed the compensation to be estimated in a particular way, and the law would give a right, if there was wrong in the proceeding, to correct the error. Whereas, all that equity could do would be to direct an action in the first instance, without any authority to do so, in order to try in the first instance that which the Act of Parliament has not

required to be tried in the first instance, and that which may never require to be tried at all. For in most cases which go to a Jury the right would not be so much in dispute as the amount of the compensation, and no question would arise after the finding of the Jury which would require another proceeding. Now, the opinion of Lord *Cottenham* has been clearly overruled, and I entirely agree with the authority of the cases in which that opinion has been overruled ; I think the same principle applies in the present case. The injunction cannot be maintained, I think, by the provisions of the Act referred to. And as regards the general question, I think it is open to the Court of Session to correct any error into which the Jury may have fallen as regards an excess of their jurisdiction, just in the same way as, by a proper process in England, a similar error could be corrected in regard to compensation found here. The law is the same only with reference to the different tribunals, both in England and in Scotland, in regard to these cases.

My Lords, we then come to what is really the question intended to be brought before your Lordships' House, although the case carries us so much further, and that is the question of merits. Now, it is singular enough that in this very case it appears, on looking at the evidence before the jury, and it is stated in the Respondent's case, I think, that no witness was aware of any similar case, except the case of *Cowan's Hospital*. Nobody knew of a case in Scotland where there had been a successful attempt to recover damages of a like nature. Nobody disputes it in this country, and there is not one law applicable in this respect to Scotland, and another law applicable to England. The same law governs both countries—the same injury arises from the same cause. Whether it is on one side the border or the other is utterly indifferent,

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for there is the same law, although in different Acts of Parliament, with very slight variations, only such as to meet the different circumstances of the two countries when applied to the same circumstances with respect to railways, and the duties and the benefits arising or resulting therefrom.

My Lords, in England the universal opinion has been that no such remedy lies. If such remedy did lie, most unquestionably you would have had thousands of instances in which it would have been applied for, because daily and hourly men are sustaining damage and inconvenience from acts done under the authority of Acts of Parliament by railway companies. That is undeniable; but it is a damage authorized by the Act of Parliament, and it is a general inconvenience which all the Queen's subjects are subjected to, and for which no particular remedy is pointed out.

My Lords, it is clear upon the general reasoning, and upon the general view of all men in the profession, both in Scotland and in England, that the question would not bear a moment's argument. Therefore we will look at the cases to see how far the authorities bear that out. Now, in the case of the *Cowan Hospital* in Scotland, which was the foundation of the decision of the case now before your Lordships, the Court founded their decision simply upon this, that there was land taken, and therefore the party was further damaged by an act which otherwise would have affected everybody, and not that party more than others; or, if it did affect him more than others, it was only a question of *quantum*. But the circumstance of the land being taken gave a jurisdiction, and there might be compensation claimed for the particular crossing or whatever it was. Now it is quite clear that that is a foundation which cannot be relied upon here. It must be utterly indifferent to a case of this

sort whether land be taken or not as an abstract question ; because it is quite settled that there may be a damage, and compensation may be required by a party from whom no land is taken. If land be taken, it stands then separately by itself. For that there must be a separate assessment, a separate compensation, a separate price ; but you may find compensation for severance ; you may find upon your land, even that for which you have had compensation, certain quantities cut out in the middle of your field, and you are entitled to compensation for it as so much land. You are entitled to compensation again because there is a severance of two parts. But in respect of any other injury, unless it be an injury to the land, no claim can be founded upon the circumstance that compensation is given for land.

In concluding my remarks upon the cases, I concur with what my noble and learned friend has said with respect to Lord *Cunninghame's* authority in the case in Scotland. I think it is very much to be regretted that the Court of Session did not adopt it ;—it is a well reasoned judgment, and certainly it goes upon the true ground upon which the judgment ought to have proceeded. I cannot myself read what fell from the learned Judges in giving judgment in this case in the Court of Session, without feeling an intimate persuasion that they gave way simply to the decision which had already been pronounced, and that not one of them was satisfied with the grounds of that decision. But they seem to have been unwilling to reverse a decision so recently made ; and it is manifest that they rather invited the Appeal, at least one of the learned Judges certainly invited the Appeal, which is now before your Lordships.

Now, my Lords, as regards the authorities relating to this case, cited on the part of the Respondents, and therefore in support of the decision of the Court of

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Session, they are very few indeed. The case of *The Queen v. The Eastern Counties Railway Company*, which is in the 2d Railway Cases, was relied upon in Scotland, and is relied upon now at your Lordships' Bar; but in that case there was an actual injury I should say to the land; at all events there was an injury to the owner of the land, which would give him an immediate right, no doubt, to compensation. From his land he had been enabled to step at once upon the road, which had been lowered by the Company, and it had been so lowered that he lost his access to that road, unless he had new appliances in order to enable him to approach it. There was, therefore, a real injury—there was a ground of complaint there personal to himself, and which was not open to the rest of the world. It was a general complaint when he got to the road; when he got there he had to sustain an injury in common with all the rest of the Queen's subjects; that is to say, the road might be rendered a great deal less easy to travel upon than it was before it had been crossed. For that he would have no remedy;—it is a common inconvenience—all are subject to it; and the power to commit that injury was given by Act of Parliament for the public benefit; and therefore, the benefit which is received by the public from the railway is considered to be the only compensation to which the Queen's subjects in general are entitled in respect of the damage caused at the particular spot over which the railway travelled, or in respect of which the road in that spot had been lowered. I consider, therefore, that that case in no respect authorizes the decision of the Court of Scotland in this case.

The other case which was referred to was that of *Wilkes v. The Hungerford Market (a)*, and that clearly

(a) 2 Bing. New Cases, 281.

has nothing to do with this question, because, in point of fact, in that case the ground upon which compensation was claimed by a shopkeeper, the access to whose shop had been cut off by an Act of the Company under the Act of Parliament, enclosing the access to it, was, that they had unreasonably delayed the time of moving the board which prevented the access to his shop. The compensation was not claimed in respect of barring up the access which was authorized by the Act of Parliament, but the compensation was claimed in respect of the injury occasioned by the improper conduct of the Company in the exercise of the powers given to them by the Act of Parliament. They ought to have opened the communication sooner than they did ; and for that and that alone the compensation, I think, was obtained. The shopkeeper was enabled to recover compensation to the amount of a few shillings by reason of the injury which was done him on account of the Company having delayed the removal of the board for a few days. That case, therefore, has no bearing upon the question now before your Lordships.

My Lords, I will just refer to the cases in favour of the view that I am now submitting to your Lordships. Let us see what the circumstances are ; here there is no inconvenience which is not sustained by the whole of the Queen's subjects ; there may be, there must be, in these cases a question of more or less inconvenience. It may be that a man who has a couple of stalls alongside of the road may have ten times oftener to traverse the road than the owner of the finest mansion within a quarter of a mile of it, or even abutting upon it ; and, therefore, it is impossible to estimate the quantum of inconvenience unless it amounts to a damage such as that to which I have referred in the first case, or to an unnecessary continuation of the damage to which I have referred in the second

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case. But in this case I can see nothing by which this gentleman would sustain damage beyond what everybody else sustains. His estate is not damaged. Before the Jury it was insisted that he was actually entitled to damage in respect of the railway being near his property. That was a little too violent, and they do not appear to have acted upon it; but all the Respondent's witnesses declared that no benefit accrued to his estate from having a railway near it. That seems rather a strong view of the case, because there are nuisances, no doubt, arising from having a railway near you, yet there are also some benefits attaching to it, in consequence of the facility of travelling, and having it so near your own door. But I can see nothing which affects this gentleman's estate in respect of the crossing. That is a common inconvenience to everybody. The Act of Parliament, of course, it must be borne in mind, expressly authorizes the crossing on a level. Now, in passing that Act of Parliament, no man could shut his eyes to the unavoidable consequence of that kind of crossing. It is a very great inconvenience; nobody has to sustain the inconvenience who does not feel it very much; it not only delays your progress, but, by the very circumstance of its being a level crossing, horses in carriages, and horses which men are riding, must necessarily be very carefully guarded in order to prevent the alarm which all horses almost inevitably feel from the rushing by on a level, of a railway train; but there is no compensation to be had for that. And if there were, I ask where are we to stop? I do not deny that if any particular damage could have been shown to be sustained by this party, to which the rest of the Queen's subjects were not subjected, there might be then a demand, although I am not prepared to say what would be the nature of that demand, which would give such compensation.

But here it is only a question of degree. It is a matter of opinion whether the estate is benefited or not by the contiguity of the railway; but he sustains no damage beyond what is sustained by other people, or it is only a question of the degree of inconvenience sustained by him as compared with the inconvenience sustained by other people.

My Lords, the authorities on the other side appear to me to be perfectly conclusive. With respect to the case of *The Queen v. The Bristol Dock Company*, I cannot myself distinguish that case from the present case. There was a public river accessible to all men, the water in which might be used by all men, subject, no doubt, to certain conditions, but the water, speaking generally, might be used by all men; any man could advance to that river and help himself to a pailful of the water, or a cartful of the water. A person having a brewery within a certain distance, diverted a sufficient portion of the water of the river for the purposes of his works. Then the Bristol Dock Company, under the authority of their Act of Parliament, executed certain works which contaminated the water, and rendered it no longer fit for this man's use. He says, I sustain a particular damage from that circumstance, for the water which I used before, and had a right to use, has become so deteriorated and of such quality that I cannot any longer carry on my business. It was held that he had only a general right; that nobody had any particular personal right to the water, that it was common to all the King's subjects, and that, therefore, he was not entitled to recover upon that ground alone. Now, where is the difference between a public river and a public road? The rights of both are common. A public river is, in point of fact, a highway, and a public road is a highway. You use each according to its quality, and if you have only that common right

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which belongs to all men, you cannot claim compensation in regard to a damage to either the one or the other which is authorized by an Act of Parliament. And if in any such case Parliament ever did intend that compensation should be given, it is perfectly manifest that it would be given generally to all within a certain limit, because there must inevitably be damage to many to a certain extent.

My Lords, the same principle was, in a later time, held in the case of *The King v. The London Dock Company*. There it was a claim to a common road, which was stopped up. That road was common to all; and it was held that no individual could maintain a right of compensation in respect of the damage done to him.

My Lords, I will now refer to the case of the *East and West India Docks and the Birmingham Junction Railway Company v. Gattke*. Lord Truro there lays down the same principle; I believe he went out of his way rather to declare that opinion. He says, speaking of the East and West India Dock Company, "I think this case is quite distinguishable from the case of the *London and North-western Railway Company v. Smith*, upon the following grounds. In that case, compensation was claimed solely upon the ground of injurious affection resulting from the pernicious stoppage of what, at the time of the Company's Act, was a public highway. No damage or injury was sustained by the Plaintiffs, but what, in a greater or less degree, applied to all the Queen's subjects; and the question was a question of law which seems to approximate very nearly to the question decided in the case of *The King v. The Bristol Dock Company*, in which case compensation was claimed by certain brewers, who were in the habit of using the water of the Avon for brewing, by reason of the Dock Company having rendered the water unfit for that purpose in

the construction of their works. But the Court held that no such appropriation of the water had taken place as to give the claimants more right to complain than any other individual of the public who had been in the habit of getting water from the river. The complaint, in substance, was a public nuisance, for which an indictment would have been the only remedy, if the Legislature had not authorized it to be done. In that case, the injury complained of was common to the public, as it was also in the case of the *London and North-western Railway Company v. Smith*, and it might reasonably be contended that the case of the *The King v. The Bristol Dock Company* was a direct decision against the validity of that claim." Therefore; I can find nothing, after looking very anxiously through the cases, to induce me to alter the opinion which I had previously formed. Having formed a very strong opinion upon this case, I was anxious to see whether there was anything which would bear against it in point of authority. I can find nothing that has the slightest tendency to lead me to a different opinion from that which I had formed upon the merits of this case. It appears, therefore, that all the authority is one way, and that all the general opinion of the profession is the same way, and too much weight, generally speaking, cannot be given by any Court of Justice to what is fairly known to be the general opinion of the profession. It is scarcely possible, that all men advising, can go wrong, and I have hardly ever known a case in which what has been deemed the general opinion of the profession has not ultimately been found to be the correct opinion. I think, therefore, that I must come to the same opinion, and state to your Lordships that the Court of Session has miscarried in the decision at which they have arrived.

My Lords, I am very anxious that there should be

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some stop put to these proceedings, and, therefore, if it can now, by any suggestion that the House can make, be so arranged as not to let that happen which inevitably will be the result, if a Common Order is made, viz., that the Case do go back to the Court of Session, in order that a new litigation may be commenced in this matter, and the question be again referred to another jurisdiction, with all the consequences of such a proceeding. I should very much lament if that should take place; and, I think, if the parties on both sides are inclined to act reasonably, it cannot and ought not to take place. Now, the Court below considered and found that the Respondents in this case had recovered more than they were entitled to recover, and they gave them the costs. As far as I can judge, the sum that was given for the supposed damage by the level crossing must have been a very small sum. I should think that was so.

Sir Fitzroy Kelly: It was 500*l*.

Mr. Anderson: No; that is quite a mistake.

The Lord ST. LEONARDS: If you can come to an agreement between yourselves in five minutes, as to what should be deemed the measure of damages given by the jury in respect of the level crossing, the question then would only arise in respect of the costs; because that sum would probably reduce the amount below that which was offered by the Company, and then the Respondents would not be entitled to the expenses which they obtained in the Court below. If you can agree upon what I shall venture now to suggest to you, it will be for the benefit of both parties, and I must say it will also be for the interests of the administration of justice. It would be a sad thing if this case should go back to Scotland, in order that in such a trifling matter a new litigation should be commenced in the Court of Session with a new direction for a trial

by another Jury, and go back again to the Court, and, perhaps, ultimately end with another Appeal to this House. If you can agree upon the sum which was awarded by the Jury in respect of the level crossing, and then it should be thought just that there should be no costs on either side, but, that up to this time, each party should bear his own costs, and that the sum which should be considered to be the measure which the Jury gave for the damage occasioned by the level crossing should be struck off the amount sought to be obtained by this Appeal, then I think the interests of both parties would be consulted, and the interests of justice will not have suffered.

Sir Fitzroy Kelly : My Lord, on behalf of the Caledonian Railway Company, I have only to state that the misfortune seems to be that we differ about the sum which the Jury actually meant to give in respect of the damage occasioned by the level crossing. We have an averment, which, however, is denied, but which we believe to be true, that the Jury meant to give 60*l.* for the severance and 500*l.* for the level crossing. If that be admitted, I should be perfectly content to consent to reform the verdict, and enter it exactly as if it had been pronounced according to law.

The Lord ST. LEONARDS : That is rather helping yourself to the lion's share.

Mr. Anderson : I am informed that that is quite incorrect ; it is not admitted. I think it is preposterous.

The Lord ST. LEONARDS : What do you say to this course,—that you should divide the sum.—Let half of the sum be considered as the amount that should be properly awarded for severance, and let there be no costs below on either side, and no costs of this Appeal.

Sir Fitzroy Kelly : If it follows that we should be entitled to half the costs, supposing the law gives them to us, I should have no objection to that course. We

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feel satisfied of the fact that 60*l.* only was given for the severance.

The Lord ST. LEONARDS: You are not answering it as I put it. Are you willing to enter into an agreement on both sides to meet the justice of the case in order to stop the litigation from Scotland, which we see constantly in this House, and which calls for considerable reprobation. There ought to be a check put upon it.

Sir *Fitzroy Kelly*: What I am content to do is this: I say no more than what we believe to be the fact. In accordance with your Lordship's suggestion, I would consent to this on behalf of the Railway Company. The verdict for the land actually taken was 360*l.*,—that, I presume, neither party seeks to disturb. The verdict for severance and level crossing was 560*l.* Now, my Lord, I have no objection to halve that, and to let the verdict stand for 360*l.*, *plus* the half, which would be 280*l.* That would make together an entire verdict for 640*l.*

Mr. *Anderson*: That is 200*l.* less than they offered us before we went to trial.

The Lord ST. LEONARDS: I recommend you, Mr. Anderson, to accede to that proposal.

Mr. *Anderson*: My client is not here.

The Lord ST. LEONARDS: You had better act for your client.

Mr. *Anderson*: If it were put to me I think it is a very unreasonable proposition on the part of my learned friend.

Sir *Fitzroy Kelly*: I shall not increase my offer.

Mr. *Anderson*: Their offer to the Respondent before they went to trial was 850*l.*

Sir *Fitzroy Kelly*: But we know that Railway Companies invariably offer a great deal more than they think just, because they know that there will be large

costs incurred in the event of a trial, which must fall upon them. I will do what I have proposed because it was suggested by the noble and learned Lord.

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The Lord ST. LEONARDS: I should recommend you, Sir Fitzroy Kelly, rather than this litigation should go on, to adhere to your original offer. That would prevent all difficulty, and no costs should be allowed.

Sir *Fitzroy Kelly*: I cannot do that, because it would be introducing a precedent quite fatal to the interests of Railway Companies. They always offer some hundreds of pounds more than they think to be just, because they know that large costs will be incurred in the event of a trial, which must fall upon them.

Interlocutors reversed, and cause remitted, with declaration that the Respondent was not entitled to any compensation in respect of the level crossing in the Appeal mentioned.

GRAHAM, WEEMS, AND GRAHAM.—JOHNSTON,
FARQUHAR, AND LEECH.