

COURT OF SESSION

Wednesday, December 7, 1887.

OUTER HOUSE.

[Lord Lee, Ordinary.]

MACPHERSON v. CALLANDER AND OBAN
RAILWAY COMPANY.*Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 33), secs. 52, 60, 68—
Level Crossing—Locked Gates.*

Held that a railway company, acting under the provisions of the Railways Clauses Consolidation (Scotland) Act, 1845, is not entitled in the ordinary case to put locks upon gates at level-crossings over accommodation roads, and that to justify their doing so a case of necessity, or of such high expediency as to amount to necessity, would have to be made out.

Alexander Macpherson was tenant of Letters Farm, near Lochearnhead. The farm was approached from the turnpike road by a carriage road, across which there was a level railway crossing. This crossing was made by the Callander and Oban Railway Company about 1867, when the gates on each side were made to fasten with a latch, but without lock and key.

In March 1887 the railway company put a padlock on each of the gates, alleging that this had become necessary for the safety of the public travelling on the line in consequence of the increased traffic. They offered the keys to Alexander Macpherson, who refused them, and raised an action of declarator against the railway company, by which he sought to have it found and declared that "the road or way leading from the turnpike road to the pursuer's farmhouse and farmsteading of Letters, across the defenders' line of railway, on the level, near their Lochearnhead station, is the roadway or approach to said farm and farmhouse and steading from said turnpike road, and that the pursuer as tenant thereof, and his servants, and all others requiring access to said farm or farmhouse, are entitled to the free use, possession, and enjoyment of said roadway or approach for the purposes of carting, driving, riding, walking, &c.: And that the said defenders have no right to impede or obstruct the pursuer, his servants, and others aforesaid, in the said free use and enjoyment of the said right of way or road, or in any of their rights and privileges, excepting always when and so long as it may be necessary for the defenders to close against all traffic the gates at said level-crossing during the passage of trains along their line of railway: And that the defenders are not entitled to keep said gates constantly fastened under lock and key, or fastened in any way so that they cannot be opened by the pursuer and his servants, and others requiring to walk, ride, cart, or drive across said level-crossing: And the defenders ought and should be decreed and ordained, by decree foreshaid, to remove the said locked gates, and all other obstructions erected by them upon said road, in so far as they exclude free and open access to the pursuer, his servants,

and others, by the said road and level-crossing to and from his said farm and farmhouse at all necessary times, excepting always when it is necessary for said gates to be closed to allow of the passage of trains along said line of railway."

The Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. c. 33), provides by sec. 52 that "if the railway shall cross any highway other than a public carriageway on the level, the company shall at their own expense make and at all times maintain convenient ascents and descents, and other convenient approaches, with handrails and other fences, and shall, if such highway be a bridleway, erect and at all times maintain good and sufficient gates, and if the same shall be a footway, good and sufficient gates or stiles, on each side of the railway where the highway shall communicate therewith."

Section 60 provides that "the company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, (that is to say) such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the side, or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made."

Section 68 provides that "if any person omit to shut and fasten any gate set up at either side of the railway for the accommodation of the owners or occupiers of the adjoining lands as soon as he and the carriage, cattle, or other animals under his care have passed through the same, he shall forfeit for every such offence any sum not exceeding forty shillings."

The pursuer stated that he was put to great inconvenience by the gates being locked, and that neither visitors nor tradesmen could come to the farm in consequence. He pleaded, *inter alia*—" (1) The defenders are not entitled to lock the gates at said crossing against pursuer, his servants, and others seeking access to his house and farm, and decree should be pronounced as craved."

The defenders stated that the safety of the public made it necessary that the gates should be kept locked; that the gates at their other level-crossings were so kept; that there were wicket-gates for foot-passengers; that the keys of the gates were always at their station at the call of the pursuer or his servants; and that they were still willing to hand them over to the keeping of the pursuer.

They pleaded, *inter alia*—" (2) The defenders having all along tendered the keys of the locked gates to the pursuer, and these being again now tendered to him, the present action was unnecessary, and the defenders are entitled to absolvitor."

Argued for the pursuer—The defenders had no right to lock the gates unless they had a man always at the crossing to open them, as in the case of crossings over turnpike roads, which were provided for by section 40. The Act contemplated gates which could be opened by anyone crossing, for it put a penalty upon failure to close and fasten them.

Argued for the defender—The matter was one for their discretion. They were bound to protect the travelling public as far as they could. They were putting the pursuer to no unreasonable in-

convenience. It was his own fault that the keys were not in his own house.

The Lord Ordinary (LEE), on 7th December 1887 found and declared in terms of the declaratory conclusions of the summons.

Opinion.—The defenders' railway at a point near Lochearnhead Station crosses on the level the carriage road forming an approach to the farm and farmhouse occupied by the pursuer. The pursuer in this action complains that the defenders have recently put a lock on each of the gates at this level-crossing, and have kept the gates locked day and night so that no one without a key can pass along the road, and this statement is not denied. The principal question raised by the record is, Whether the defenders are entitled to keep the gates so fastened, or fastened in any way, so that they cannot be opened by the pursuer or his servants or visitors requiring to pass along the road over the level-crossing?

“The defenders allege, and I think that at this stage it may be assumed, that they offered the keys of the gates to the pursuer, and that it is common at other level-crossings on their railway to keep the gates locked.

“The question whether they are entitled to do so on an accommodation road such as this appears to me to depend on a construction of the 60th and 68th clauses of the Railway Clauses Consolidation Act. It was not contended for the defenders that by their special Act they had obtained any powers beyond that of constructing their railway, and maintaining and using it subject to the provisions of the general Acts.

“It appears to me, that the right of the company with respect to the maintenance of accommodation works includes everything which naturally and reasonably arises out of the obligations imposed on them. On this principle I have no doubt that the obligations imposed on them with reference to forming the line and protecting it against trespass, cattle-straying, and other inconveniences likely to prove a source of danger to the lieges, give to the company discretionary powers of considerable latitude in arranging the gates and stiles which they are required to provide. But it is a different question whether the gates which they are required to provide for the

accommodation of the owners and occupiers of land may be kept by them locked so that no one can pass through without a key. It is implied in the provision of sec. 68 (which imposes a penalty on anyone who shall ‘omit to shut and fasten any gate set up at either side of the railway for the accommodation of the owners or occupiers,’) that the gates to be provided and maintained shall be shut and fastened. But it does not follow that such gates are to be fastened with lock and key. There are many kinds of gate quite in common use which shut and fasten themselves by gravitation, and in a manner perfectly sufficient to keep up the continuity of the railway fences without being locked.

“To justify the railway company in insisting upon the gates at any particular place being kept fastened by lock and key, I think that a case of necessity, or of such high expediency as to amount to necessity, would have to be made out. No such case is alleged here. This is the ordinary case of a level-crossing over a carriage-drive through agricultural or pasture land. To keep the gates locked would impose on the owner or occupier the burden of maintaining a gatekeeper at the place for accommodation of tradespeople and visitors coming to the house. I fail to observe in the statute anything to support the contention of the defenders with respect to such a level-crossing as this is said to be. Gates that fall to and fasten themselves appear to me all that can be required or imposed upon the owner and occupier. I have therefore granted decree in terms of the declaratory conclusions of the summons.”

The defenders reclaimed to the First Division, but upon the case being called on 10th January they intimated their acquiescence in the Lord Ordinary's interlocutor, to which the First Division accordingly adhered with additional expenses.

Counsel for the Pursuer—Dickson. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders—R. Johnstone. Agent—R. Bruce Cowan, W.S.