directed to perform public duties, the cost of which is to be defrayed by rates, and the position of incorporated companies who are empowered for their own purposes and with a view to profit to undertake work of the same description. In the one case the public body is under a legal obligation to proceed with the undertaking, but its members act gratuitously and are neither entitled to make a profit nor are responsible for loss. In the other case the company is under no obligation to proceed with the undertaking, and is absolutely free to consider whether the speculation for which parliamentary powers have been obtained is worth prosecuting with a view to profit. If a railway company elects to make use of its parliamentary powers, it is in a certain sense executing an Act of Parliament, but it is not performing a public duty, and I think it would be foreign to the scope and purpose of the Public Authorities Protection Act to apply its provisions to the case of actions brought against a commercial company for acts or defaults in the execution of powers which they are under no obligation to put in force and which they only use for their own benefit. The Airdrie and Coatbridge Water Company being in fact and substance a commercial company, cannot in my opinion claim the benefit of the Public Authorities Protection Act, and on this ground I think the defenders' first plea must fail.

I also agree with the Lord Ordinary that this is not an action or proceeding of the nature contemplated by the Public Authorities Act. It is an action founded on the 100th section of the Act 1 and 2 Will. IV, cap. 43, which empowers the road authority to charge the expense of restoring a road against the persons opening it. It is therefore not a claim in respect of an act or default on the part of the Water Company, but is a claim arising from the statutory powers of the road authority to repair the road at the expense of the persons who open it, whoever these persons may be. The claim is given without limitation of time, and I think it is therefore unnecessary to consider at what particular time the damage done to the road by the Water Company may be held to have ceased, or whether the execution of the necessary repairs was brought to an end within the period of six months, which according to the defenders' argument limits the right of action. . . .

The question of the cost of repair is one of some difficulty. I think that the pursuers have proved the expenditure set forth in their account by such evidence as is reasonable and usual in executing contracts of this description. . . . On the other hand, it is sufficiently clear that the pursuers got a better road as the result of the labour which they have put upon it, and they cannot be allowed to charge the whole of their expenditure against the defenders.

The Lord Ordinary had on this ground cut down the claim from a sum of over £700 to £550. But then I think that the repairs authorised by the 100th section of the Road Act means a repair which may be done immediately and once for all, and that it was not intended that the road authority should go on making successive repairs at the cost of the Water Company or water authority until all trace of damage to the road should have disappeared. I therefore think that a further abatement of the account sued for is necessary, and I propose we should assess the pursuer's claim at £400. This would lead to a decerniture against the Airdrie and Coatbridge Water Trustees for that amount. As regards the contractors I am unable to see that there is any legal ground for a decree against them. It appears from the minutes of the District Committee that they declined from the beginning to recognise the contractors, and insisted on holding the water authority directly responsible. I think they were right in so doing, and it follows that Messrs Pate are entitled to be assoilzied, with expenses. . . .

The LORD PRESIDENT and LORD PEARSON concurred.

LORD KINNEAR was not present.

The Court recalled the interlocutor of the Lord Ordinary, assoilzied the defenders Thomas Pate & Son, and of new decerned against the defenders the Airdrie, Coatbridge, and District Water Trustees for £400.

Counsel for the Pursuers and Respondents—Wilson, K.C.—Orr Deas. Agents—Steedman, Ramage, & Bruce, W.S.

Counsel for the Defenders and Reclaimers—Clyde, K.C.—T. B. Morison. Agents—Drummond & Reid, W.S.

Tuesday, March 20.

FIRST DIVISION.

(EXCHEQUER CAUSE.)

[Lord Pearson, Ordinary.

H.M. ADVOCATE *v.* HEYWOOD-LONSDALE'S TRUSTEES.

Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Payment within Year of Death—Prepayment of Obligation in Daughter's Marriage-Contract Prestable on Payer's Death, thereby Extinguishing Annuity—Finance Act 1894 (*57 and 58 Vict. cap.* 30), *sec.* 2, *sub-sec.* (1) (c)—"*Gift.*"

In 1899 A bound himself in the marriage-contract of a daughter to pay a present annuity of £300 to her and on his death a sum of £15,000 to the marriage contract trustees for her behoof, with power to prepay the said sum in whole or in part, but as soon as the said sum or £10,000 thereof should have been paid the annuity was to cease. In 1900 A paid to the trustees £10,000 and died within six weeks.

Estate duty and settlement estate duty on the £10,000 having been

claimed under section 2 (1) (*c*) of the Finance Act 1894—*held* that these duties were payable.

Revenue—Estate Duty—Settlement Estate Duty—Property Deemed to Pass—Gift—Consideration in Money or Money's Worth—Discharge by Daughter in her Marriage-Contract of her Legal and Conventional Rights—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 3, *sub-secs.* 1 *and* 2.

A father, bound by marriage-contract and bond of corroboration to pay to his younger children after his death a sum of £12,000 with power of apportionment reserved, made certain provisions in favour of his daughter in her marriage-contract, which she accepted in discharge of her legal and conventional rights through his death. *Held* that for the purpose of calculating estate duty such discharge was not a consideration in money or money's worth which, in terms of the Finance Act 1894, sec. 3, sub-secs. 1 and 2, fell to be deducted from a payment by the father to the daughter's marriage-contract trustees made within a year of his death and forming property deemed to pass on his death.

The Finance Act 1894 (57 and 58 Vict. cap. 30), in Part I, which includes sections 1–24, deals with estate duty, and by section 1 imposes such duty upon the principal value of the property, real or personal, settled or not settled, which passes on the death of a person dying after the commencement of the Act. Section 2 (1) provides—"Property passing on the death of the deceased shall be deemed to include the property following—that is to say . . . (*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act 1881, as amended by section 11 of the Customs and Inland Revenue Act 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a volunteer were omitted therefrom."

Section 38 (2) of the Customs and Inland Revenue Act 1881, as amended by section 11 of the Customs and Inland Revenue Act 1889, and by the above-quoted section of the Finance Act 1894, reads as follows—"The real and personal or moveable property to be included in an account shall be property of the following descriptions, viz., (*a*) Any property taken as a *donatio mortis causa* made by any person dying after the first day of August 1894, or taken under a disposition made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased, or property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. (*b*) . . . (*c*) . . ."

The Finance Act 1894, by section 3, enacts—"(1) Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes, nor in respect of the falling into possession of the reversion on any lease for lives, nor in respect of the determination of any annuity for lives, where such purchase was made, or such lease or annuity granted, for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee. (2) Where any such purchase was made, or lease or annuity granted, for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit, or in the case of a lease, for the use or benefit of any person for whom the grantor was a trustee, the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

On 17th July 1905 the Lord Advocate, on behalf of the Inland Revenue, brought an action against John Pemberton Heywood-Lonsdale, of Bicester Hall, Oxfordshire, and others, trustees acting under the antenuptial contract of marriage, dated 28th July 1899, between Henry Heywood Heywood-Lonsdale, of Shavington and Coverley, Shropshire, and the Honourable Helena Mabel Hamilton, third daughter of John Glencairn Carter Hamilton, Baron Hamilton, of Dalzell. In it he sought, *inter alia*, that the defenders should be ordained to deliver an account of the amount paid to them as trustees by Lord Hamilton of Dalzell twelve months before his death, which occurred on 15th October 1900, in terms of the obligations undertaken by him in the said marriage-contract, in order that the estate duty payable thereon might be ascertained. The amount which had been so paid by Lord Hamilton was £10,000.

The defenders, *inter alia*, pleaded—"(2) On a sound construction of the Finance Act 1894 estate duty is not payable upon the sum of £10,000 in question, and the defenders should be assoilzied from the conclusion therefor. (3) The said sum not being liable to estate duty is not liable in settlement estate duty. (4) In any event the defenders are entitled to a deduction of £2000 from said sum of £10,000, in respect that Mrs Heywood-Lonsdale purchased the provision to that extent in money's worth as condescended on."

The facts of the case are given in the opinion (*infra*) of the Lord Ordinary (PEARSON), who on 3rd January 1906 pronounced this interlocutor—"Repels the defences: Finds that estate duty and settlement estate duty are payable by the defenders in respect of the sum of £10,000 paid to them on 5th September 1900 by the late Lord Hamilton of Dalzell, as property passing on his death within the meaning of the Finance Act 1894, and decerns and ordains

the defenders to deliver an account accordingly: Appoints the cause to be enrolled for further procedure; and grants leave to reclaim."

Opinion—"The defenders are the trustees under the antenuptial contract of marriage between Captain Heywood-Lonsdale and the Hon. Helena Mabel Hamilton, third daughter of the late Lord Hamilton of Dalzell. The question in dispute is, whether estate duty and settlement estate duty are due in respect of a sum of £10,000 which was paid to the defenders by Lord Hamilton on 5th September 1900, about six weeks before his death, which occurred on 15th October 1900.

"By his own marriage-contract dated in 1864, Lord Hamilton being heir of entail in possession of the estate of Dalzell, bound himself and the heirs of entail to pay a provision of £12,000 to his younger children, divisible among them as he (whom failing, his wife) should appoint, and failing appointment, equally. Upon a disentail and re-entail of the estate carried through in 1894-95, the security for this provision was continued by a bond of corroboration and disposition in security. The younger children of Lord Hamilton were six in number. The provision, equally divided, would yield £2000 to each, but this was subject to the parents' reserved power of apportionment.

"This was the position of matters when Captain and Mrs Heywood-Lonsdale were married. By their antenuptial contract of marriage, which is dated 28th July 1899, Lord Hamilton bound himself and his heirs, executors, and representatives to pay to his daughter as pin-money during his and her joint lives, or until payment of a capital sum as after mentioned, a free yearly annuity of £300 as an alimentary life provision, exclusive of all rights of her husband. Lord Hamilton further bound himself to pay to the trustees at the first term after his death a sum of £15,000, free of all death duties, with penalty and interest. He reserved, however, the right to prepay this sum in whole or in part during his life, in which event the payment of £300 should cease from the date of payment of the £15,000, or of not less than £10,000 thereof. The trustees were to hold the fund and pay the income to the wife, whom failing to the husband, and on the death of the survivor it was to be held for behoof of the children or issue of the marriage, subject to a power of apportionment. Failing children or issue, the whole was to be paid to the person for the time holding the peerage of Hamilton of Dalzell.

"These provisions were accepted by Mrs Heywood-Lonsdale as in full satisfaction to her of all legitim and others which she could claim through the death of her father, and also in lieu of all provisions by him in her favour in his own contract of marriage.

"The present question has arisen in consequence of Lord Hamilton having availed himself of his reserved power to make prepayment of the provision of £15,000 in whole or in part during his life. He prepaid £10,000 of it to the trustees on 5th September 1900, and thereby terminated his obligation to pay £300 a-year as pin-money; though, as he died within six weeks, this ceased to be of practical importance.

"The Crown claim that estate duty is payable in respect of the sum so paid as being property passing on the death of the deceased under and by virtue of section 2, sub-section (1)(*c*), of the Finance Act 1894. It is proper to note at the outset that section 2, sub-section (1), as now authoritatively construed, brings into charge certain classes of property which do not pass on the death of the deceased, but which, in terms of section 2, 'shall be deemed' to be property so passing; see *per* Lord Macnaghten in *Cowley*, 1899, App. Cas. 210-3. It is necessary to keep this in mind in construing the section, as it displaces the criterion of 'passing on the death' as the test of liability to duty, and substitutes for it the question whether the circumstances of the case in hand fall within the sub-section founded on. Now, the sub-section founded on is sub-section (1)(*c*), whereby 'property passing on the death' is to be deemed to include property which would be required to be included in an account under section 38 of the Inland Revenue Act 1881, as amended by section 11 of the Inland Revenue Act 1889, if those sections were re-enacted subject to certain important amendments which are set forth. The resulting enactment is to be found at page 110 of Hanson's Death Duties (5th edition), and it is under head A of that enactment that the question arises. This, so far as applicable here, includes (1) property taken under a disposition purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bona fide* made twelve months before the death of the deceased; and (2) property taken under any gift, whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. It is plain that this clause is dealing not only with gifts pure and simple, but with a wider class of transactions. In the previous Acts referred to the gift must have been taken under a 'voluntary' disposition, and the word 'voluntary' is now deleted, which points to gifts made in pursuance of some antecedent obligation as being within the clause. Further, the last clause, as to possible benefit to the donor by contract or otherwise, shows that the gifts contemplated include such as may have an element of onerosity in them, and this (as has been held in England) not necessarily by way of reservation out of the corpus or income of the gift itself, but arising *aliunde*. Now, the clause so construed appears to me wide enough to include the payment of £10,000 made on 5th September 1900. And if so, if that is the date at which the gift is to be regarded as made, then it is taxable, because it was made within twelve months before the death of the deceased. It is said that

this is merely a case of a debtor paying his debt before it was due and payable under the contract—which no one would think of describing as a gift; and, moreover, that even the anticipation of the period of payment was here of no advantage to the creditor, because the annuity of £300 (being three per cent. upon £10,000) ceased *ex contractu* as soon as the £10,000 was paid. But the repayment could not have been enforced, so that it was purely voluntary (though that is not required to bring it within the section); and operating as it did as a gift *inter vivos*, it was none the less so, within the meaning of the section as above explained, because it was not a pure and simple gift, but was attended with onerous considerations on the other part. I take it that one purpose of the section as it now stands is to distinguish transactions of gift (in the widest sense) from transactions of purchase and sale; and at all events the former, as defined by the words of the clause, do not exclude any given transaction merely because it may be (1) onerous, or (2) enforceable.

"But it is said that the only 'property' here was the original obligation by Lord Hamilton in his daughter's marriage-contract to pay the £15,000 at the first term after his death, subject to his reserved power to make prepayment to the effect of extinguishing her claim for pin-money. In this view, the 'disposition' is to be found in the marriage-contract which contained the obligation to pay, and which is dated 28th July 1899, more than twelve months before the death. But this brings into play the last clause of the enactment, namely, that relating to property taken under any gift whenever made, of which *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. It is said that here the donee was put into immediate possession and enjoyment of the gift, first by the delivery of the marriage-contract to trustees, and secondly by the payment of the pin-money. But the payment of £300 a-year and the payment of the £10,000 are quite different things, though not unconnected with each other. And the immediate possession and enjoyment of the gift can only be said to have been assumed at the date of the marriage-contract if it is the obligation to pay which is regarded as the gift, as distinguished from the payment. If so, possibly the delivery of the marriage-contract might be regarded as putting the trustees into possession, but in no view can it be regarded as conferring the 'enjoyment' of the gift.

"In either view, therefore, I hold that the main defence to the action fails, and that the Crown is entitled to have an account for the ascertainment of estate duty and settlement estate duty. The authorities to which I was referred on this part of the case were *Roberts*, 20 D. 449; *Montefiore*, 21 Q.B.D. 461; *Worral*, 1895, 1 Q.B. 99; *Holden*, 1903, 1 K.B. 832.

"But the defenders maintain that even if estate duty is payable in respect of the £10,000 they are entitled to a deduction therefrom of £2000, being Mrs Heywood-Lonsdale's equal share of the younger children's provision of £12,000, which, as already mentioned, she renounced and discharged in her marriage-contract. It is urged that this discharge, and also her discharge of legitim, operated as a partial consideration for the £15,000 provision undertaken by her father in her marriage-contract; and that deduction of such partial consideration is expressly provided for in section 3, sub-section 2, of the Finance Act 1894. I do not think this view is sound. In the first place, it would be impossible to put any definite money value upon the two items said to have been surrendered in 1899—on the legitim, because it was not ascertainable until Lord Hamilton's death, and was till then at his discretion; on the £2000 provision, because, although that was her equal share, it was defeasible by her father under his reserved power of apportionment. But, further, I do not regard section 3 as having any application to this case. The part of it which is said to apply is that which deals with a *bona fide* purchase and sale—'estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes . . . where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use or benefit.' Then sub-section 2 deals in the same terms with the case of a purchase for partial consideration, the value of which is to be allowed as a deduction from the value of the property for the purpose of estate duty. In my opinion there was here no purchase and sale; and there certainly was no consideration in money or money's worth paid to the vendor Lord Hamilton 'for his own use or benefit.' I hold, therefore, that the defenders are not entitled to any such deduction as they claim."

The defenders reclaimed, and argued—The present case did not come under section 2, sub-section (1) (*c*), of the Finance Act 1894, as the payment was made in pursuance of an antecedent obligation. The cases which were cited to the Lord Ordinary, and on which his decision proceeded, did not apply. *Att.-Gen.* v. *Holden*, [1903] 1 K.B. 832, was distinguishable, inasmuch as there was in it no antecedent obligation but a complete absence of onerosity. So, also, there was no antecedent obligation in *Att.-Gen.* v. *Worrall*, [1895] 1 Q.B. 99; *Earl Grey* v. *Att.-Gen.*, [1900] A.C. 124; *Att.-Gen.* v. *Johnson*, [1903] 1 K.B. 617. *Att.-Gen.* v. *Beech*, [1899] A.C. 53, was more nearly in point. This payment was no gift, since full consideration was given for it, and it was in effect the purchase of an annuity, so distinguishing the present case from that of *Att.-Gen.* v. *Viscount Cobham*, [1904] 90 L.T.R. 816. Nor did the second clause of the section of the statute as set forth in the Lord Ordinary's opinion render the payment liable to duty, since there was no

interest left in the settlor. The annuity was enjoyed by the donee, and a beneficial title was given to the total exclusion of the donor, so distinguishing the present case from those of the *Lord Advocate* v. *Roberts' Trustees*, January 26, 1858, 20 D. 449; and the *Att.-Gen.* v. *Montefiore*, L.R. [1888], 21 Q.B.D. 461. Here, had the donee been an individual, he might have realised full value in the open market; in addition the donee was in possession of a bond of corroboration, and so had *bona fide* possession of the gift, taking it to be such. No duty was exigible, and the Lord Ordinary's interlocutor should be recalled. In any event, a deduction should be made in assessing the sum liable to duty in terms of section 3 of the Finance Act 1894, since Mrs Heywood Lonsdale had given consideration by renouncing her legal and conventional rights. The cases of *Lord Advocate* v. *Warrender's Trustees*, January 9, 1906, 43 S.L.R. 278; and *Att.-Gen.* v. *Ellis and Others*, L.R. [1895], 2 Q.B. 466, were also referred to.

Argued for the pursuer and respondent—The duties sued for were exigible; under the statute, section 7, sub-section 1, no deduction would have been made in consideration of the obligation to pay the £15,000. This payment was clearly a gift in the sense of the statute, and the case was ruled by that of *Att.-Gen.* v. *Cobham, ut supra.* Section 2, sub-section (1) (c), applied, since it aimed at bringing into the scope of the Finance Act 1894 such transactions as the present which were alleged to be onerous. The word "gift" was here used in its ordinary sense as distinct from donation, and such a gift with a reservation was liable in duty — *Att.-Gen.* v. *Worrall, ut supra*; *Att.-Gen.* v. *Johnson, ut supra.* The question was, was the payment or obligation to pay originally a gift, whatever it had now become? It was—*Att.-Gen.* v. *Holden, ut supra, per* Ridley (J.) As to consideration having been received for the payment, in Scotland it was well settled that payments in a marriage-contract were not for a consideration in money or money's worth in the sense of the statute, the true consideration being marriage—*Lord Advocate* v. *Sidgwick*, June 6, 1877, 4 R. 815, 14 S.L.R. 522; *Inland Revenue* v. *Alexander's Trustees*, January 10, 1905, 7 F. 367, 42 S.L.R. 307. The case which ruled the present was that of *Att.-Gen.* v. *Smyth*, L.R., Ir. [1905], vol. 2, K.B.D. 553, and the duties sued for were payable.

At advising—

LORD PRESIDENT—This is a case arising out of the Finance Act in respect of the following circumstances:—Lord Hamilton of Dalzell, under his marriage-contract, was bound to pay a certain provision to his younger children, but with the ordinary power of apportionment. One of his children, the Hon. Helena Mabel Hamilton, married Captain Heywood-Lonsdale. Lord Hamilton became a party to his daughter's marriage-contract, and under that marriage-contract he bound himself to pay an annuity of £300 a-year to her, and the first term after his death to pay a sum of £15,000. This was to be in full of any right she could have either under his marriage-contract or in any other way. But he also took a power, if he chose, to pay a sum of £10,000 or £15,000 during his lifetime. If he so paid it, two events were to happen. In the first place, the sum of £15,000 after his death was to be either wholly or *pro tanto* satisfied, and secondly, his obligation to pay the annuity of £300 a-year was to cease. He availed himself of that option and did pay £10,000 to the trustees of Captain and Mrs Heywood-Lonsdale, but he died within six weeks of doing so. Accordingly a claim is made by the Crown for estate duty and settlement estate duty upon that payment of £10,000. That depends upon section 2, sub-section 1 (c), of the Finance Act of 1894. The Lord Ordinary has found that the duty is due. I am entirely satisfied with the Lord Ordinary's reasoning. He points out that the word "voluntary" now being cut out, "gift" must have a wider scope than it had before, and I should really have been almost content to add nothing to what the Lord Ordinary has said, but I think it right to say that our attention was called at the debate to a case which has been decided in Ireland, and which was, I understand, not brought before the Lord Ordinary's notice —*The Attorney-General* v. *Smyth*, reported in Irish Law Reports, 2 K.B.D., 1905, p. 553, in which there is a most exhaustive and luminous judgment of Chief Baron Palles dealing with what I think is exactly the same question. If I may be allowed to say so respectfully, I entirely agree with everything that Chief Baron Palles there said, and I do not think it could be more felicitously expressed. I shall therefore add, in my own words, only really one sentence to what the Lord Ordinary and the Chief-Baron have said. The English word "give" may be represented in the language of the civilians either by "do" or "dono." Now, it is true that the substantive which comes from "give"—"gift"—in ordinary colloquial language has come to represent *res donata* and not *res data*, but none the less I think it is still capable of the other construction, and I think the result of cutting out the word "voluntary" which was used in the statute is that "gift" can no longer be taken in the strict sense of *res donata*. Accordingly, for these reasons, I agree with the judgment which the Lord Ordinary has pronounced.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court pronounced this interlocutor—

"Adhere to the interlocutor [of Jan. 3, 1906], refuse the reclaiming note, and decern: Find the defenders liable in expenses since the date of the interlocutor reclaimed against, and remit the account thereof to the Auditor to tax and report to the Lord Ordinary in Exchequer Causes, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses."

Counsel for the Defenders and Reclaimers —Younger, K.C.—Hon. W. Watson. Agents —Hamilton, Kinnear, & Beatson, W.S.

Counsel for the Pursuer and Respondent —The Solicitor-General (Ure, K.C.)—A. J. Young. Agent—The Solicitor of Inland Revenue.

Tuesday, March 20.

FIRST DIVISION.

[Lord Low, Ordinary.

GLASGOW CORPORATION *v.* CALEDONIAN RAILWAY COMPANY.

Road—Railway—Burgh—Maintenance of Roadway—Bridge Carrying Street Over Railway—Railway's Obligation to Maintain Road—District Annexed to City from County—Special Powers of City Authority as to Streets—"Public Highway"—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 39.

The Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, provides for "any turnpike road or public highway" crossed by a railway being bridged by the railway company, and enacts that such bridges with the approaches shall be maintained by the railway company.

A railway company, whose Special Act conferred power in certain cases to substitute for existing portions of road new portions which were to be subject to the same provisions as the existing portions, crossed with its lines certain roads which at the formation of the line were under a county local authority. The roads were bridged in terms of section 39 of the Railways Clauses Consolidation (Scotland) Act 1845, in places new portions of road being substituted for existing portions. Some years subsequently the district embracing these roads was annexed to a City whose Special Act vested the roads in the city authority and subjected them to its other Special Acts, which contained provisions as to streets after being put on the register of public streets being maintained thereafter by the local authority.

In an action by the City against the railway company to enforce the obligation of maintaining the roadway, *held* (1) that the Railways Clauses Consolidation (Scotland) Act 1845, sec. 39, by its terms "turnpike road or public highway" applied to streets in a city as well as roads in a county district, and so still applied to the roads in question; (2) that the substituted portions were in the same position as the other portions of road; and (3) that the special powers of the transferees could not operate a release from its obligations to the railway company.

Road—Railway—Burgh—Maintenance of Roadway — Bridges Carrying Streets Across Line — City Authority Owning Tramway System Using Bridges—Liability for Maintenance—Tramways Act 1870 (33 *and* 34 *Vict. cap.* 78), *sec.* 28—*Railways Clauses Consolidation (Scotland) Act* 1845, *sec.* 39.

A railway company was bound in terms of the Railways Clauses Consolidation (Scotland) Act 1845, section 39, to maintain the roadway upon bridges and approaches thereto which carried streets across their line. These roadways were also utilised by a tramway system owned by the corporation of the city in which they lay, the Tramways Act of 1870 being incorporated in their Special Act. In an action by the corporation to enforce against the railway company the obligation of maintenance of the roadway, *held* that the company's obligation was not to maintain the whole roadway, with a right of relief against the tramway, but was merely to maintain the portion of the roadway not falling within section 28 of the Tramways Act as incorporated in the Special Act.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 39, enacts—"If the line of the railway crosses any turnpike road or public highway, then except where otherwise provided by the Special Act, either such road shall be carried over the railway or the railway shall be carried over such road by means of a bridge, of the height and width and with the ascent or descent by this or the Special Act in that behalf provided, and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company, provided always that, with the consent of the Sheriff or two or more justices as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriageway, on the level."

Section 46—"If, in the exercise of the powers by this or the Special Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage road, horse road, tram road, or railway, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with or as nearly so as may be."

Section 49—"If the road so interfered with . . . cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow."