Friday, July 20.

SECOND DIVISION.

[Lord Pearson, Ordinary.

LANARKSHIRE COUNTY COUNCIL *v.* EADIE AND CALEDONIAN RAILWAY COMPANY.

Road—Railway—Substitution of New Road for Old—Right of Local Authority in the Old Road—Building by Adjoining Owner on Old Road where it Forms Cul-de-sac—Interdict—The Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 46 *and* 49—*Turnpike Roads (Scotland) Act* 1831 (1 *and* 2 *Will. IV, cap.* 43), *sec.* 70—*Roads and Bridges (Scotland) Act* 1878 (41 *and* 42 *Vict. cap.* 51), *secs.* 42 *and* 43.

A railway company in the exercise of statutory powers interfered with a public road, occupying the site of part of it with their railway line and station platforms, and provided a substituted road to the satisfaction of the local authority in terms of the 49th section of the Railways Clauses Consolidation (Scotland) Act 1845, which was incorporated with their Special Act. The new road ran to the north of the old and formed a cord to the arc which the old road had described. A portion of the old road near the east end of the arc about 88 feet in length was not actually used by the railway company, and formed a cul-de-sac affording access to property fronting it on the south belonging to A but affording access to no other property. A having acquired from the railway company the ground which lay *ex adverso* of his property, on the other side of the old road and between it and the new, proposed to build over the said portion of the old road. No steps had at any time been taken under the Turnpike Roads (Scotland) Act 1831, section 70, or later under the Roads and Bridges (Scotland) Act 1878, sections 42 and 43, to have the old road closed. *Held*, on an application by the county council as county road trustees for interdict, that no right in the portion of the old road in question remained in the complainers.

Lord Low—"Now, it seems to me that when a road has been interfered with by a railway company, acting under statutory powers, in such a way that it cannot be restored, and the company provide a substituted road, in terms of the 49th section" of the Railway Clauses Consolidation (Scotland) Act 1845, "to the satisfaction of the local authority, the General Road Acts have no application."

Campbell v. *Walker*, May 29, 1863, 1 Macph. 825, *distinguished.*

By section 1 of the Clydesdale Junction Railway Act 1845 (8 and 9 Vict. cap. clx) it is, *inter alia*, provided— . . . "And be it enacted . . . that the several Acts of Parliament following (that is to say) the Companies Clauses Consolidation (Scotland) Act 1845, the Lands Clauses Consolidation (Scotland) Act 1845, and the Railway Clauses Consolidation (Scotland) Act 1845, shall be incorporated with and form part of this Act."

By section 6 of the Caledonian Railway (Clydesdale Junction Railway Deviations) Act 1846 (9 and 10 Vict. cap. cccxcv) it is, *inter alia*, provided— . . . "Be it enacted that, subject to the provisions contained in the said recited Act relating to the Clydesdale Junction Railway, and the Acts thereby incorporated therewith, it shall be lawful for the Caledonian Railway Company to make and maintain the said deviations of the said railway and branch, and all necessary works and conveniences connected therewith, in the lines and upon the lands delineated on the said plans and described in the said books of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purposes."

The general heading to sections 6–24 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) is as follows:—"*Construction of Railway.*—And with respect to the construction of the railway, and the works connected therewith, be it enacted as follows":—By section 16 it is, *inter alia*, provided—"*Works to be executed.*—Subject to the provisions and restrictions in this and the Special Act, and any Act incorporated therewith, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works—(that is to say), *Inclined planes, &c.*—They may make or construct in, upon, across, under, or over any lands, or any streets, hills, valleys, roads, . . . within the lands described in the said plans, or mentioned in the said books of reference, or any correction thereof, such temporary or permanent inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passages, conduits, drains, piers, arches, cuttings, and fences as they think proper. *Alteration of course of rivers, &c.*—They may alter the course of any rivers not navigable, . . . within such lands, for the purpose of constructing and maintaining tunnels, bridges, passages, or other works over or under the same, and divert or alter, as well temporarily as permanently, the course of any such rivers or streams of water, roads, streets, or ways, or raise or sink the level of any such rivers or streams, roads, streets, or ways, in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper. . . . *General power.*—They may do all other acts necessary for making, maintaining, altering, or repairing and using the railway. . . ."

The general heading to sections 39 to 54 of the same Act is as follows:—"*Crossing of roads and construction of bridges.*—And with respect to the crossing of roads or other interference therewith be it enacted

as follows:— . . ." By section 46 it is provided—"*Before roads interfered with others to be substituted.*—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, tramroad, 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."

By section 49 of the same Act it is, *inter alia*, provided—"*Period for restoration of roads interfered with.*—If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road 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; and the former road shall be restored or the substituted road put into such condition as aforesaid as the case may be within the following periods. . . ."

On 21st December 1904 the County Council of the County of Lanark, as the County Road Trustees, presented a note of suspension and interdict against William Eadie, spirit merchant, Cambuslang, praying the Court to interdict, prohibit, and discharge him "(*primo*) from erecting buildings, hoardings, or other structures, excavating foundations, depositing building materials on that portion of the old Glasgow and Hamilton highway which crosses from the Branch (Coats) highway westwards, that area of ground known as 'The Square,' Cambuslang, lying opposite to and northwards of the premises in Cambuslang occupied by the respondent as a spirit shop called 'Railway Tavern,' and dwelling-houses adjoining, and between said premises and the present Glasgow and Hamilton highway. . . ." [The note also contained a prayer (*secundo*) to interdict him from obstructing an alleged right-of-way across the 'The Square,' but the Lord Ordinary held that the existence of this right-of-way had not been established, and the question was not raised in the Inner House.] Answers were lodged to the note for Eadie, and also for the Caledonian Railway Company.

The complainers pleaded—"(2) The proceedings of the respondent Eadie complained of *quoad* his intended operations on the portion of the old road specified under head (*primo*) of the prayer of the note, being illegal and in violation of the rights of the complainers in said portion of the old road, the complainers are entitled to suspension and interdict as craved under said head, . . . (4) The Caledonian Railway Company's Acts not having vested in the said Railway Company the *solum* of the portion of road in question, and no steps having been taken either under the Roads Act of 1831 or that of 1878 to close it and dispose of it in terms of these Acts, the complainers are entitled to suspension and interdict as craved under head (*primo*) of the note, . . . (5) *Separatim*—The alleged action of the respondents the Caledonian Railway Company in appropriating part of the old road in question was *ultra vires* of their powers under statute or at common law."

The respondent Eadie pleaded—"(1) The right of highway over that portion of the old Glasgow and Hamilton highway, so far as it crossed the piece of ground known as 'The Square,' having been abandoned by the pursuers and their authors and the public for more than forty years, the complainers have no title or interest to insist on the interdict craved in the first place. (2) (*a*) The complainers having no right or title to the site of the old Glasgow and Hamilton highway, so far as it crossed the piece of ground known as 'The Square,' or (*b*), *separatim*, the complainers having lost by prescription any right or title to said site, the interdict first craved should be refused with expenses."

The respondents the Caledonian Railway Company pleaded—"(2) The respondents having interfered with the old road under statutory powers, and having substituted a new road for the portion of the old road interfered with, the *solum* of the said portion of the old road is thereby freed and relieved of any rights by the public to use the same as a public road. (3) In respect that the right to use the old road as a public road was abandoned in 1846, and has not since been insisted on, the complainers, as representing the Road Trustees, have no title or interest to insist on interdict as claimed. (4) The respondents having right under their title to the *solum* of the said area of ground, and the right to use the same as a public road having been abandoned and lost, . . . interdict as craved should be refused with expenses."

The facts of the case appear from the opinions of the Lord Ordinary (Pearson and Lord Low *infra*.

On 18th August 1905 the Lord Ordinary (Pearson) pronounced the following interlocutor:—". . . Interdicts, prohibits, and discharges the respondents in terms of the first head of the prayer of the note as amended; . . . and decern: Appoints the cause to be enrolled for such further procedure as may be necessary, and that parties may be heard on the question of expenses; and grants leave to reclaim."

Opinion.—"The purpose of this note of suspension and interdict is to try certain questions as to the right of the public in and over an unenclosed space of ground in Cambuslang, which has for a number of years been known as The Square. It is of

quite small extent, measuring about 88 feet from east to west, and on an average about 78 feet from north to south. It is bounded on the north by Main Street; on the east by Coats Road; on the south by a tenement including nine small houses and a tavern belonging to the respondent Mr Eadie; and on the west by the station precincts of the respondents the Caledonian Railway Company, from which it is divided by a wall with gates. The two respondents, on the assumption that the Square was their own property, recently put up hoardings on it with a view to building up and otherwise appropriating the open space, and it is against these proceedings that the interdict is directed.

"The complainers maintain two distinct and separate public rights over the open space. In the first place they claim, as being still vested in them as successors of the old Turnpike Road Trustees, a strip of about 40 feet wide, which traverses the Square from east to west, and which is proved to have been part of the old Glasgow and Hamilton turnpike road before its diversion in 1846-47 . . . In the second place they claim that there has been constituted, by prescriptive use, a public right-of-way for foot-passengers between the south-east and north-west corners of the Square, as marked red on the plan. Abstracting for the moment the right-of-way coloured red, there remain two almost triangular spaces, one to the north coloured yellow, and the other to the south coloured purple, on that plan. The former belongs in property to the Railway Company, and the latter to Mr Eadie. Save as to the question of right-of-way, these are, as I understand it, both now outside the prayer of the note as amended. After a long proof I think it appears that the parties are substantially at one upon all the material facts, and that by far the greater part of the evidence might have been made matter of admission.

"I consider first the claim as to the old turnpike road where it runs through the Square. It appears that the railway at this part was constructed under powers contained in two Special Acts of 1845 and 1846, in which was incorporated the Railways Clauses Act 1845. The railway at and near Cambuslang Station was in cutting, and according to the parliamentary plans the turnpike road would have had to be carried over it at such an angle as to involve the building of a long skew bridge. To avoid this and to enable the road to be carried over at an easier angle, it was desirable to deviate part of the turnpike road and to carry it further to the north. This was done, the new part being now a portion of the main street of Cambuslang, and the part of the old road now in question being quite near the eastern end of the deviation. Before the deviation was made by the Railway Company they approached the Road Trustees on the subject, and submitted a sketch of it to them on 2nd December 1846. The Trustees' committee of management remitted to a sub-committee of three to visit the ground, 'and if satisfied that the deviation line proposed will not be injurious to the public, to acquiesce in the same on the part of the trust,' the Railway Company taking upon them any claims of damage or other claims at the instance of proprietors of property on the line of the present road or others on account of the operations. The sub-committee inspected the ground on 5th December as staked off to show the diversion, and they 'gave their consent thereto on the condition that the work should be executed, so far as the Trust road is affected, at the sight and to the satisfaction of the Trustees' surveyor,' and on a further condition as to raising 'the present road' where it crossed the Culloch Burn. To these conditions the Railway Company's engineer assented. Nothing further appears to have taken place between the parties, except that in March thereafter the Trustees made a demand on the Railway Company to make and keep the new road passable; and in October 1849 it seems to have been taken over by the Trustees on their receiving £23, 11s. 8d. as a settlement of their claims for the deviation.

"One other circumstance must be noticed as explaining the position of the parties concerned. Both the old road and the new ran through the lands and estate of Rosebank; and the Railway Company had purchased that estate by private agreement in December 1844. It was described as consisting of 99 acres, with reference to a plan which has been lost; but a plan is produced which is said to represent the original, and which might, in some aspects of the case, have been of importance. But at any rate Rosebank comprised the ground between the old road and the new, and also the solum of the new road, which therefore the Railway Company themselves furnished from their own estate. The part of the old road which was superseded by the new was left open to the public, without either fence or building, from the east end of it as far west as the wall I have already mentioned which separates the Square on its west side from the station precincts. But from that wall westwards, for its whole length, the old road was enclosed by the Railway Company and others and used as private property, except certain parts of it further west, which appear to be portions of the public street.

"There can be no question that the old road was never shut up under the powers conferred by the General Turnpike Act 1831. This being so, the Road Trustees and their successors remain possessed of all the public rights which were vested in them as Trustees of the old road, unless some other statutory right can be pleaded by the Railway Company. I think this is clear on the authorities; and although it was urged for the Railway Company that the decisions on section 70 of the Turnpike Act had to do mainly with the rights of neighbours and other persons having private interests in the road, the same principle was affirmed with reference to an older statute as regards the assertion of a public right-of-way in the opinions delivered in *Murray* (1870, 9 M. 198), though in one view it was not

necessary to the judgment. It is true that in their third plea-in-law the Railway Company maintain, as they also did in their original statement on record, that the right to use the old road as a public road was 'abandoned' in 1846 and has not since been insisted on. But by an amendment of their averments the Railway Company have deleted all reference to the alleged abandonment, and have substituted the word 'discontinuance,' which seems to me an expression of fact (and therefore perhaps more appropriate to a condescendence), but without any legal implication. Their real case I take to be as expressed in the second plea-in-law, namely, that the Railway Company having interfered with the old road under statutory powers, and substituted a new road for the old one, the *solum* of the old road was thereby freed from public rights and vested unburdened in the Railway Company as owners of the lands of Rosebank. This result, as the language used in the plea suggests, is supposed to follow not from anything in the parliamentary plans or in the Special Acts, but from the provisions of the Railway Clauses Act, and more particularly section 16 and section 46, taken in connection with the consent or acquiescence of the Road Trustees as expressed in the documents to which I have already referred. The 16th section will hardly serve the company's purpose. It confers power indeed, for the purpose of constructing the railway, to divert or alter the course of roads. But the argument demands more than a mere power to divert a road, and, moreover (what is still more important), the section has been construed by high authority as determined and limited by the words of the last particular clause, namely, 'they may do all other acts necessary for making, etc., the railway'; and it has been laid down that necessity is not made out where it is a mere question of cost, as the difference between a bridge on the skew and on the square appears to be. See the cases of *The Queen* v. *Wycombe Railway Company* (L.R. 2 Q.B. 310); *Pugh* (L.R. 15 Ch. Div. 330). The wording of the plea rather suggests the language of section 46 of the Act, which deals with the case of interference with a road, and the substitution of another road for it. I have some doubt on the facts, and specially in view of the cause assigned by the Railway Company's witnesses for casting about the road, whether this was an interference and substitution at all within the meaning of the group of sections from section 46 to section 50, as these are expounded in the case of *Carruthers* (15 D. 591). Moreover, section 46 is conditioned, as is section 16, upon its being 'found necessary' to do certain things; and I do not see that any case of necessity was made out. But in any view I do not read the section as including in the idea of 'substitution' the transfer of the whole of the original subject interfered with to the Railway Company. I am not aware that it has ever been so construed in any decision, and the suggestion seems to me to go far beyond the necessity or the reason of the enactment. Indeed, the Railway Company do not rest their case wholly upon the statutory enactment, for they call in aid the consent (such as it was), or perhaps one ought to say the acquiescence, of the Road Trustees in the changed state of matters, as barring the complainers as the trustees' successors from now vindicating the public right. But then what was the change in the state of matters? It is not as if the Railway Company had gone into occupation of the whole length of the old road. They did occupy a part, which is included in their station premises, and their right to which is not here disputed. But as regards the part of the old road to the east of the station ground, things simply remained as they were, and the old road has remained to this day open to all, and substantially in the same condition as it was in 1846. If there was a transaction by which (the Trustees assenting, or at least not objecting) the Railway Company got a *quid pro quo* for the land they were dedicating to the line of the new road, I am unable to see any reason for extending that beyond the part of the old road they were then put in possession of. So far as they have possessed and enclosed it, it may be assumed that this was deemed consistent with the public interest; but I have heard no good reason why the concession should go further, or rather should be now deemed to have gone further at the time. Nor is it a sufficient answer to say that this part of the old road was kept open for the benefit and in the interest of the Railway Company as an access to their station, and of Mr Eadie as an access to his tenements and his public-house. They will get the full benefit of this consideration in the second part of the case, namely, as to the right of footpath; but so far as the old road now in question is concerned, it simply remained as it was, open for all purposes, including public purposes, so far as these could be served by it in the altered circumstances. Nor, in the view I take, does any question arise as to the property in the *solum* of the old road. That property remains where it was.

"On these grounds I hold that the complainers are entitled to interdict in terms of the first part of the prayer as amended.

"The second claim is for a right-of-way for foot-passengers extending diagonally across the Square in the line marked red on the plan. . . ." [*His Lordship then proceeded to deal with the right-of-way claimed, which he held had not been established.*]

The respondents reclaimed, and argued—The statutory method of shutting up a public road provided by the Turnpike Roads (Scotland) Act 1831, section 70, and by the Roads and Bridges Act 1878, sections 42 and 43, was not the only way in which a part of a public road could be shut up or cease to be a road. A company might obtain statutory authority to shut up a road—*Hay* v. *City of Glasgow Union Railway Company*, July 14, 1871, 1 R. 1191, 11 S.L.R. 700; *Marquis of Salisbury* v. *The Great Northern Railway Company*, 1858, 5 C.B., N.S. (Scott's C.B.) 174; and *Melksham Urban District Council* v. *Gay*, 1902, 18

T.L.R. 358; and in the present case the effect of the statutory authority obtained, under which the old road had been interfered with and a substitute road provided, had been to make the whole of that part of the road for which the substitute had been provided cease to exist as a road. A portion of the old road had been used for the railway line and station premises; that portion certainly was no longer a road; and as to the portion here in question, though not actually used by the Railway Company, it had been interfered with in the sense that it no longer afforded a way of passage to the public, for it formed a cul-de-sac, and the only person (Eadie) to whose property it served as an access desired to shut it up. This distinguished the case from *Campbell* v. *Walker*, May 29, 1863, 1 Macph. 825. The *solum* of a public road belonged to the adjoining proprietors and the only right of the public to a road was a right of passage—*Galbreath* v. *Armour*, July 11, 1845, 4 Bell's Ap. 374, esp. Lord Campbell at p. 380-1 and Lord Brougham at p. 390; and *Harrison* v. *The Duke of Rutland*, [1893] 1 Q.B. 142. It was preposterous 60 years after the new road had, with the Road Trustees' consent, been substituted for the old, to say that it must be shown that the diversion was "necessary" for the purposes of the railway. The Road Trustees had done nothing to keep up the ground in question as a road, nor had it been nor could it be used by the public as a road, and hence any right the Road Trustees or the public might once have had they had lost by dereliction—*Winans* v. *Lord Tweedmouth*, March 10, 1888, 15 R. 540, 25 S.L.R. 405; and *Melksham Urban District Council* (*cit. supra*).

Argued for the complainers—(1) "Such lands" in the portion of section 16 of the Railways Clauses Act headed "*Alteration of course of rivers, &c.*" referred back to "the lands described in the said plans" which occurred in the previous portion of the same section headed "*Inclined planes, &c.*" The railway company had not in their deposited plans drawn any line across the old road to show how much of it was to be taken, and accordingly the ground in question was not delineated or "described in the said plans"—*Protheroe* v. *Tottenham and Forest Gate Railway Company*, 1891, 3 Ch. 278; *Place* v. *The West Highland Railway Company*, December 12, 1894, 32 S.L.R. 145—and the Railway Company therefore could not found on section 16, nor could they benefit from section 46, for "any road" in that section meant any of the roads to which section 16 applied. (2) Apart from special legislation a turnpike road could not be closed to any extent or effect except by procedure under the Turnpike Roads (Scotland) Act 1831 (1 and 2 Will. IV, cap. 43), section 70, and the Roads and Bridges (Scotland) Act 1878 (41 and 42 Vict. cap. 51), sections 42 and 43. This procedure had not been followed, and the rights of the public remained now vested in the complainers as successors of the Road Trustees—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), section 11. The rule was that once a highway always a highway—*Murray and Others* v. *Arbuthnot*, November 29, 1870, 9 Macph. 198, 8 S.L.R. 152; *Walker* v. *Weir*, March 26, 1817, 6 Pat. Ap. 281—and the rule applied even where a substituted turnpike road had been provided—*Lang* v. *Morton*, February 2, 1893, 20 R. 345, 30 S.L.R. 395. The case of *Campbell* v. *Walker* (*cit. supra*) was very similar to the present, and the grounds of judgment of three of the judges in that case were sufficient to decide the present in the complainers' favour, Lord Cowan being the only judge who laid stress on the cul-de-sac being an access for the frontagers there. It was not *Campbell's* right that was there vindicated but the public's. The public still retained their rights to the ground here in question—Pratt on Highways, 15th ed. p. 6—*Gwyn* v. *Hardwicke*, 1856, 25 L.J. Mag. Cases 97. *Winans* (*cit. supra*) had no application. In *Hay* (*cit. supra*), just because they wanted to shut up the road, the words "shut up," and not merely divert or substitute, were used. In *Marquis of Salisbury* (*cit. supra*) the railway company had actually enclosed the ground, and the public did not use it. The rights of the public to the road vested in the Road Trustees were not lost by acquiescence—Pratt on Highways, 15th ed. p. 129. As to the word "substituted" in sections 46 and 49, the Railway Company had not substituted the new road for the old except in so far as they had "interfered with it." The part in question still existed and had not been "interfered with." As to the words "divert or alter" in section 16 the same argument applied. Here there was no legislation warranting taking away of the public's rights in the road, for the reclaimers had failed to prove that the diversion or substitution was "necessary," and that was required not only by section 46 but also by section 16—*London and North-Western Railway Company* v. *Ogwen District Council*, 1899, 80 L.T. 401; *Attorney-General* v. *The Dorset Central Railway Company*, 1861, 3 L.T. 608; *The Queen* v. *Wycombe Railway Company*, 1867, L.R., 2 Q.B. 310; *Pugh* v. *Golden Valley Railway Company*, 1880, L.R., 15 Ch. D. 330.

At advising—

LORD LOW—The question which has to be determined in this case seems to me to depend chiefly upon the meaning and effect of the 46th and 49th sections of the Railway Clauses Act 1845, and especially of the latter section.

These sections form part of the group of sections beginning with the 39th, which are brought together under the general heading of "Interference with Roads." From the 39th to the 45th section the case of a railway merely crossing a road is dealt with, and provisions are made in regard to level crossings, bridges carrying the line over the road, or carrying the road over the line, and kindred matters, such as gradients. Section 46, however, passes to another kind of interference with roads, and deals with cases in which "in the exer-

cise of powers by this or the Special Act granted, it is found necessary to cross, cut through, raise, sink, or use any part of any road . . . so as to render it impassable for or dangerous to passengers or carriages." In such a case it is made imperative upon the company before commencing operations "to cause a sufficient road to be made instead of the road to be interfered with," and to maintain "such substituted road" in as convenient a state for traffic, as nearly as may be, as the road interfered with.

That section is plainly limited to the period during which the works by which the road is interfered with are in course of execution, but the 49th section provides what is to be done when the works are completed. It enacts that if the road interfered with can be restored "compatibly with the formation and use of the railway" it shall be restored, but "if such road 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."

Now under their Special Act the Caledonian Railway Company were authorised to use part of the old turnpike road in question, and they did so by laying their railway for some distance in a cutting actually upon the line of the old road, and they also used other parts of the road for station platforms and other necessary works. I did not understand it to be contended, nor, in my judgment, could it have been successfully contended, that the Railway Company were not justified in making the use of the road which they did. Further, I do not think it could be suggested (nor did I understand it to be suggested) that this was not a case for a substituted road. It is plain that the old road could not have been restored compatibly with the formation and use of the railway, because, as I have said, the railway ran for some distance in a deep cutting upon the very line of the road. The choice, therefore, seems to have been between a long skew bridge over the railway and a new road. The Railway Company offered the substitute road which is now in use, and the Road Trustees approved of and accepted that road, it being clearly in the interest of the public to do so.

Now, in so far as the ground upon which the old road ran has been actually used by the Railway Company, it has, as matter of fact, ceased to exist, and the complainers cannot claim any right to a road which is non-existent, and therefore so far as that part of the old road is concerned the substituted road has come in its place for every purpose.

There is, however, a part of the old road lying to the east of the railway works which the Railway Company have not used. That part of the old road is intersected by the West Coats Road which crosses it at right angles, and no question is raised in regard to the portion which lies to the east of West Coats Road. It is still capable of being used, and is in fact used, as a public road, and nobody proposes to interfere with it. The portion of the old road, however, which lies to the west of West Coats Road is in a different position, and is the subject of the present litigation. Its length is about eighty-eight feet, and it is bounded on the west by the wall enclosing the ground (which includes part of the old road) upon which the railway station and its adjuncts are erected; on the north by a piece of ground belonging to the Railway Company; on the south by ground the property of the respondent Eadie; and on the east by West Coats Road.

The piece of the old road in question (that is, the piece lying to the west of West Coats Road) is therefore a cul-de-sac, and since the completion of the railway works it has been incapable of any use whatever as a public road except in so far as it was required to give access to the property now belonging to Eadie.

After the completion of the railway works in 1848 the Railway Company granted a letter to the then proprietors of Eadie's ground, in which they bound themselves "to level the ground in front of said property and between it and the new line of the turnpike road" (that is, the substituted road), "and to leave the said space open and common in all time coming." That obligation was carried out, and since its date access has been allowed to Eadie's property not only by the old road but over the piece of ground belonging to the Railway Company intervening between it and the substituted road. It appears, however, that recently an agreement has been entered into between the Railway Company and Eadie for the acquisition by the latter of the piece of ground belonging to the Railway Company upon the north side of the old road, Eadie's intention being to build upon the ground between the substituted road and his property, including the piece of the old road in question. If it be the case that that piece of the old road has ceased to be a road, and if in consequence the incorporeal right of passage with which the ground occupied by the road was burdened has flown off, I do not think that it can be doubted that Eadie, as owner of the ground on both sides of the road, and therefore of the *solum* under the road, is entitled to build upon it.

The complainers, however, maintain that the only way in which any part of a public road can be shut up and cease to be a public road is by following the statutory procedure for shutting up a road (that procedure being, at the time when the railway was made, regulated by the General Turnpike Act 1831, and now by the 42nd and 43rd sections of the Roads and Bridges Act 1878), and that, accordingly, unless and until that procedure is adopted, the piece of road in question remains a public road vested in them as the local authority.

Now, it seems to me that when a road has been interfered with by a railway company, acting under statutory powers, in such a way that it cannot be restored, and

the company provide a substituted road in terms of the 49th section to the satisfaction of the local authority, the General Road Acts have no application.

I do not think that that proposition can be disputed in cases where a road or part of a road has actually been used for the construction of railway works. The present case furnishes an example of such a use of a road, because, as I have already pointed out, the cutting in which the line is laid occupies the site of part of the road. The complainers admitted that they could not maintain that that part of the road was still vested in them for the public interest, and that amounts to an admission that a public road may, under the Railway Acts, cease to exist, although it has not been shut up in the manner provided by the Road Acts. The complainers, however, maintain that if a piece of the road, however small, and however useless for the purposes of a road, is not actually used by the Railway Company, that piece remains a road vested in the Road Trustees, and cannot be used for any purpose whatever unless the statutory procedure for shutting up a public road is adopted. Accordingly, although the acquisition by Eadie of the ground upon the north side of the road has put an end to the only interest in the road which remained after the substituted road was provided, and although there is now no human being by whom the road can be used for the purposes of a road, the complainers maintain that it is still vested in them, and that they are entitled to demand that it shall remain open, unless they choose to set in motion the statutory procedure for having it shut up.

I am of opinion that not even a technical right to the piece of road in question remains in the complainers, although, even if there were such a right it would not, in my judgment, entitle them to the interdict which they seek, because, as their counsel frankly admitted, they have no interest whatever to enforce the right. My reasons for holding that no right to the piece of road in question remains in the complainers are these—Although the Railway Company have not actually used it for railway works, they have interfered with it so that it cannot be restored—that is to say (as I understand the expression) it cannot be made fit for the purposes which it formerly served. The Railway Company were therefore bound in terms of the 49th section to supply as a substitute for the piece of road in question an equally convenient road, and they have done so. It therefore follows, in my judgment, that the "substituted road" came in place (as the very expression implies) of the road for which it was substituted, and that the latter ceased technically, as it had ceased in fact, to be a road at all.

I do not think that that view is in any way inconsistent with the case of *Campbell* v. *Walker* (1 Macph. 825), upon which the complainers founded. It seems to me that in that case the road, in so far it lay between Mr Campbell's property and Helensburgh, had not been interfered with, and that no new road had been substituted for that part of it. The present case would indeed have been somewhat analogous to *Campbell's* case if the Railway Company had tried to shut up the old road while it was still required as an access to Eadie's property. They did not however do so, and Eadie's interest being out of the way, and no other interest being suggested, and a new road having in fact been supplied and accepted as a substitute for the old road, the decision in *Campbell's* case has in my judgment no application.

I am therefore of opinion that the Lord Ordinary's interlocutor, in so far as it grants interdict in terms of the first head of the prayer of the note, should be recalled.

LORD JUSTICE-CLERK—That is the opinion of the Court (the Lord Justice-Clerk, Lord Kyllachy, Lord Stormonth Darling, and Lord Low).

The Court pronounced this interlocutor—

". . . Recal the said interlocutor [dated 18th August 1905]: Repel the reasons of suspension: Refuse the interdict craved, and decern. . . ."

Counsel for Complainers (Respondents)—Wilson, K.C.—Cullen, K.C.—MacRobert. Agents—Ross, Smith, & Dykes, S.S.C.

Counsel for Respondent (Reclaimer) Eadie, and for the Respondents (Reclaimers) The Caledonian Railway Company—Cooper, K.C.—Blackburn. Agents for Eadie—Campbell & Smith, S.S.C. Agents for the Caledonian Railway Company—Hope, Todd, & Kirk, W.S.

Friday, July 20.

FIRST DIVISION.

[Exchequer Cause.

MOORE (SURVEYOR OF TAXES) *v.* STEWARTS & LLOYDS, LIMITED.

Revenue — Income-Tax — Profits — Deductions—Payment Made to Rival Company for Commanding Interest in its Management—"Money wholly Expended for the Purpose of Such Trade"—Income-Tax Act 1842 (5 *and* 6 *Vict. cap.* 53), *sec.* 100, *Schedule D, Rules Applying to First and Second Cases, No. I.*

A company having made an agreement with another company carrying on a similar business, whereby it obtained, in return for an undertaking to make up the yearly profits of the second company to a certain amount, a commanding interest in its management, claimed to deduct from its yearly profits for the purposes of income-tax assessment the sum paid to the other company. The Income-Tax Commissioners allowed the deduction, holding that the payment had been made by the company "for the purpose of its trade, and that it might sell its goods at