ancy here under consideration. The point involved is exceedingly short and sharp though not without difficulty. I think the Lord Ordinary's interlocutor is wrong and must be recalled. The substitution of a scale of compensation by the agreement of parties for that upon which the tenant would be entitled to be compensated under the Act is quite legal, provided that the substituted compensation is fair and reasonable, which for present purposes I assume it to be in this case. There is no averment to the contrary in the pleadings, and the presumption is very strong to that effect. But the agreement between the parties went further than a mere scheme of substituted compensation, for it adjected a provision that "no claim for compensation under the said Acts or under these conditions shall be made by the tenant later than one month prior to the determination of the tenancy." This provision is certainly a variation of and an encroachment upon the tenant's statutory right to delay making his claim until the last hour of his tenancy. It was said for the landlord that the provision in itself in no way deprives the tenant of his right to compensation, and that it is not by virtue of the agreement, but only in consequence of his own failure to observe the terms of the condition, that mischief has arisen or could arise. But the point seems to me to lie deeper down; and the question is as to the legality, or the reverse, of such a provision as we have here. I think it is an illegal provision. The statutes sanction a pactional substitution of compensation in terms of agreement for compensation in terms of the Acts, but not, as I consider, the adjection of a collateral stipulation such as this, which might (at least indirectly) operate to deprive the tenant of his right to obtain any compensation at all.

LORD JUSTICE-CLERK — I concur with your Lordships.

The Court recalled the interlocutor of Lord Guthrie dated 13th January 1910, repelled the reasons of suspension, and refused the interdict.

Counsel for the Complainer—Johnston, K.C. — A. R. Brown. Agents — Skene, Edwards, & Garson, W.S.

Counsel for the Respondent — Morison, K.C.—Jamieson. Agent — James Purves, S.S.C.

Wednesday, December 21.

FIRST DIVISION.

[Lord Salvesen, Ordinary.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY *v.* AYR MAGISTRATES AND OTHERS.

(*Vide Glasgow and South-Western Railway Co.* v. *Hutchison*, 1908 S.C. 587, 45 S.L.R. 444; and *Glasgow and South-Western Railway Co.* v. *Magistrates of Ayr*, 1909 S.C. 41, 46 S.L.R. 57.)

Burgh — Police—Street — Private Street — Railway—Road Forming "Part of Any Railway"—Railway Lines Forming Obstruction in Street—Burgh Police (Scotland) Act 1892 (55 *and* 56 *Vict. c.* 55), *sec.* 4 (31)—*Burgh Police (Scotland) Act* 1903 (3 *Edw. VII, c.* 33), *sec.* 103 (5) *and* (6).

The Burgh Police (Scotland) Act 1892, sec. 4 (31), enacts—"'Street' shall include any road, highway, bridge, quay, lane, . . . thoroughfare, and public passage or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank."

A railway company brought an action against the magistrates of a burgh, in which they sought declarator (1) that a certain strip of ground in the burgh known as Oswald Road, which they had in 1889 acquired for "extraordinary purposes," and over which there was a public right-of-way, formed part of a railway within the meaning of section 4 (31) of the Burgh Police (Scotland) Act 1892, and was not a "private street," and (2) that the pursuers were entitled to use it for the purposes of their railway as they might think proper. They also craved interdict against the magistrates proceeding with a resolution to cause the road to be freed from obstructions (*i.e.*, a double line of rails which the company had in 1908 laid down upon it) and to be properly levelled.

Held that Oswald Road was not part of a railway at the date of the passing of the Burgh Police (Scotland) Act 1892; that it then became by force of the definition contained in that Act a "private street"; and that the railway company could not thereafter transform it into a railway by laying rails upon it so as to bring it within the exception contained in the Act.

Held further that the rails formed an "obstruction" within the meaning of section 104 (2) (*d*) of the Burgh Police (Scotland) Act 1903, and that the magistrates were entitled to have them removed.

Stewart v. *Greenock Harbour Trustees*, June 8, 1864, 2 Macph. 1155, *followed.*

Expenses—Reservation of Particular Expenses Followed by General Decree for Expenses—"Expenses in the Cause"—Power of Auditor to Disallow such Expenses—A.S., 15th July 1876, *General Regulations, Art.* 5.

Article 5 of the General Regulations as to the taxation of judicial accounts appended to the A.S. of 15th July 1876 enacts—"Notwithstanding that a party shall be found entitled to expenses generally, yet if, on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings."

Held (after consultation with the Judges of the Second Division) that when an interlocutor declares that expenses are to be "expenses in the cause," it means that the expenses are to go as a matter of right to the party who is eventually successful, and who gets a general finding of expenses in his favour at the end.

The Burgh Police (Scotland) Act 1892 (55 and 56 Vict. c. 55), sec. 4 (31), is quoted *supra in rubric.*

The Burgh Police (Scotland) Act 1903 (3 Edw. VII, c. 33), enacts—sec. 103 (5)—"'Public street' shall in the principal Act [*i.e.*, 1892] and this Act mean (*a*) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town council or commissioners; (*b*) any highway within the meaning of the Roads and Bridges (Scotland) Act 1878 vested in the town council; (*c*) any road or street which has in any other way become or shall at any time hereafter become vested in or maintainable by the town council; and (*d*) any street entered as a public street in the register of streets made up under this Act. (6) 'Private street' shall in the principal Act and in this Act mean any street other than a public street." Section 104 (2) (*d*) enacts—"For section 133 [of the Act of 1892] shall be substituted the following section:—'Where any private street or part of such street has not, together with the footways thereof, been sufficiently levelled, paved, causewayed, or macadamised and flagged to the satisfaction of the council, it shall be lawful for the council to cause any such street or part thereof, and the footways, to be freed from obstructions, and to be properly levelled, paved, causewayed, or macadamised, . . . and thereafter to be maintained, all to the satisfaction of the council.'"

On 7th December 1908 the Glasgow and South-Western Railway Company brought an action against the Magistrates of Ayr and others, in which they, *inter alia*, sought declarator that a certain strip of ground in the Burgh of Ayr, known as Oswald Road, formed part of a railway within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903, and particularly section 4 (31) of the Burgh Police (Scotland) Act 1892, and was not a "private street" within the meaning of the said Acts. They also craved interdict against the Magistrates putting into force a resolution calling upon the pursuers to remove certain rails which they (the pursuers) had laid thereon, and to have the road properly levelled and macadamised.

The *conclusions* of the *summons* are fully detailed in the *second* opinion (*infra*) of the Lord President.

The *circumstances* in which the action was brought were narrated by the Lord President in his *first* opinion (*infra*), as follows—"The circumstances which give rise to this case are of a somewhat complicated character, and I think it will perhaps best conduce to clearness if I really tell the story from the beginning rather than merely incorporate the incidents of the story by means of reference.

"There is a strip of ground in the burgh of Ayr, which forms one-half of a road or street—and I pause here to say that at the moment I am not using this word in any technical sense—called Oswald Road. This strip of ground, which *de facto* has formed half of this road or street, belongs to the Glasgow and South-Western Railway Company. It was acquired by them from Mr Oswald of Auchincruive by ordinary title, that is to say, although they had compulsory powers they did not put these compulsory powers into effect, but obtained the ground from him by disposition. The disposition bore to transfer the ground under the burden of certain rights of a public or quasi-public character which existed in favour of other people as to rights of passage. Confronting the strip of Oswald Road which did not belong to the Railway Company were certain feuars, and these feuars presented a petition under section 11 of the Burgh Police (Scotland) Act 1903 to the town council of Ayr to form and lay out the new street on the line of the existing road known as Oswald Road. The operations for which they sought authority were confessedly to be exercised not only upon the strip of ground which was immediately *ex adverso* of their feus, and which belonged in property to themselves, but were confessedly also to extend to the strip of ground which belonged to the Railway Company. The Railway Company resisted that application.

"The application was granted by the Magistrates of Ayr, and an appeal was taken to this Court. The defences put forth by the Railway Company were practically of a twofold character. They said that the right to deal with this matter did not arise because the ground in question formed part of a railway and consequently fell within the exception which is to be found in the 31st sub-section of the 4th section of the Burgh Police (Scotland) Act 1892, which, if it applies, cuts out, if I may use the expression, ground in that situation from falling within the definition, within which it would otherwise fall—the definition of a street. They also said that

whether it was a street, or whether it was not, section 11 of the Burgh Police (Scotland) Act 1903, upon a proper construction thereof, only applied to operations completely *in suo* of the petitioners, and did not apply to operations which extended to other people's property. In that case proof was allowed, necessarily allowed in this state of the pleadings, as to the history of the road, and in that proof facts were elicited of which I have up to this partly availed myself.

"The Court here pronounced a judgment dismissing the petition, and they dealt with both points raised in the case. In the judgment which was given by myself, and in which the other Judges concurred, I took up the point that I have mentioned first, and held, rightly or wrongly, that in the particular facts proved there the strip in question did not form part of the railway in the sense of the 31st sub-section of section 4 of the Act of 1892. I then go on to say that as it does not fall within that exception, that it falls within the definition of street, and that, falling within the definition of street, when you come to the interpretation of the sections of the Act of 1903 you will find that it is a private street. Coming to the second point, I then go on to say that in my opinion section 11 of the Act of 1903 is limited to operations *in suo*. The result was that the petition there was dismissed, the Railway Company having failed in one of its arguments but succeeded in the other.

"That judgment was pronounced on the 19th of February 1908. On the 23rd of February the Railway Company at their own hands laid down a double line of rails upon the ground. The reply to that strategical move was that the Town Council of Ayr passed a resolution under section 104, sub-section 2, head (*d*), of the Burgh Police Act 1903 to have the road put in order and freed from the obstruction caused by the railway lines. That resolution could only be passed upon the assumption that the road in question was a private street; but of course the Town Council of Ayr had a good foundation for that, because they had the opinion of the Court in a case to which they were not parties, but which was none the less the opinion of the Court that it was a private street. The Railway Company in an appeal to this Court prayed the Court to quash the resolution.

"The Court refused to do so, and after reading the judgment of the Court—the Extra Division—I do not think there is the slightest doubt as to what view they proceeded on. I think Lord Pearson's judgment brings that out exceedingly clearly. Paraphrasing that judgment, what I think it comes to is this: It has been decided by the Supreme Court of this country, without going to the House of Lords, that this street is a private street. Notwithstanding, the Railway Company at their own hand have chosen to put down something upon the ground which undoubtedly in the sense of the law creates an obstruction; and therefore in a summary proceeding of this kind we are not going into the merits of the question whether it is a private street or is not as between you two, when it has already been decided in a question between another person and the Railway Company. This is a summary proceeding, and it is enough for us that *prima facie* it is a private street, and accordingly we refuse to interfere with the judgment of the Magistrates.

"If I may say so without offence, it seems to me that that judgment was perfectly and conclusively right. But I think it is equally clear that the Court then were merely determining upon a summary proceeding, and were not assuming to decide for all time as between these persons what had been decided between other persons, because Lord Pearson says quite clearly—'I think it lies with the Railway Company to legalise their position, but whether they can do so by an action of declarator or by obtaining statutory powers it is not for us to say.' Accordingly the Railway Company have now brought an action of declarator with the view, as Lord Pearson phrased it, of legalising their position. They seek to have it found and declared that the strip of ground in question is not a private street, and, that being so, the Magistrates have no right to interfere with them in doing what they propose to do, namely, to lay lines upon it. That they are wrong in that position so far as the judgment is concerned I have no doubt, but they have told us quite frankly that their only object in doing so is in order to take up the question to a higher tribunal; and that they have a perfect right to do. It seems to me that our judgment in the first case, which is at the bottom of the whole thing, may of course be wrong. I may have been wrong in saying that in the state of circumstances which I there held proved the strip in question did not form part of the railway within the meaning of the statute. It is quite right that that judgment should be submitted to review. The Railway Company could not take up that case to have it reviewed, because they won the case as against the feuars and could go no further. Therefore they could not go up to the House of Lords in a case which they had already won in order to say that the First Division was wrong in not allowing them to win upon another ground different from the ground upon which they did allow them to win. Accordingly I think they must be allowed to go to the House of Lords for the present purpose."

The pursuers pleaded, *inter alia*—"(3) The said strip of ground not being subject to the provisions of the Burgh Police (Scotland) Acts 1892 to 1903, or alternatively, being part of the pursuers' railway within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903, and not being or forming part of a private street within the meaning of the said Acts, decree should be pronounced in terms of the appropriate declaratory conclusions. (4) The said strip of ground having all along been appropriated and dedicated to the formation of a railway, and the same having been ac-

quired by and being vested in the pursuers for the purposes of their railway undertaking, the pursuers are entitled to utilise the same for such purposes. (5) The said strip of ground being part of a railway undertaking, no third party can acquire any right in or over it inconsistent with its use for railway purposes. (6) The resolution of the defenders called in the second place, of date 14th March 1908, being illegal and *ultra vires*, the pursuers are entitled to interdict as craved. (7) In any event the rails laid down by the pursuers in the portion of Oswald Road in question not being an obstruction, the defenders called in the second place are not entitled to call upon the pursuers to remove the same."

The defenders, *inter alia*, pleaded—"(2) In respect of the decision of the Court of Session referred to in article 14 of the condescendence it is *res judicata* as between the present pursuers and defenders (*a*) that the strip of ground in question is a private street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903, and (*b*) that the laying of said lines of rails thereon by the pursuers did not convert said strip from a 'private street' into 'part of a railway' within the meaning of said Acts. (3) In respect that the strip of ground in question forms part of a private street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903 (*a*) pursuers are not entitled to lay rails thereon without the consent of these defenders, who are accordingly entitled to be assoilzied from the whole conclusions of the action, and (*b*) said strip of ground cannot without statutory authority be made part of the pursuers' railway, and no such authority having been obtained by the pursuers, these defenders are therefore entitled to decree of absolvitor. (4) The said strip of ground having been acquired by the pursuers for extraordinary purposes subject to the public and servitude rights condescended on, and the said public and servitude rights not having been extinguished by statutory or other authority, the pursuers are not entitled to lay down a railway thereon as part of their undertaking, and the defenders should be assoilzied. (6) In respect that said strip of ground is part of a private street within the meaning of the Burgh Police (Scotland) Acts 1892 to 1903, and that the rails laid thereon by the pursuers (*a*) form an obstruction thereon, . . . these defenders are entitled to cause the same to be removed, and they should accordingly be assoilzied from the conclusions of the summons."

On 16th June 1909 the Lord Ordinary (SALVESEN) found that the conclusions for interdict were excluded *exceptione rei judicatæ* and dismissed the action.

Opinion.—"The operative conclusions in this action are to interdict the defenders from putting in force a resolution, dated 14th March 1908, to cause a part of Oswald Road to be freed from obstructions and to be properly levelled, &c., in terms of certain plans, sections, and specifications therein referred to; or at any rate to interdict the defenders from interfering in any way with the lines of rails used and maintained by the pursuers on that road. The dispute between the parties is one of long standing, having already been the subject of two litigations; and the defenders plead that the decision pronounced by the Court of Session on 3rd November 1908 dismissing an appeal taken by the pursuers against the resolution in question is *res judicata* of all the matters involved in the present action.

"[*After narrating the circumstances in which the action was brought his Lordship proceeded*]—

"In my opinion the defenders are right. Exactly the same matters that are submitted for the determination of the Court in the present case were dealt with and decided in the appeal referred to. The whole of the pursuers' demands depend on the view that the part of the road in question is not a private street within the burgh of Ayr. The contrary has been decided twice already, and once in a case to which the present pursuers and defenders were parties. It would be impossible for me to grant interdict in the terms prayed for without going directly in the teeth of the decision of the Extra Division, which is an excellent test of whether the decision in that case was *res judicata* of the present. The pursuers founded on certain *obiter dicta* in Lord Pearson's opinion to the effect that the proceeding there was of an administrative nature and that the pursuers might legalise their position by an action of declarator. Lord Pearson certainly did not express an opinion to the latter effect; and while it might have been competent for the Division to have sisted proceedings in the appeal until an action of declarator had been raised to decide the matter in dispute, I see no reason why they should have done so or why their decision should not have the finality that the Burgh Police Act contemplated. At first sight it seems hard that the pursuers, who bought a strip of ground which was expressly dedicated for use as a waggon road, should be prevented from using it as such by the operation of the Burgh Police Act. But when it is kept in view that the public had already acquired a right-of-way along the waggon road before the pursuers purchased it, and so had prescribed a right which made the use of the road as a railroad impracticable, the supposed hardship entirely disappears.

"The only other point that I need notice is the averment that since the judgment of November 3rd, 1908, the pursuers have levelled up the roadway, and offer to prove that the rails do not any longer constitute an obstruction to the use of the road by the public. I do not, however, read the judgment of the Extra Division as proceeding on the view that the rails were an obstruction simply because they were at the time above the level of the roadway, although that element no doubt enters into Lord Pearson's opinion. Be that as it may, I do not consider that I have any power to review a judgment of the Inner

House which, by dismissing an appeal against the resolution of 14th March 1908, affirmed the right of the Council to have the rails removed. If the pursuers had desired to raise this question they should have done so after the opinions of the Court were delivered and before the judgment was signed. I think they are now too late."

The pursuers reclaimed to the First Division, who on 13th July 1909 pronounced this interlocutor—"Recal said interlocutor, repel the second plea-in-law for the compearing defenders, and remit the cause to the Lord Ordinary to allow the parties a proof of their averments on record, and to proceed as accords: Find the expenses of the reclaiming note to be expenses in the cause."

LORD PRESIDENT— . . . [*After the narrative ut supra*] . . . I cannot disguise from myself that the way in which the Lord Ordinary has treated the case seems to me to prevent the Railway Company from laying the case before the House of Lords in such a way as to enable their Lordships to go into the matter. The determination of the question of whether this is or is not part of the railway is inextricably bound up with the facts of the case, and the facts have only been proved in the first case, and have not been technically proved in this case. I think that in the whole circumstances of the case his judgment is really not right in putting the matter upon *res judicata*. I think the proper course was to allow a proof, and then, of course, to repeat the judgment that had been come to before, because I cannot imagine at this moment that anything can now be proved which would alter the conclusion to which we came in the first case. I accordingly propose that your Lordships should recall the interlocutor of the Lord Ordinary, and remit the case to him to allow parties a proof of their averments. But, really with the people with whom we have to do here, I would suggest that probably the proof might to a very large extent be obviated by either a minute of admissions, or if there are certain matters in which they are not agreed, by interlocutor holding the evidence repeated as proof in this case.

LORD KINNEAR — I am of the same opinion. I think the judgment of the Extra Division was in effect a possessory judgment. The view taken by their Lordships as I understand it is this—that in the circumstances of the moment as they were brought before the Court the Railway Company could not be allowed to take the law into their own hands, and at their own hand lay down rails upon what appeared to be a private street. But their Lordships indicated very clearly that there might be a question of legal right behind which they were not in a position to dispose of. Lord Pearson went on to say that whether that question of right was to be disposed of by declarator or to be settled by statute, the Court at that time was not called upon to consider. That made it quite clear that there was in his Lordship's mind a question which was left undecided, and I think that is the question which the Lord Ordinary has held to be *res judicata*.

LORD PEARSON—I entirely agree.

A proof was accordingly taken, the import of which sufficiently appears from the Lord Ordinary's opinion appended to an interlocutor of 13th January 1910, whereby he assoilzied the defenders from the conclusions of the summons.

Opinion.—"I refer to my opinion appended to the interlocutor of 16th June 1909 for a narrative of the facts set forth on record. A proof has since been led, but I do not think it has materially added to what could be inferred from the statements of parties. The whole dispute relates to that part of Oswald Road which is marked X Y on the Ordnance Survey sheet in process. It is on this road that the pursuers have laid a double line of rails, which, if not interfered with, they propose to connect with their line through a field of which they are the proprietors. They have I think succeeded in showing that this double line is at present useful for railway purposes, and will be rendered more so if the proposed extension is carried out, and they have been able to adduce a good many cases where railway lines exist on public or private streets within burgh, and where nevertheless a certain amount of carriage traffic of the ordinary kind is being concurrently carried on. The proof also discloses what scarcely required evidence, namely, that if the roadway is constantly made up to the level of the rails the passage of carts will not be substantially interfered with, although this cannot be affirmed of the present condition of the road. Having noted these facts it would be sufficient for me simply to give effect to the unanimous opinion of the First Division that the part of Oswald Road in question is a private street within the burgh of Ayr; and to hold with the Extra Division that the presence of rails on a private street constitutes an obstruction which the municipal authorities are entitled to call upon the Railway Company to remove. As the case, however, has confessedly been brought with a view to a judgment of the House of Lords it is right that I should notice some of the facts upon which the parties relied, and which have perhaps been brought out more clearly now that the titles are in process and have been explained by the oral evidence.

"By a feu-contract between Richard Oswald of Auchencruive and the Magistrates of Newton-upon-Ayr, dated 19th December 1765, the latter disponed to Mr Oswald and his heirs a portion of the commonty of the burgh of 30 feet wide from the march of the lands belonging to the burgh and the ground belonging to the burgh of Prestwick to a certain place in the north dyke of the harbour of Ayr, on which ground Mr Oswald intended to make a waggon road. Right was reserved to the freemen and inhabitants of Newton, or others having their permission, to cross or

pass over this piece of ground with horses and carts; and free liberty to the cattle pasturing on the common to pass and repass over the same in all places. No waggon road was ever made by Mr Oswald or his successors, and the line of the 30 feet strip was not even defined until 1842, when an agreement was entered into between the Magistrates and the then proprietor of Auchencruive for that purpose. In 1889 the latter conveyed to the pursuers such portions of the strip of ground as had not already been acquired by them for the purposes of their undertaking, along with an acre and 14 falls of ground lying near the north dyke of the burgh of Ayr acquired under the feu-charter of 1765 in connection with the proposed waggon road. So far as the pursuers were concerned this latter conveyance proceeds on the authority conferred by section 38 of the Railway Clauses Consolidation (Scotland) Act 1845, which provides for the purchase by agreement of land not exceeding 20 acres for extraordinary purposes. In the private Acts obtained by various railway companies, who are now all represented by the pursuers, provision was made for the special protection of Mr Oswald's rights over this waggon road. Thus in 1837 provision was made for the waggon road crossing the railway authorised by that Act on the level. In 1853 similar provision was made with regard to the main line of the Glasgow and South-Western Railway. In 1865 Mr Oswald's rights in the waggon road were reserved entire. In 1866 running powers were given to him over the railway No. 2 authorised by the Act of that date so far as necessary for the traffic on the waggon road or private railway when it came to be made and connected with the public railway authorised. In 1878 elaborate provisions for his protection were embodied in the private Act of that date. Lastly, in 1889, on the preamble that the pursuers had agreed with the proprietor of Auchencruive for the purchase of his rights in the waggon road and other property, all the sections in the Acts already enumerated were repealed as being no longer necessary, the owner of Auchencruive having ceased to have any property in the subjects described in the feu-contract of 1765.

"So much for the rights of Mr Oswald and the pursuers as appearing from the various titles and Acts of Parliament. In the meantime, however, public rights had been acquired, and it is now matter of admission 'that the portion of Oswald Road from the point X up to Marchfield Road has been used by the public as a right-of-way for all purposes at least since the year 1841.' It also appears that at this part the breadth of the road over which the public have acquired a right-of-way is 40 feet, the 30-feet strip being on the westmost side of the road as it at present exists. The date 1841 is noteworthy as it is before the date of the agreement by which the waggon road was defined, and as I read the minute of admissions the right-of-way had at that time been acquired for all purposes—at all events, it must have been so acquired before 1889, when the Railway Company got their only title to the road.

"The pursuers maintained that by the conveyance of 1889 they acquired all the rights in the strip of land in question, including the right to put down railway lines conferred by the feu-charter of 1765, and that these rights had remained unaffected in the person of the then proprietor of Auchencruive until he parted with them in favour of the Railway Company.

"It is not necessary to consider to what extent the acquisition by the public of a right-of-way for all purposes along the road in question may not have had the effect of abrogating the rights conferred by the feu-charter of 1765 so far as they relate to the laying of lines. In my opinion it is sufficient that the subjects acquired by the pursuers could only be legally acquired for extraordinary purposes as defined by section 38 of the Railway Clauses Consolidation (Scotland) Act 1845 already referred to. These purposes do not include the making of sidings, and still less of a loop-line of railway connecting two portions of a main line; and indeed appear to me to be exclusive of such purposes. It was boldly contended by Mr Hunter that Oswald Road was not a street as defined by section 4, sub-section 31, of the Burgh Police (Scotland) Act 1892, in respect that it was or formed part of a railway; and he justified his contention on the ground that it had been acquired by a railway company for railway purposes. If every piece of property owned by a railway company must for the purposes of that section be treated as part of a railway, the argument would be unanswerable; but I think if that had been the true meaning of the section it would have been differently expressed. The First Division have already held that this part of Oswald Road is not part of a railway; and as the admission makes it clear that it is a public passage within burgh, used by carts or foot-passengers, it is impossible to resist the conclusion that it is a street within the meaning of the Burgh Police Act.

"I was referred by Mr Hunter to the following reported cases—*Gonty*, [1896] 2 Q.B. 439, p. 445; *Grand Junction Canal Company*, 21 Q.B.D. 233, at 277; *Matson*, 3 A.C. 1082, at p. 1087; *Coates*, [1909] 2 Ch. 579, at p. 582; and *North British Railway Company*, 6 F. 620, at p. 639, 41 S.L.R., 492. These authorities were quoted to show that it is not necessarily inconsistent with the use of a public road for public purposes that there should be rails across or upon it, and that a railway company may dedicate part of its property which is not being used as a railway to the public for the purposes of passage. None of the cases, however, related to a private or public street within burgh, nor did they affirm that against the wishes of the local authority a railway company who happened to own the *solum* of a public road may lawfully put rails upon it, and use the rails for traffic as the pursuers have done. It was

decided as far back as 1864 that the Greenock Harbour Trustees had no right, even with permission from the Police Commissioners as custodiers of the streets, to lay down rails along the streets of Greenock—*Stewart v. Greenock Harbour Trustees*, 2 Macph. 1155. The Harbour Trustees in that case offered to prove that the laying of rails and the working of the traffic upon them would not interfere with the convenience of the owners of property abutting on the street or their use of it, but the Court considered it unnecessary to allow a proof, holding that it was extravagant to say that the use of locomotives on the streets would cause no inconvenience. Apart from the recent decision of the Extra Division, this case appears to me to be conclusive against the pursuers. Oswald Road was a public street in Ayr before the pursuers' operations on the 23rd February 1908, and they were not entitled without statutory authority to lay rails on the street or to use same as a siding of their authorised railways. This disposes of the alternative conclusions of the summons, which are based on the assumption that Oswald Road is a private street. In all the cases referred to by the pursuers in the course of the evidence where rails, the traffic on which is propelled by locomotives, exist in the public streets of Scotch towns, it is conceded that statutory authority was obtained before the rails were actually laid, with the single exception of Leith. In that case, however, it may be assumed that the rails were laid not merely with the sanction of the Commissioners as custodiers of the streets, but of all the owners of property abutting upon it; for according to the case of *Stewart* any one of the latter might have interdicted the laying of the rails. The practice on which the pursuers founded so strongly is thus entirely against them. Apart therefore altogether from the two decisions which the pursuers have intimated their intention of submitting to review by the House of Lords, I reach the conclusion that they are not entitled to succeed in any of their demands, and that the defenders fall to be assoilzied. . . ."

The pursuers reclaimed, and argued — (1) *Esto* that in *Hutchison's* case, 1908 S.C. 587, 45 S.L.R. 444, the Court had decided that Oswald Road was a "private street," that decision was not *res judicata* as between the present parties, and the pursuers were therefore entitled to a decision on the point with a view to appeal to the House of Lords. This strip of ground had been acquired by the pursuers expressly for railway purposes, be it only for "extraordinary purposes," and it was therefore part of their railway at the passing of the Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55). That being so, it was not a "private street" in the sense of section 4 (31) of that Act. The fact that there was a public right-of-way over Oswald Road did not prevent its forming part of a railway, for the presence of rails was not necessarily an interference with the right-of-way. Section 38 of the Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) gave a very wide meaning to the term "extraordinary purposes," but the Lord Ordinary had unduly narrowed its significance, and virtually deprived the company of making any use of the strip of ground for railway purposes. (2) *Esto*, however, that Oswald Road was a "private street," the pursuers were within their rights in laying down rails upon it. Such rails were not necessarily an "obstruction," and the proof showed that they here were not. If they were so, as presently laid, they could be altered and made flush with the street. (3) The question whether the rails were an "obstruction" was not *res judicata* by the decision of the Extra Division in *Glasgow and South-Western Railway Co* v. *Magistrates of Ayr*, 1909 S.C. 41, 46 S.L.R. 57, for in that case the Court treated it as a subsidiary point, and did not actually decide it. That being so, the pursuers were entitled to appeal to this Court against a decision of the Magistrates, for such a decision being only *pro modo et tempore* could not deprive them of their legal rights.

Argued for respondents—(1) Oswald Road was clearly a "private street." It was absurd to say that everything belonging to a railway formed part of it, and was therefore excluded from the operation of the Burgh Police Acts. At the passing of the Act of 1892 this strip of ground was not *de facto* being used as part of the railway, and the company could not thereafter make it so merely by laying rails upon it, so as to bring it within the exception. Moreover, this ground was subject to a public right-of-way, and such ground could never be part of a railway in the sense of section 4 (31) of the Police Act of 1892. The existence of the public right-of-way was enough to prevent the company closing it up, and so withdrawing it from the jurisdiction of the Magistrates as they might otherwise have done—*Kinning Park Police Commissioners* v. *Thomson & Company*, February 22, 1877, 4 R. 528, 14 S.L.R. 372. (2) The question whether the rails laid down by the pursuers were an "obstruction" was *res judicata*, for that had been expressly decided in the respondents' favour by the Extra Division. It was within the discretion of the Magistrates to have them removed, and the Court had expressly held that the Magistrates were entitled so to decide. The decision of the Lord Ordinary should therefore be affirmed.

At advising—

LORD PRESIDENT—The matters out of which this case arises have been so often before your Lordships that I do not think it necessary to preface my judgment by repeating them in detail. The only particulars I should ask your Lordships' attention to are the conclusions of the present summons. Of these the first is for a declarator that the pursuers are heritable proprietors of a certain strip of ground. That declaratory conclusion, however, is a mere echo of the title, and is really only introductory to what is to follow. The

same may be said of the second conclusion, which is to the effect that the strip of ground was acquired by and is vested in the pursuers. No doubt they add the words "as part of and for the purposes of their railway undertaking," but these words as they stand are obviously ambiguous. So far as these first two conclusions are concerned, nobody contradicts them. The third conclusion is "that the said strip of ground is not subject to any of the provisions of the Burgh Police (Scotland) Acts 1892 to 1903, or any Acts amending the same;" and then there is an alternative to that, the fourth conclusion, "that the said strip of ground forms part of the railway of the pursuers within the meaning of the said Burgh Police (Scotland) Acts 1892 to 1903, and particularly section 4 (31) of the Burgh Police (Scotland) Act 1892, and is not a private street." And then lastly, the fifth conclusion, that whether any of these declaratory decrees be granted or not, "the pursuers are entitled to maintain and use for the purposes of their undertaking the said strip of ground and the lines of rails already laid down thereon, and to lay down, maintain, and use for said purposes such further lines of rails thereon as they may deem expedient," and that the defenders, the Magistrates, should be interdicted from proceeding with a resolution whereby they propose to cause Oswald Road to be freed from obstructions and to be properly levelled.

Now the gist of this last conclusion, as to which there is controversy, lies first of all in the question whether or not this Oswald Road is a private road. We have already determined in the first case that arose on the matter that it was a private road, but that determination is not *res judicata*, because the parties were not the same. The Railway Company were the same, but the other parties were not the Magistrates but certain feuars. Over and above that, the circumstances were not precisely the same, because, whereas at the date of that judgment there was nothing *de facto* in the way of rails laid down on the road, now there have been rails put on the road by the Railway Company at their own expense, which was done shortly after the first judgment. So far of course as the technical question is concerned, although it is not *res judicata*, obviously if there were no change of circumstances we could scarcely be expected—at least I could scarcely be expected—to change the opinion which I then expressed, and although I am quite willing to reconsider it, I have not changed my opinion. In so far as that opinion was adverse to the general position which was argued on behalf of the Railway Company, namely, that anything that was the property of the railway was in the sense of the statute part of the railway, I still retain my view that that is not a sound proposition; but the question of the change of circumstances is different, and therefore I consider that matter to be now open.

I have come to the conclusion that this strip of ground is still no part of the railway, and for this reason. The matter really depends upon what is a private street; and a private street is, by force of the definition of the Act of 1892 coupled with the Act of 1903, any road, *inter alia*, used by foot-passengers or carts within the boundaries, that is, not part of, a railway. Now it seems to me that the definition must speak as at its date, that is to say, at the time when the ground in question becomes burgh either at the extension of boundaries or at the passing of the Act. Now this land was acquired by the Railway Company in 1889. The Burgh Police Act was passed in 1892, and whatever was the precise condition of affairs before that—for I do not think we are really informed on this occasion precisely what was the condition of affairs before 1892—at any rate we are informed that previous to 1892 the boundary of the royal burgh of Ayr had been extended right up to the boundary of Prestwick, and consequently included this land, and we know by the Act of 1892 that it applied necessarily to all royal burghs except the burghs mentioned in the schedule, of which Ayr is not one. Accordingly it seems to me that as soon as the Act of 1892 passed, taking with it the fact that this particular ground had by that time been included within the boundaries of the royal burgh of Ayr, by force of the definition this became a private street, as it was not at that date part of the railway. At that date it certainly was not part of the railway, unless of course the general proposition I have referred to as being unsound was true; and accordingly I come to the conclusion that in 1892 this became a private street. If that is so, then it must follow the fate of a private street, and of course it follows from that that declarator cannot be given in terms of either the third or the fourth conclusion. If this then is a private street, I do not think that the Railway Company can make it not a private street by action at their own hand, viz., by putting rails down upon it. They cannot make it part of a railway, even although rails in that position might have made it part of a railway before it became a private street; for I do not think you can take it out of the category of private street, after it has once been included in that category, by altering the circumstances so as to bring it within the terms of the exception.

There only remains the question whether the general declarator asked at the end should be granted. I do not think it should. In the first place, so far as concerns the actual rails with which we are concerned here, that is decided by the case before the Extra Division, and so far as rails in general are concerned, I think the matter is really concluded by the judgment of the Court in the Greenock case of *Stewart* (2 Macph. 115), in which it was held that to put down rails in a street was an obstruction which might be complained of and objected to by those who had right in the street. There it was the Stewarts, here it is the Magistrates, and each had an equally good title to object. Accordingly

I think this declarator should be refused, and on the whole matter I think that the judgment of the Lord Ordinary is right.

LORD KINNEAR—I agree with your Lordship.

LORD JOHNSTON—It was intimated very plainly by counsel for the reclaimers in this case that they wish by a judgment on this reclaiming note to conclude and bring to a final point a litigation which has been going on in various forms for a considerable time, in order that they may be in a position to take the whole matter to the House of Lords. I have only come into this case at the eleventh hour, and I do not feel justified in doing more than saying that as far as I am now seised with the matter at issue I acquiesce in the judgment which your Lordship proposes.

LORD MACKENZIE—I agree with your Lordship. I should like, however, to make one remark, which is this, that I do not think the question whether or not the Railway Company are entitled to lay what are called "dock rails" is properly raised by the fifth conclusion of the summons. The conclusion is that they are entitled to maintain and use the lines of rails already laid down, and to lay down, maintain, and use such further lines of rails thereon as they may deem expedient. We cannot affirm a conclusion in these terms, but whether they may have a right, if they satisfy the Magistrates, to lay down dock rails consistently with the public use of the road is a different matter, with regard to which I express no opinion.

In moving for expenses counsel for the respondents craved the Court to find him entitled to the expenses of the first reclaiming note, which on 13th July 1909 were declared "to be expenses in the cause." He stated that unless a direct finding for these expenses were now given him the Auditor might strike them out on taxation on the ground that his clients had been unsuccessful in that branch of the case. He cited *Alston & Orr* v. *Allan*, 1910 S.C. 304, 47 S.L.R. 255.

Counsel for the reclaimers opposed the motion, and craved a remit to the Auditor in ordinary form, the Auditor being the Court of first instance in such matters.

LORD PRESIDENT—We shall consult with the Judges of the Second Division before giving our decision.

On 21st December the Court (after consultation with the Second Division) gave judgment as follows:—

LORD PRESIDENT—This case was raised by the Glasgow and South-Western Railway Company against the Provost and Magistrates of Ayr for declarator to certain effects—I need not go through the conclusions—with regard to their lines upon Oswald Road. The action came to depend before Lord Salvesen, and Lord Salvesen assoilzied the defenders upon the ground that the matter was *res judicata*, in respect of an interlocutor pronounced by the Extra Division in a petition at the instance of the Magistrates of Ayr for laying out Oswald Road as a street. In that petition, which had been opposed by the Glasgow and South-Western Railway Company as respondents, decree had been granted in the petitioners' favour. Against that interlocutor of Lord Salvesen's a reclaiming note was taken to this Division, and their Lordships recalled the interlocutor and remitted to Lord Salvesen to allow a proof. I need not go into the particular reasons why they did so, because they are set forth in the judgment, but, very briefly, it was upon the ground that they did not think that the former petition could be taken as a *res judicata* case, for the Extra Division had on the face of their judgment said they looked upon what they were doing as a possessory and not as a final judgment. Then at the end of the discussion upon the reclaiming note, when the Court had intimated its judgment, the usual motions for expenses were made, and the interlocutor of this Division was that the expenses should be "expenses in the cause."

The case went back to Lord Salvesen. He took a proof, and he then pronounced the same decree as he had before, namely, decree of absolvitor, although of course this time not founding it upon *res judicata*, but upon the merits of the action as tried before him. A reclaiming note was taken against that interlocutor of Lord Salvesen's. The case was heard in this Division, and the Division affirmed the interlocutor of Lord Salvesen *simpliciter*, and made a general finding of expenses in favour of the victorious party, the defenders.

The matter was very properly brought up to us by the counsel for the defenders, because of the case of *Alston & Orr* v. *Allan*, 1910 S.C. 304, decided in the Second Division the other day, in which case there was an interlocutor couched in the same terms as the one which I have recited, namely, that expenses should be "expenses in the cause." The Auditor had, notwithstanding that finding, looked into the matter for himself and applied the fifth article of the General Regulations appended to the Act of Sederunt, 15th July 1876, and disallowed as against the victorious party the very expenses which had been reserved as expenses in the cause, upon the ground that, so far as that part of the case was concerned, the eventually victorious party had been unsuccessful. And accordingly counsel for the victorious parties here brought to our notice that decision and asked for a further intimation to the Auditor, because they conceived that the true meaning of the interlocutor we had pronounced was that the expenses should go to the party who was ultimately successful.

We saw of course that the question was one of general interest, and accordingly we have had upon this matter a joint consultation of their Lordships of the First and Second Divisions, and although there were necessarily some of their Lordships who remained of the former opinion, the opinion which I am now pronouncing is

the opinion of the majority of the two Divisions. It is that when an interlocutor declares that expenses are to be expenses in the cause, the meaning of that is that the expenses are to go, as a matter of right, to the party who in the cause is eventually successful, and who gets a general finding of expenses in his favour at the end.

I have personally no doubt that in the profession that was always understood to be the meaning of it, and I think that it is not only so but that this meaning can easily be supported upon considerations to which I think there is no good reply. The meaning of the fifth article of the Regulations, or rather the origin of the fifth article of the Regulations, is to avoid cross findings of expenses. Where one party is successful and where at the end of a case he gets a general finding, there may be portions of the case in which he has been unsuccessful, and, accordingly, if it had not been for the fifth article of the Regulations the only way to have dealt with that would have been, instead of giving a general finding, to split the case into sections, and to dispose of the expenses of each section separately, either in favour of one party or the other, or in favour of one party in one section and in another section to give no expenses to either the one or the other. In order to avoid the eternal necessity of that, the fifth article of the Regulations was enacted, and it was said that when there was at the end of the case a general finding of expenses, yet, nevertheless, the Auditor in looking into the case might, if he found a branch of it in which the eventually successful party had been unsuccessful, not give him as against his opponents the expenses of that branch.

Now the whole hypothesis of that is that the Court has not taken up bit by bit sections of the expenses. But when you have a reclaiming note which gives rise to what is an interlocutory judgment, and when at the end of the discussion of that reclaiming note there is a motion made there and then for the expenses of the discussion which has just ended, the Court is necessarily cutting the case into sections, and the Court before whom that reclaiming note has been heard is by that time thoroughly seised with all the facts which would go to the giving of expenses to either the one party or the other. And it can do so. It can give expenses to the person who has (what I may call) immediately won the reclaiming note, or it can find, if both parties have asked for more than they have got, that neither party shall have expenses.

But then there is another class of circumstances with which it has to deal, which is this—A reclaiming note may be seemingly to the advantage of one party at the moment, because its result may be that the interlocutor which was brought up by it may be altered, and yet, after all, the whole matter may be such a necessary step in the totality of the process that the Court may feel it would be unjust to give separate expenses on the reclaiming note, and that it would be better that the fate of these expenses should depend upon ultimate success. That is the occasion on which it is said that the expenses shall be expenses in the cause. If that is done, the question of expenses is really absolutely decided upon that section of the case, and therefore there is no application for the article allowing the Auditor to go back into it, as there is where the Court has not dealt with the case in sections but has dealt with it in the whole.

Accordingly we make this declaration, and it will be understood that in future that is the meaning of an interlocutor which declares that the expenses shall be expenses in the cause.

The Court pronounced this interlocutor—

"Adhere to said interlocutor: Refuse the reclaiming note; and decern: Find the defenders entitled to additional expenses since said 13th January 1910; and remit," &c.

Counsel for Pursuers (Reclaimers) — Solicitor-General (Hunter, K.C.) — Macmillan. Agent—John C. Brodie & Sons, W.S.

Counsel for Defenders (Respondents) — Dean of Faculty (Scott Dickson, K.C.)— Hon. W. Watson. Agent—James Ayton, S.S.C.

Friday, December 23.

FIRST DIVISION.

WILLIAMSON AND OTHERS (M'GROUTHER'S TRUSTEES), PETITIONERS.

Trust—Charitable Trust—Petition by Private Trustees for Authority to Transfer Trust to ex officio Trustees.

A testatrix by her trust-disposition and settlement conveyed her whole estate to certain individuals as trustees, and, *inter alia*, directed them "to hold and apply the sum of £1000 for providing an endowment for two bursaries for Highland students attending the Free Church College, Glasgow, and also to hold and apply the sum of £2000 and the interest thereof for the purpose of increasing the incomes of the poorer ministers of the Free Church of Scotland in the Highland districts, which sum shall be applied in such manner and in such sums as to my trustees shall seem proper." The trustees presented a petition to the Court for authority to transfer the two said trust funds of £1000 and £2000 to the Financial Board of the said College and the General Trustees of the said Church respectively, both *ex officiis*.

The Court, after a report, indicated that the permissibility of the proposed transference depended on whether the new trustees proposed were committees of a "constitutional" and "permanent" character, whose existence was not