

tion to be made to such person in the form, or as nearly as may be in the form, contained in the schedule hereto annexed. . . .”

Intimation was dispensed with by the Lord Ordinary where the woman with whom adultery was said to have been committed was not cited as a co-defender, but where a letter from the woman was produced acknowledging the truth of the charges contained in the summons and intimating her intention not to defend.

This was an action of divorce raised by a wife against her husband, in which she alleged adultery with a woman who was not called as co-defender. The husband did not lodge defences to the action. A letter was produced, written by the woman, in reply to a letter enclosing a copy of the summons, in which she acknowledged the truth of the charges contained therein and intimated her intention not to defend the action.

The Lord Ordinary (CULLEN), on the motion of counsel for the pursuer, dispensed with the formal intimation required by the Act of Sederunt, and fixed a diet of proof.

Counsel for the Pursuer—A. R. Brown.
Agents—J. C. & A. Steuart, W.S.

HOUSE OF LORDS.

Tuesday, February 27.

(Before the Lord Chancellor (Loreburn),
Lord Atkinson, Lord Gorell, and
Lord Shaw.)

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

(In the Court of Session, December 21, 1910,
48 S.L.R. 211, and 1911 S.C. 298.)

Burgh—Police—Street—Railway—Private Street—Road “Forming Part of Any Railway” — Railway Lines Forming “Obstructions” in a Street—Burgh Police (Scotland) Act 1892 (55 and 56 Vict. cap. 55), sec. 4 (31)—Burgh Police (Scotland) Act 1903 (3 Edw. VII, cap. 33), sec. 104 (2) (d).

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. . . .”

The Burgh Police (Scotland) Act 1903, sec. 104 (2) (d), enacts—“Where any private street or part of such street has not . . . been sufficiently levelled, paved, . . . and flagged to the satis-

faction of the council, it shall be lawful for the council to cause any such street or part thereof . . . to be freed from obstruction, and to be properly levelled, paved. . . .”

Held (aff. judgment of the First Division)(1) that a strip of ground in a burgh adjoining a railway, consisting of an unformed road along which existed a public right-of-way for traffic of all descriptions, which had been acquired by the railway company in 1889 for “extraordinary purposes,” but never used till 1908, when the company laid a set of rails on it, did not form “part of any railway,” and fell within the definition of “street” in the Burgh Police (Scotland) Acts; and (2) that the rails laid by the company might form “obstructions.”

[This case is reported *ante ut supra.*]

The Glasgow and South-Western Railway Company, pursuers and reclaimers, appealed to the House of Lords.

At delivering judgment—

LORD ATKINSON—This is an appeal from two interlocutors dated respectively the 13th of January 1910 and 21st December 1910, the first pronounced by the Judge Ordinary who tried the case, and the second pronounced on appeal by the First Division of the Court of Session confirming the first.

The controversy between the appellants and respondents out of which the appeal arises relates to a strip of ground, 30 feet in width, situated formerly within the burgh of Newton-upon-Ayr, now within the extended boundaries of the burgh of Ayr, and forming part of what has come to be known as Oswald Road. One Mr Oswald, of Auchencruive, was in 1837, when the appellants obtained their first Act authorising the construction of their railway, owner of this land. How he got it, or to what purpose he intended to devote it, are in my view irrelevant. He was admittedly seized and possessed of the full proprietary right in it.

In the year 1889 the appellants purchased the strip of land from Oswald for the sum of £3500. They acquired it under the powers conferred upon them by the Railways Clauses Consolidation (Scotland) Act 1845 for extraordinary purposes, which purposes are, by section 38 of that statute, defined to be “making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving and depositing, loading, or unloading goods, &c. And for the purpose of making convenient roads or ways to the railway or any other purpose which may be requisite or convenient for the formation or use of the railway.” Whether as between the company and the vendor the strip of land was subject to any right in him over the land is irrelevant. The proprietors of the land abutting on the eastern side of this strip, that is, the side furthest away from the appellants’ railway, at some remote time added a strip of about 10 feet

wide for the greater part of the length of the strip so purchased, and this enlarged strip, 40 feet in breadth, is now called Oswald Road. On the 23^d of February 1908 the Railway Company laid down a double line of rails on this ground. Up to that date they had never used it for any purpose. It was never bottomed or metalled or made up as a road. In some places it was grass-grown, but the Railway Company admit that there is and long has been a public right-of-way over it for the passage of horses, carts, and of persons on foot; and further, it has been found on the facts at the trial of the case that the rails so laid down were an obstruction to the right of the public thus to use it.

The earlier litigation it is unnecessary to deal with, but the Town Council of Ayr on the 14th of March 1908, acting under the provisions of the 133rd section of the Burgh Police (Scotland) Act 1892 as amended by the 104th section of the Burgh Police (Scotland) Act 1903, passed a resolution to have the road put in order and freed from obstruction. This resolution, it is admitted, could only be legally passed by the Town Council on the assumption that the road in question had at the date of the resolution become and was a private street. The Railway Company accordingly instituted this action, seeking to have it declared that the strip of ground was not at the date of the resolution a private street, and that this being so the respondents had no right to interfere with them. A proof having been taken, the case, after much litigation, came on for hearing, with the result that the Lord Ordinary pronounced the interlocutor of the 13th January 1910, by which the respondents, the Magistrates, were assoilzied, and that interlocutor was by the interlocutor of the First Division, dated 21st December 1910, adhered to.

The question upon which the case turns is this—Had this place become a “private street” within the meaning of the 25 and 26 Vict. cap. 101 (repealed by the Burgh Police (Scotland) Act 1892), or within the meaning of the latter statute? The definitions of a street and a private street in the two statutes are identical.

Private street in each means a street maintained or liable to be maintained by persons other than the Commissioners. This place, Oswald Road, was certainly not maintained by the Commissioners. So far as it was maintained at all, it was maintained by some persons other than the Commissioners. Then was it a street when these rails were laid down upon it? “Street” is thus defined: “Section 4 (31)—. . . [quotes, *v. sup.*] . . .”

It is not denied that this road was used by carts and foot-passengers long before the year 1862, when the 25 and 26 Vict. cap. 101, was passed. Up to 1889, the date of the purchase by the Railway Company, it would appear to me that this statute operated upon the state of things so existing for twenty-seven years. There could be no question of any part of the street being a railway during that period, but

even if that were not so, I think it is not enough that the soil merely should, after it has become subject to a public right-of-way, be acquired by a railway company for extraordinary purposes if it never has in fact been used for any of those purposes. The mere acquisition of the land for extraordinary purposes, coupled with an intention ultimately to use it for some of them, cannot by itself convert land allowed to lie waste into a railway within the meaning of this definition. In my view, therefore, this Oswald Road had become a private street, if not long before 1889, certainly before February 1908, when these rails were laid down upon it. There is no doubt that a public right-of-way may, under the 46th section of the Railways Clauses Consolidation Act of 1845, in the absence of any provision in the Special Act prohibiting it, be exercised over the permanent way of a railway. *The Dartford Rural District Council v. The Bexley Heath Railway Company* ([1898] A.C. p. 210) established that. But here the fact has been found against the appellants that the rails as laid are an obstruction to the public right-of-way. It is not necessary to decide at present whether if this place, Oswald Road, has become a private street, as I think it clearly has, the company cannot ever lay down rails upon it, but certainly they cannot do so in such a way as to cause an obstruction such as it is found they have created. The decisions appealed from are therefore, in my opinion, right and should be affirmed, and this appeal be dismissed with costs.

LORD SHAW—I do not entertain any doubt that the Scotch Courts have come to a correct conclusion in this case. It is only because on both sides of the bar it was represented that the question at issue between, so to speak, railways on the one hand and municipal authorities on the other, was of great importance in Scotland, that I venture again briefly to resume the facts. It does not appear to me to be necessary, however, in doing so, to go into the history of the strip of ground afterwards known as Oswald Road, Ayr, or to recount its various transmissions since 1765 up to the date when it was acquired by the Railway Company from Mr Oswald in 1889.

In 1885 this road or piece of ground, originally a part of the burgh of Newtown-upon-Ayr, was wholly incorporated in the extended burgh of Ayr. What was then the situation of that piece of ground? That is cleared up by the admission of parties to this effect, that it “has been used by the public as a right-of-way for all purposes at least since the year 1841,” this admission being made, of course, by the pursuers without prejudice to their pleas as to the effect of their acquisition of the *solum* in 1889 in virtue of their conveyance and the Railway Acts. It may be useful as a test to look at the state of matters in and after this year 1885. The municipal boundaries of Ayr in that year included this ground. It is admitted that it has

been used by the public as a right-of-way for all purposes at least since 1841. The Burgh Police Act of 1892 had no doubt not then been passed, but its predecessor, the Police and Improvement Act of 1862, a statute which was not referred to in the discussion, was in full operation. By the definition of that Act it does not appear to me to be doubtful that the ground was a "private street." By section 3, the definition section of that statute, "the expression 'private street' shall mean any road, street, or place within the burgh (not being or forming part of any harbour, railway or canal station, depot, wharf, towing-path, or bank) used by carts, and either accessible to the public from a public street or forming a common access to lands and premises separately occupied and which has not been, before the adoption of this Act, well and sufficiently paved and flagged by the owners of premises fronting or abutting on said street, and which has not been maintained as a public street." As I say, it does not appear to be open to doubt, accordingly, that Oswald Road in and after 1885 was a private street.

In 1889, acting under the provisions of section 38 of the Railways Clauses Consolidation (Scotland) Act, the appellants' company, by voluntary agreement, acquired that ground. I shall refer in a little to what I consider to be the effect of that statute, but I may remark that from the date of that acquisition in 1889 until February 1908 the ground does not appear to have been in fact used or appropriated as any part of a railway. No rails were laid down upon it, no exclusive possession was taken of it, but, on the contrary, it stands admitted that the public rights and thoroughfare existed as before. The Town Council of Ayr exercised their ordinary jurisdiction with regard to private streets over it, and in 1896, without objection by the appellants, a public sewer was laid in Oswald Road, and we were informed that the gas mains were also, under public authority, there laid.

Meantime in 1892 the Burgh Police (Scotland) Act had passed, and the statutory definitions therein are as follows—"Private street" shall mean any street maintained, or liable to be maintained, by persons other than the commissioners"; and it is further provided that "'street' shall include any road, highway, . . . 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." For the purposes of this case there is no material distinction between this and the language of the Act of 1862, and there can be no reasonable argument against the proposition that both *de facto* and *de jure* in February 1908 the road in question was, and had for many years been, a private street within the jurisdiction of the municipal authorities of Ayr.

There are various conclusions of the summons in this case, but it was candidly

admitted by Sir Alfred Cripps that he desired a judgment which would for practical purposes combine the third and fourth conclusions in this way—"that the said strip of ground is not subject to any of the provisions of the Burgh Police (Scotland) Acts . . . because the said strip of ground forms part of the railway of the pursuers within the meaning of the said Burgh Police (Scotland) Acts . . . and is not a private street, . . . and is in no way subject to any of the provisions of the said Acts relating to streets." There follows the fifth conclusion, which appears to me to be a serious but quite logical consequence of the third and fourth conclusions which I have cited, and to constitute what in my opinion is a most audacious demand. It is to the effect that the appellants are entitled to maintain and use for the purpose 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.

It appears that on the 14th of March 1908 the Town Council of Ayr had passed, under their statutory powers, a resolution requiring that this portion of Oswald Road should be freed from obstruction and properly levelled, bottomed, &c., and it is of course maintained that this resolution was invalid if the other conclusions of the summons are affirmed. In a word, the object of this suit is this, that it was within the power of the Railway Company in February 1908, by laying rails on this private street, to destroy its character as such, and to cut it out of the jurisdiction of the Ayr municipal authorities and of all the provisions of the Burgh Police Act. The appellants, it is maintained, had the power to do this, because by laying the rails they made the ground part of the railway, and so brought it within the exception to private streets. It follows, accordingly, that the surface of the ground can, according to the argument, be used without let or hindrance by locomotives, trucks, and carriages, and that the rails can be laid, as in point of fact they are, over the drainage system underneath. I mention these things to show the state of confusion and danger, both above and below ground, which might result from a decree in terms of the conclusions of this summons, and from an affirmation of the construction of the Acts of Parliament for which the appellants contend.

The argument hinges upon the proposition that the strip of ground is part of a railway and within the exception to private streets in the Burgh Police Acts. I desire to state broadly, in the first place, that I think "part of a railway" is, and was meant to be, part of a railway in fact, and not merely ground, buildings, or the like which happen to be the property of the railway. It is easy to figure the acquisition of property, say, for sites of offices or other convenient accommodation possibly in parts of burghs which are not even adjoining the actual railway, as it is generally

understood such property may be acquired under the 38th section of the Railways Clauses Consolidation Act, and I should hold it to be quite unsound to suggest that the fact of such purchase operated to cut out such ground, buildings, &c., from the municipal jurisdiction of the burgh. But if the ground, buildings, &c., are merely the property of the railway, and do not in the language of the Act form part of any harbour, railway or canal station, &c., then it does not appear to me that the exception which is founded upon has any application.

I now turn to section 38 of the Railways Clauses Act, which permits the company, in addition to their powers of compulsory taking, privately to purchase a certain limited amount of land "adjoining or near to the railway, or to any other railway communicating therewith, and on which the traffic thereon may pass, and in any town or city adjoining to or near such railways, . . . for the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway." Speaking for myself, I do not entertain any doubt that instead of the land, which is dealt with in section 38, being treated as land which forms part of the railway, it is, on the contrary, treated as land which is different from the railway in fact, but is "adjoining or near to the railway," or convenient for the "formation or use of the railway." The railway, in short, is one thing, even as used in that statute, and the land which is the subject of section 38 is another thing, and the Act nowhere provides that the mere acquisition of property by the company shall thereby operate its conversion into part of the railway.

This might be sufficient to dispose of this case, but I desire to give my adhesion to the view which is set forth in the opinion of the learned Lord President. I do not agree with what was maintained to have been his view, that the Act of 1892 must speak from its date, and that accordingly everything must stand fixed at that period. I do not think that the latter of these propositions is implied in what the learned Lord President said, but I understand his meaning to be, and, if so, I entirely concur in it, that when the Act of Parliament passed it became operative when and as the circumstances arose within the area of the burghal jurisdiction to which its provisions could apply. Land might be laid out subsequent to 1892, and rights of access might be granted, or facts as to public thoroughfares emerge, and, as these things occurred, the provisions of the Act of 1892 could be called into operation. I need not go through the many sections of the statute which show that the Act was meant to have its adaptations to emerging circumstances as I have mentioned; but I find nowhere in the Act any countenance to the suggestion that apart from the express authority of Parliament, the statutory municipal jurisdiction, once set up, could be thereafter cut down or cut

into by the acts of inhabitants or corporations within the burgh. This, however, is precisely what, according to the argument of the appellants, has occurred. Against the will of the respondents the Railway Company have placed down these rails, and they propose to treat and use the road as non-burghal, and to bring about the exclusion of the municipal jurisdiction, together with the confusions and dangers to which I have alluded.

I do not think that there is any sanction for these proceedings on account of the fact that the land has been acquired under section 38 of the Railway Clauses Act, nor do I think the effect of the Railway Company's action is to set up the exception to, and exclusion from, the Burgh Police Acts, as contended for.

In view of this opinion it is unnecessary for me to refer to the subsidiary parts of the case. I think, for instance, that the *Greenock* case (*Stewart v. Greenock Harbour Trustees*, 1864, 2 Macph. 1155), in which it was held that the working of locomotive traffic on rails through a public street was so plainly an obstruction to traffic as not to require any evidence to be led upon the subject, was rightly decided. Nor is it needful to make any pronouncement upon the question of whether finality attaches to the action of the Town Council in forbidding obstruction, that action having been already ratified *in foro contentioso*. My humble opinion being that the foundation of the appellants' case is unsound, it follows that they had not power, apart from statute, to cut down the burghal jurisdiction, and that they are not entitled to decline to give effect to the Town Council's resolution for the proper levelling, macadamising, freeing from obstructions, &c., of this road.

I agree with the course proposed, and think that the appeal should be dismissed.

The LORD CHANCELLOR and LORD GORELL concurred.

Appeal dismissed with expenses.

Counsel for the Pursuers (Appellants)—Cripps, K.C.—Macmillan. Agents—John C. Brodie & Sons, W.S., Edinburgh—Sherwood & Company, London.

Counsel for the Defenders (Respondents)—C. D. Murray, K.C.—Munro, K.C.—Hon. W. Watson. Agents—P. A. Thomson, Town-Clerk, Ayr—James Ayton, S.S.C. Edinburgh—John Kennedy, W.S., Westminster.