other owed about £6000, and the new bills altered very much these relative proportions; but it was part of the course of business that the appellants should have power to alter these proportions from time to time. The appellants made a new division of the total amount due from the Glasgow firms, as they were fully authorised to do, and though they reduced the liability of one and increased the liability of the other firm, still it could not be questioned, on the facts of the case, that when the new bills were so drawn the old bills were at an end. That was the clear understanding of all the parties, and it was only by some ingenious afterthought of the appellants that they had thought of resorting to the old bills, and founding upon them the present claim. As to any supposed difference between the English and Scotch procedure as to the mode of proof, there was no foundation for such a contention.

Lord Colonsay said he also entirely concurred that the bills now sued upon had been superseded by the new bills. As to the rule about requiring the writ or oath of the creditor being necessary to prove that the bills were discharged, it was a misapplication of such a rule to think that it applied to the circumstances of this case, the issue to be proved being what was the course of dealing between these parties; and on the issue general evidence was clearly admissible.

Lord Cairns also concurred, and said there could be no reasonable doubt on the facts of this case that the course of dealing between the parties was that when new bills of exchange were drawn, the old bills were to be entirely withdrawn from circulation, and treated as discharged. It was only an afterthought of the appellants to bring this action, suggested by the fact that they had kept the old bills in their possession; but that made no difference. The appeal must therefore be dismissed, with costs.

Agents for Appellants—Murray, Beith, & Murray, W.S.

Agents for Respondents—Maconochie, Duncan, & Hare, W.S.

Monday, May 9.

SCOTTISH NORTH-EASTERN RAILWAY CO. *v.* INSPECTOR OF ST VIGEANS.

(*Ante*, vol. v, p. 103.)

Railway—Poor-Law Assessment—8 and 9 Vict., c. 83, § 91—Poors-rates. By the Act incorporating a Railway Company, passed prior to the Poor Law Act of 1845, it was enacted that the Company should not be liable "for any feu-duties or casualties to the superiors, nor for land-tax, cess, stipend, schoolmaster's salary, nor any public or parish burden whatever, but the same shall be paid by the original proprietor of such lands or heritages." By the Poor Law Act of 1845 certain changes as to assessments were made, and enactments inconsistent therewith repealed. *Held*, reversing decision of the Second Division, that the Company were liable for poors-rates for the railway constructed entirely upon ground acquired by them under their Act.

This was a suspension in which the question was as to a right of exemption claimed by the Scottish North-Eastern Railway Company from poor's assessment, in respect of certain exempting clauses in their Acts. The clauses mainly relied upon were the 23d section of the Act 6 Will. IV., c. 32, and the 32d section of the Act 6 Will. IV., c. 33. By section 23 of cap. 32, it was enacted, "That the rights and titles to be granted in manner above-mentioned to the said company to the lands and heritages therein described shall not in any measure affect or diminish the right of the superiority of the same, but notwithstanding the said conveyances, the rights of superiority shall remain as before, entire in the persons granting such conveyances; and the lands and heritages so conveyed to the said company shall not be liable for any feu-duties or casualties to the superiors, nor for land-tax, cess, stipend, schoolmaster's salary, nor any public or parish burden whatever, but the same shall be paid by the original proprietor of such lands or heritages." By section 32, cap. 34, it is enacted, "That the lands or heritages to be acquired for the purposes of this Act shall not be liable in payment of land-tax, or any feu-duties, casualties of superiority, cess, stipends, schoolmaster's salary, or other public or parochial burdens, unless it be so stipulated in the conveyance thereof to the said company, but the same shall be paid by the original proprietors of such lands or heritages, except in case the said company shall purchase and acquire the whole lands or heritages belonging to any person within the said parishes, in which case the said burdens shall be paid by the said company for the whole of such lands or heritages which may be so acquired as aforesaid."

The Court had formerly decided, in an action at the instance of the Inspector of Coupar-Angus, that the claim of exemption was well-founded; but the present case was designed to bring up the merits of the Coupar-Angus case with a view to appeal, and also to enable the respondents to state certain additional pleas, to the effect (1) that the exemption only applied to the assessment attaching to *ownership;* and (2) that there were certain portions of the railway company's line in the parish of St Vigeans which were not under the exempting clauses.

The Lord Ordinary suspended *simpliciter*, holding that there was no distinction between this case and that of Coupar-Angus, and that the respondent had not condescended upon the portion of the line excepted from the exemption.

His Lordship pronounced the following interlocutor and note:—

"The Lord Ordinary having heard parties' procurators, and made avizandum, and considered the proceedings: Finds that the suspenders, the Scottish North-Eastern Railway Company, are not due to the respondent, the collector of poors-rates for the parish of St Vigeans, the sum of assessment for which warrant has been granted: Suspends *simpliciter* the warrants and proceedings complained of: Declares the interdict already granted perpetual, and decerns: Finds the respondent liable to the suspenders in the expenses of process: Allows an account thereof to be lodged, and remits to the auditor to tax the same, and to report.

"*Note.*—The present case must be ruled by the decision of the Court in the case of the *Scottish North-Eastern Railway Company* v. *Gardiner*, 29th January 1864, 2 M., 537. The collector of poors-rates for the parish of St Vigeans has avowedly disregarded that decision, and assessed the Railway Company, without giving effect, in any respect, to

the exemptions sanctioned by the judgment. The sum insisted for, and for enforcement of which poindings were executed of the Company's carriages and locomotives, is clearly not due to the whole extent. The Lord Ordinary would have been well pleased had he been enabled in the course of the process to fix the sum (within that demanded) truly due by the Company, and he gave the collector an opportunity of showing the limitation produced by the application of the decided case. The collector has been unable to do so, from causes alleged by him to be beyond his control. The Lord Ordinary has therefore felt that he had no alternative but to grant suspension of the warrant and interdict against the prosecution of the poinding."

The Inspector reclaimed to the Second Division, but the Court adhered, except as to the last point, in regard to which they held the Company bound to specify the lands on which they claimed exemption.

The Respondent appealed.

Sir Roundell Palmer, Q.C., and Anderson, Q. C., for him.

Lord Advocate and Mellish, Q.C., in answer.

At advising—

Lord Chancellor—My Lords, in this case the appellant complains of certain directions which have been given with reference to an assessment which he, as the collector of poors-rates in the parish of St Vigeans in the County of Forfar, put in force against the respondents, the Scottish North-Eastern Railway Company. His appeal is against an interlocutor which has been pronounced by the Court against his proceeding, as collector of the poors-rates, to collect a rate which had been assessed upon the company.

The question which arises upon this appeal is, Whether or not, under the several Acts of Parliament passed with reference to the constitution of the companies represented by the Scottish North-Eastern at the present time, the property through which the railway passes and which is held by the railway company is, or is not, exempt from the operation of an assessment which has been made with reference to the parish of St Vigeans, that being a parish which the railway traverses, and as to which the assessment of the rate is now in question?

There were originally two Acts of Parliament, one for constructing a railway from Arbroath to Forfar, and the other for constructing a railway from Dundee to Arbroath. The sections contained in these railway Acts, with reference to the purchase of land for the several railways, were different in form, perhaps in some degree different in substance, but upon the present occasion, so far as we are called upon to pronounce a decision in this case, the form seems to be to the same effect in the one case and in the other.

By the 3d section of the Dundee and Arbroath Railway Act, the company was authorised to make the railway. By the 21st section the form of conveyance was specified, and by the 23d section it was enacted that "the rights and titles to be granted, in manner above-mentioned to the said company to the lands and heritage therein described, shall not in any measure affect or diminish the rights of the superiority of the same, but notwithstanding the said conveyances the rights of superiority shall remain as before, entire in the persons granting such conveyances, and the lands and heritages so conveyed to the said company shall not be liable for any feu-duties or casualties to the superiors, nor for land-tax, cess, stipend, schooolmaster's salary, nor any public or parish burden whatever, but the same shall be paid by the original proprietor of such lands or heritages."

This form of enactment appears to have been not infrequent at the time when the Act passed, which was in the year 1835, owing to a jealousy which was felt on the part of the proprietors of lands, with reference to the influence conferred by holding a superiority, and with reference also, no doubt, to certain privileges which existed with reference to votes for the election of Members of Parliament, which rendered persons holding a superiority desirous of retaining it in their own hands; and the intent of Parliament, no doubt, was that this superiority should be so reserved, and that, the superiority being reserved, any assessment which might be made with reference to the ownership of the lands should continue to be paid by those who owned the lands, and that the Railway Company should take the lands free from those particular assessments which are here specified. There was no intention of course, as against the public, of liberating the lands altogether from the payment of the rates. That is expressly asserted in the latter part of the clause, which says that the lands shall not be liable to be conveyed to the company free of those particular charges, but that the same shall be paid by the original proprietors of such lands or heritages. The first words might have seemed to exempt the lands altogether, but in those words Parliament was intending to deal with a totally different subject matter, a matter with which the parish had nothing to do, namely, the question was, how the payments should be distributed between the vendors of the lands and the purchasers?

The Act for taking the land from Arbroath to Forfar differed in some degree from the Act I have adverted to. In that Act, passed in 1836, there were some special enactments. By the 32d section of that Act a form of conveyance was pointed out which was to give a good title to the company. And in that same section it was provided, "That the lands or heritages to be acquired for the purposes of this Act shall not be liable in payment of land-tax or any feu-duties, casualties of superiority, cess, stipends, schoolmaster's salary, or other public or parochial burdens, unless it be so stipulated in the conveyance thereof to the said company," but the same shall be paid by the original proprietors of such lands or heritages, except in case the said company "shall purchase and acquire the whole lands or heritages belonging to any person within the said parishes, in which case the said burdens shall be paid by the said company for the whole of such lands or heritages which may be so acquired as aforesaid."

There were therefore in this particular Act two special cases of exemption from the general rule, that of the vendors continuing to pay the assessments—namely, that it might be otherwise stipulated, if the parties thought fit, in the conveyance itself; and the other being that in the event of the railway company taking the whole of the proprietor's property, inasmuch as in that event the proprietor would cease to care anything further about his superiority, which of course would be put an end to by the whole of his property having been acquired—then in that case the company were to pay the rates. That only the more clearly demonstrates that by the section which I have read in the previous Act there was no intention of affecting the rights of the parish to levy rates upon

the property which might be taken by the railway company, but that it is simply a matter of arrangement between the railway company and those from whom they purchased as to which of the two parties shall bear the burden.

Part of the argument that we have heard has been founded, in fact, upon that view of the case, because a portion of the argument was directed to this question, whether or not the position of the parties should not be regarded as one in which the parish had no concern whatever, but that the parish was simply to take the usual course of assessing the property in whosoever's hands it might be found; but that when this assessment should be made by the parish, the right of the party holding the lands—namely, the Railway Company (if the Railway Company should be the persons from whom the parish should demand and obtain the payment of the rate), the right of the railway company would be this, and this only, to have recourse by virtue of these sections against the vendor as the person who would be liable to recoup them in respect of the provisions contained in the Statute. I do not think it necessary to pursue that inquiry, but the impression upon my own mind certainly is, that that cannot be read as the true construction of the Act, for there is not any specific direction in the Act, as there would have been if that had been the intention, authorising the company to demand the amount of any payment they might make from the vendor, who would be bound to indemnify them. There is nothing in the Act pointing out that relation between the parties, or giving a remedy to the company for obtaining repayment from the vendor, which one would expect to find specifically pointed out, if such had been the intention. I do not think, therefore, that the case will turn upon any such construction of the Act as that which I have just referred to.

But, subsequently to these Acts, very great changes took place with reference to the whole arrangement of the poor law assessment as regarded the railways. At the time of this Act being passed, the lands in question occupied by the railway company would have to be treated like any other lands with reference to the poors-rate, according as they were found valued and rated in the parish books. The owner who had been entered originally upon the parish book as owner of the land would, I apprehend, still have his name retained for the purpose of convenience at least, under these Acts as owner of this land, which would be actually and bodily occupied and possessed by the railway company, and he would be rated like any other owner for the portion of land which he had so parted with but as to which, under the special provisions of the Act, he had chosen to retain this liability as owner in respect of contribution to the parochial burdens. That might have given rise, independently of the Act to which I shall presently have to refer, to difficult questions through the increased value that might be acquired by the land in consequence of its being occupied as a railway. If, for example, a cotton manufactory or mill had been built upon the property, the owner, I apprehend, would, under those sections, have been liable for the rate upon the increased value of the property so purchased, in consequence of its being placed in a more advantageous position by reason of the site being occupied by a factory or mill or being made the subject of any other improvement.

But in the year 1845 an Act of Parliament was passed which entirely varied the position of the railway companies with reference to the mode in which they were to be assessed in regard to public burdens. It was an Act for the amendment and better administration of the laws relating to the relief of the poor in Scotland. It recites the expediency of improving the mode of assessment, and that the Acts for the relief of the poor should be extended; and then it provides, in the first section, that the word "heritage" shall extend to railways amongst other things. And then, in section 36, there is a provision that "where the one-half of any assessment is imposed on the owners, and the other half on the tenants or occupants of lands and heritages, it shall be lawful for the parochial board, with the concurrence of the board of supervision, to determine and direct that the lands and heritages may be distinguished into two or more separate classes." There being distinct power given in this Act of assessment, one-half upon the owner and the other half upon the occupier of the lands. And then, in section 43, it is enacted "where the one-half of any assessment is imposed on the owners, and the other half upon the tenants or occupants of lands and heritages, it shall be competent for the collector of such assessment to levy the whole thereof upon the tenants or occupants, who shall be entitled to recover one-half thereof from the owners." And then, in section 45, it is enacted "That in cases where any canal or railway shall pass through, or be situate in more than one parish or combination, the proportion of the annual value thereof on which such assessment shall be made for each such parish or combination, shall be according to the number of miles or distance which such canal or railway passes through, or is situate in each parish or combination in proportion to the whole length."

It will be seen that this introduces an entirely new principle with reference to the position of the owner of the land, who was bound under the Railway Acts I have referred to, to pay such an assessment as should be made upon the land, *qua* land, as it was held by the railway company as owners. It makes a difference in this most important respect, that the assessment in each parish upon land held by a railway company, is wholly irrespective of any improvement made by the railway company in that particular parish. It is not like the case of a mill-owner, or the case of a house-residence, or any other improved building placed upon the land, but the assessment is to be wholly irrespective of any thing that may happen in the parish at all with reference to the improvement of the land. Simply from the fact of its being part of a continuous system of railway, the land in the parish occupied by the railway is to be assessed to any railway company which shall not have the privilege of exemption in proportion to the profit they are making on the whole of their line. So that, for instance, when these very railways (as it happened to both of them) had extended and formed part of a larger system of railways than they occupied before, when the whole was placed in the hands of one company as it has now became vested in the company who are the respondents in the present case, the profit made by the whole line of railway would have to be estimated, although no additional profit whatever is earned by this particular portion of the line, but it is merely an integral portion of the whole line upon which the whole profit is made. The value of the whole line is to be brought into consideration with reference to the length of distance which is traversed by the line of railway,

and that also wholly irrespectively (as was pointed out by one noble and learned Lord here present, as having occurred in a case which came before him for decision in Scotland) of the amount of land itself occupied. And it depends simply upon the linear distance which may be occupied by the railway independently of the amount of land taken by way of cutting, which would of course differ very much from what the amount of land would be if it were carried on level ground. All that the Legislature says is not to be taken into consideration at all, but the valuation is to be made in the particular manner here pointed out.

I think that upon this point I cannot do better than refer to that which is printed at page 34 of the appellant's case—namely, the case of the *Edinburgh & Glasgow Railway Company* v. *Adamson*—upon the interpretation of the Poor Law Act coming before the Court of Session. In that case the Lord President (whose attendance we have the advantage of having with us to-day) remarks, that the Poor Law Act "prescribes a mode of assessing railways and canals different from any other kind of lands and heritages. It deals with railways as a whole, and apportions the annual value of the whole railway among the parishes according to the number of miles in each, not according to the annual value of the land occupied in each, nor according to the proportion of traffic in each, nor according to the amount of expenditure upon construction in each, nor according to the profit on the amount received as compared with the expense of working in each parish. All these considerations are thrown aside, though all of them would be essential to strict justice if the apportionment of the assessment was to bear reference to the relative parochial value of the works contributing to the gross annual value. But all these considerations are set aside. The actual value, positive or relative, of the part of the railway situated within each parish is excluded from the inquiry. The railway is to be taken as a whole, and the annual value thereof is to be ascertained, and when the annual value as a whole shall have been ascertained, then that annual value is to be apportioned according to the enactment of the Statute. The question now to be decided is, what are the component elements of that species of heritage called a railway, the annual value of which as a whole for letting is to be estimated? It is not merely the land on which the rails are laid; it is the whole composite subject making up the railway." And then, in the lower part of page 35, the learned and noble Lord says—"The Statute has singled out this new species of property called 'railway,' consisting of lands, buildings, and excavations, and fixtures of various kinds combined as a whole for one purpose and producing one annual value, and has directed the annual value of that composite to be ascertained, and being ascertained to be apportioned in a particular manner."

My Lords, it appears to me that after an Act of Parliament so entirely varying the subject matter of assessment in this particular parish from what it was at the time that the Act of 1835 and 1836 were passed, it is impossible to apply the sections contained in these Railway Acts to the state of things as it now exists.

There is contained in this Act which I have just referred to, the Poor Law Act of Scotland, a clause which I will read—namely, the 91st; but I think that, even without referring to that clause at all, the matter might be well rested upon general principle. The 91st section says, "That all laws, statutes and usages shall be, and the same are, hereby repealed, in so far as they are at variance or inconsistent with the provisions of this Act, provided always that the same shall continue in force in all other respects."

I do not think it is necessary to call in aid that particular section which has been relied upon in the argument as repealing in effect the provisions of those Acts of 1835 and 1836. For what strikes me is this, that the true construction and meaning of this Act being, not that the land is to be exempt from contribution to the parish burdens, but that the owner of the land is to pay those burdens of which the Act there speaks—namely, that he is to pay those assessments which were then *in esse*, and were then the assessment and burdens which affected the land, that provision charging the owner with the burdens then affecting the land cannot be extended to a state of things in which the burden may be extended to some twenty or thirty times the amount of burden that could by any possibility have been contemplated, a burden which would not be ascertained by the improvements made in the land in question, but would be a burden imposed upon a totally different principle. And to say that the owner was to have thrown upon him the payment of a burden assessed upon a totally different principle, and of a totally different character from anything that then existed as affecting or as by the then state of the law, capable by possibility of affecting this land, would be to make a contract totally different from that Parliamentary contract which was then made between the parties, and to throw upon the owners a burden which they were never intended, in any form whatever, to be subject to. I apprehended that when those Acts of Parliament said that the ground occupied by the railway shall be exempt from those different burdens mentioned, there was no contemplation whatever of burdens of a totally different description that might be imposed upon the land by subsequent Acts of Parliament. And when the new burdens came to be imposed, he, just like any other subject of the realm who had to bear any new burden imposed upon his property, would be freed from the previously existing burdens, he would be freed from all that then, either expressly or by implication, was done away. But there is no immunity given to him from those taxes which might be hereafter imposed upon a totally different principle and of a totally different character.

This view of the case is no doubt greatly assisted by a variety of cases, with respect to which I need not go into any detail, which are referred to in the printed papers before us, in which in contracts between individuals it has been held that contracts for indemnity between individuals do not imply contracts for indemnity against wholly new burdens which are newly imposed. Several authorities to that effect are cited in the papers before us, which it would be pedantry for me to go into in detail. None of them have a distinct and direct application to the case before us; but the principle appears to me a perfectly sound one, that as to anything which, either by the then existing law was imposed upon the land, or which could by any alteration taking place in the property without an alteration in the law come to be imposed upon the land, those burdens the railway company was freed from. These burdens the owner must bear and submit to, but with regard to this totally different character of burden, imposed wholly irrespective of

the value of the land itself, or even of the amount of land occupied and held, imposed simply upon the principle that the railway company are going for a certain length of linear distance through the parish, these are burdens of a totally different character and description from anything intended to be dealt with by the Railway Acts.

Now, the Act of 1854 does not make any material difference in principle as regards any observations I have ventured to make upon the case, as compared with what would arise under the Act of 1845, but it introduces certain new regulations which were then for the first time imposed upon those whose duty it is to assess the property of railway companies, elaborate provision of this description is made in that Act. You are not to take exactly the linear distance as you did before, the linear distance happening to be a matter which has no distinct reference in any way to the value of the land in any given parish; but there is an attempt in the Act of 1854 (however unsuccessful it may be) to administer something more like a principle of rateable value with reference to the property in the parish itself, than that which existed under the former Act, because in assessing the whole value of the railway to be let, taking the whole line of railway, whatever its length may be, as a property to be let and to have a given value assigned to it, the Act directs that there shall be a deduction of 3 per cent. from that value in respect of depôts, and other buildings of an important character, which may be occupied by the railway. That deduction having been made, you are then to take the linear assessment with reference to all the rest of the railway, and you add that to the linear value of the line in the parishes in which the buildings exist. So that there is a species of additional parochial value (if I may so express it) given to the railway in those places where the company have important buildings erected, and there would be an additional payment coming due to the parish in respect of the buildings so erected. That is no doubt in many respects a just and proper arrangement, because I presume those buildings would, amongst other things, tend by reason of the number of persons employed, and the number of persons about them, to bring into the place where the buildings were, those who might afterwards become burdensome upon the parish—some such principle I suppose prevailed when this enactment was made—and that variation in the law was accordingly adopted. I do not think that in substance or in principle that has made any important variation in the view I take of this case as founded upon the Act of 1845.

The view I have taken of the case has been this, that the arrangement by which the land was to be exempted in the hands of the railway company, the owners paying the value, applied to the state of things as it then existed, and the state of payment which, as the law then existed, would or might become due in respect of parochial assessment. But that has been superseded by a new system of poors-rate, levied upon a totally different principle, not measured by an estimate of the quantity of land taken, but proceeding upon a totally different principle, being an assessment of property in such a way as wholly to alter the whole principle laid down by the two railway Acts to which I have referred. And it therefore introduces a new tax upon the railway company in respect of those particular portions of land. Otherwise it certainly does seem to me that a most absurd result would accrue, if you were to hold that an owner could be made liable, from time to time, for additional burdens on account of the extension of a company's railway. The extension of a company's railway might be greatly affected by causes altogether independent of the particular lines running through the parish in question. It might indeed happen that these particular lines might, in consequence of that extension of the company's railway, become less valuable than before. It is possible that, in consequence of some new arrangements of things being made, the line of railway running through that particular parish might be scarcely at all used by passengers, while other districts might have a large and increasing traffic. And from a large and increasing traffic at the other end of the line, while the passengers only remained the same or were even reduced in quantity at this end of the line, a new and additional burden would, according to the construction contended for by the respondents, be thrown upon the owners in the parish who would have to bear that burden in consequence of the railway having advanced in prosperity in a different part of the country from that in which the railway, in respect of which the assessment was made, had been formed.

I apprehend, therefore, for these reasons, that the decision come to by the Court below is erroneous, inasmuch as it has exempted the railway company from a contribution towards the rates in the parish of St Vigeans. The interlocutor of the Lord Ordinary, I believe, has not been complained of in this appeal. What we probably ought to do, my Lords, upon the present occasion would be to reverse the interlocutor which is appealed from—namely, that of the Court of Session,—and it may be possibly thought right by your Lordships to give some reasons, in the shape of findings, with reference to the grounds upon which we proceed in so doing. Those findings when put into a proper shape, which can readily be done if your Lordships should concur in this judgment, will precede the reversal of the interlocutor by your Lordships. Of course in this case no costs can be given upon either side. The case will be remitted to the Court of Session.

Mr Anderson—The appellants will have the costs in the Court of Session.

Lord Chancellor—Those will be dealt with by the Court. The case will be remitted.

Mr Anderson—That will be quite satisfactory, we shall get back the costs we have paid.

Lord Chelmsford—The question raised by this appeal is not free from difficulty.

The interlocutor appealed from finds that under the terms of the statute the suspenders (the Scottish North-Eastern Railway Company) are not liable for poors-rates, whether as owners or occupants, in respect of any portion of their railway constructed wholly upon ground acquired by them in the manner and upon the footing specified in the said statutes, respectively authorising the exemption there conferred.

In 1836 two Acts were passed, one for making and maintaining a railway from Dundee to Arbroath, and the other from Arbroath *to Forfar*. Each of these Acts contains a clause of exemption from certain burdens of the lands and heritages to be acquired for the purposes of the Act.

The Lord Advocate, on behalf of the respondents, dealt with the clauses in the two Acts as substanti-

ally the same, but there are great differences in the wording of them.

The 23d section of the Dundee and Arbroath Railway Act (6 William IV., c. 32) is in these terms—"that the rights and titles to be granted in manner above-mentioned to the said company to the lands and heritages therein described shall not in any measure affect or diminish the right of superiority of the same, but, notwithstanding the said conveyances, the rights of superiority shall remain as before, entire in the persons granting such conveyances. And the lands and heritages so conveyed to the said company shall not be liable for any feu-duties or casualties to the superiors, nor for land-tax, cess, stipend, schoolmaster's salary, nor any public or parish burden whatever, but the same shall be paid by the original proprietor of such lands and heritages." The 32d section of the Arbroath and Forfar Railway Act (6 William IV., c. 24) enacts, "That the lands or heritages to be acquired for the purposes of this Act shall not be liable in payment of land-tax or of any feu-duties, casualties of superiority, cess, stipend, schoolmaster's salary, or other public or parochial burdens, unless it be so stipulated in the conveyance thereof to the said company, but the same shall be paid by the original proprietors of such lands or heritages, except in case the said company shall purchase and acquire the whole lands or heritages belonging to any person within the said parishes, in which case the said burdens shall be paid by the said company for the whole of such lands or heritages which may be so acquired as aforesaid."

It will be seen that under the last mentioned Act the conveyance to the railway company might have stipulated that the company should bear the burdens imposed upon the lands acquired by them, which could not have been under the former Act, and by the last-mentioned Act, if the company purchased the whole of the lands of any person within any of the parishes through which the line runs, the burdens were to be borne and paid by the company, whereas by the former Act the burdens were always to be borne and paid by the original proprietor of the lands and heritages.

It seems extraordinary that in two Acts of Parliament for the formation of two railways connected with each other, and passed at the same time, this difference in the wording of the exemption clause should exist. Whether this was accidental or intentional it is impossible to say, but it certainly does not diminish the difficulty of ascertaining the intention and effect of these clauses. If the clause in the Arbroath and Forfar Railway Act is to be regarded, as similar clauses in other Acts have been, merely as regulating the rights of the original proprietors of the lands and heritages and the company *inter se*, this cannot be said of the clause in the Dundee and Arbroath Railway Act, which leaves nothing to the stipulations of the parties, but fixes the burdens of the lands and heritages upon the original proprietors.

It will be best to consider the case with reference to the clause in the Dundee and Arbroath Railway Act, as a decision upon the words of that clause will cover any question which can arise upon the Arbroath and Forfar Act.

I think no stress can properly be laid upon the fact that the railway companies, for many years after the passing of their Acts, paid the poors-rate assessment in respect of their railways. If they are not liable to this particular burthen, the payment of it by them under a mistaken notion of their liability cannot operate as an estoppel, or in any way prejudice their right now to resist an unjust demand.

The first question to be determined therefore is, whether the clauses of exemption extend to poors-rate. It is contended on the part of the appellant that the words, "the lands and heritages, &c., shall not be liable to parochial burthens or parish burthens," are inapplicable to poors-rate, which is not a burden upon land but only a personal liability on an owner or occupant.

But although the poors-rate is laid upon the owner or occupant personally, it is in respect of the lands and heritages owned or occupied by him, and therefore where lands are sold and conveyed with a clause exempting the purchaser from "parochial or parish burdens," these words may, without any violence of construction, be held to include poors-rate to which the purchaser would otherwise have become liable by reason of the ownership of the lands which he has acquired.

I entertain no doubt that the clause of exemption includes the particular burden of poors-rate, and that if there were nothing more to be considered than the Acts of 1836, the railway company would be exempt from all liability to this assessment. But in 1845 the Act of 8 and 9 Vict., c. 83, was passed "for the amendment and better administration of the laws relating to the relief of the poor in Scotland," and the appellants contend that, whatever may have been the exemption of the railway company previously, the necessary result of the provisions of this Act is to impose upon them a liability to poors-rate.

The clauses principally relied upon by the appellants are the interpretation clause, section 1, which enacts that the words "lands and heritages" shall extend to and include railways;" the 45th section, by which it is enacted, "that in cases where any railway shall pass through or be situate in more than one parish or combination, the proportion of the annual value thereof on which such assessment shall be made for each such parish or combination shall be according to the number of miles or distance which such railway passes through or is situated in each parish or combination in proportion to the whole length," and the 91st section, by which all laws, statutes and usages are repealed in so far as they are at variance or inconsistent with the provisions of the Act.

The argument of the appellants derived from these clauses is, that as all railways are assessable as lands and heritages without exception, and a new mode of assessment for them is provided by the Act, a clause in previous Acts exempting them from assessment is inconsistent with the general Act, and is therefore repealed by the 91st section.

But the Act of the 8 and 9 Vict., c. 83, is not an original but an amending Act. It creates no new liability, but merely prescribes the form in which the assessment is to be made, and a previous exemption of a railway from liability to poors-rate is not inconsistent with a clause which directs how railways are to be assessed in future, which is of course applicable only to these railways which are assessable.

Mr Mellish contended for the perpetual exemption from payment of poors-rate, on the ground that the Legislature had allowed the proprietors of lands along the line of railway, to sell their lands to the company poors-rate free, that the company had to pay a higher price for lands with

this advantage annexed to them, and that to throw the burden of the rate on the company would (as he expressed it) be confiscation.

But this exception from liability to parochial burdens applies only to lands and heritages acquired for the purposes of the Act, and the burdens to be paid by the original proprietors were those of lands and heritages so acquired. We have no information as to the principle according to which the amount of the assessment was ascertained before the Act of 1845, whether the original proprietor was assessed to the same amount of rate which he paid while he was owner of the lands acquired by the railway company, or whether the rate was estimated upon the improved value imparted to the land in consequence of its being used as a railway. If he was assessed for this improved value, it is difficult to understand how that value could be arrived at before the mileage system of rateing railways was introduced.

But whatever the mode of assessing may have been, and whatever the amount of assessment, the lands acquired by the railway were the only subject of it, and it was in respect of these the original proprietors were liable in payment instead of the railway company.

On the passing of the Act of 1845 a new and entirely different system of rateing railways was introduced, and the lands and heritages acquired for the purposes of the Railway Acts of 1836, in respect of which the companies were to be exempt from liability to the poors-rate, and the burden to be borne by the former proprietors, ceased to be any part of the subject of the rate for which the companies were assessable.

The railway is treated as a distinct assessable subject, and the lands over which it runs are not in any way regarded in the assessment. No estimate is made of the value of the lands over which the railway passes; no rateing takes place in any way of the lands in the parish used by the railway, and therefore it may with perfect truth be said that the companies are not rendered liable to the poors-rate for the lands and heritages acquired for the purposes of their Acts.

It appears to me that the moment the Act of 1845 passed, the exemption clauses in the Railway Acts of 1836 ceased to have any operation. The object of these clauses was, that as long as the lands and heritages were the subject of assessment, the burden should be borne by the original proprietors and not by the companies. But under the new system of rateing railways there could be no longer any assessment upon the railway companies as owners of these lands, and therefore there was nothing for which the original proprietors could be substituted for the companies, or from which the companies could be exempted. Nor do I think that the lands over which the railways pass could remain the subject of assessment so as to continue the liability of the original proprietors, for the parishes would then have virtually, though not nominally, a double rate for the same lands, one upon the railways with reference to the extent of land which they occupy in each parish, the other an actual assessment on the lands themselves.

Suppose, under the Arbroath and Forfar Railway Act, it had been stipulated in the conveyance of the lands and heritages acquired by the company that they should be liable to the parochial burdens, it could hardly have been held that, after the passing of the Act of 1845, they would have continued liable to these burdens in addition to the assessment upon them in respect of the extent of the railway running through the parish, and it can make no difference that these burdens were payable by the original proprietors in the exoneration of the liability which would otherwise have attached upon the companies.

But whether, after the Act of 1845, the original proprietors of the land acquired for the purposes of the railways continued liable to assessment or not it is unnecessary to determine. It is sufficient for the decision of the appeal to say that, as far as the railway companies are concerned, the exemption clauses must have been deprived of all effect by the passing of the Act of 1845, because they had no longer any subject upon which to operate. So far as the companies are concerned, the lands and heritages acquired by them for the railways have been freed from liability to assessment for poors-rate, and that rate has been laid on the railways, in respect of which no person could be liable but themselves. If, therefore, the clauses of exemption were construed to relieve the companies from assessment, the railways would escape altogether from payment of poors-rate.

For these reasons, I think the interlocutor appealed from ought to be reversed.

Lord Westbury—My Lords, it has been contended on the part of the respondents in this case that the two Acts of 1836, under which these two small railways were constructed, contained in them a parliamentary exemption of the railway from the poors-rate. And it has been further contended that the exemption was not taken away by any thing contained in the Poor Law Amendment Act of 1845, or in the Lands Valuation Act subsequently passed. It may therefore be material, in the first place, to ascertain what, under the two Acts passed in 1836 for the construction of the Dundee and Arbroath and the Arbroath and Forfar, was the true status of the railways with reference to taxation for the relief of the poor. This depends on the construction of the 32d section of the one Act and the 23d section of the other. The effect of these sections appears to me to have been this—viz., that where the railway company should take out of a proprietor's land such pieces or slices of land only as were required for making the railway, they should take them *free* from parochial burdens, which were to remain charged on the owners of the residue of the lands, the parochial assessment not being disturbed; but that where, instead of pieces out of lands, the whole lands should be taken, then the railway company should be liable to the burdens in like manner as any ordinary vendee of the proprietor would be.

I do not concur with the appellants, who contend that the pieces of land were taken by the company charged with all public and parochial burdens; but that under the 32d section the company has a right of indemnity or resort against the proprietors from whom the company bought. But the true construction appears to be that, for the purpose of parochial taxation, the railway is not to be regarded as proprietor or occupier; but the ownership and occupancy of the lands sold to the railway company are regarded as still remaining in the adjoining proprietors. If, therefore, the assessment for the relief of the poor were still governed by the rules that subsisted at the time of the passing of the Acts of 1836, I should have been of opinion that the railway company was not liable to be assessed in respect of the lands held

by the railway company in the parish of St Vigeans. But the relation of the railway company to the adjoining proprietors, and the exemption of the railway itself from taxation and assessment, are entirely altered and superseded by the subsequent legislation.

By the Poor-Law Act of 1845, and by the subsequent Valuation Acts, there is created a new subject of taxation, and a new mode of valuation or assessment. From and after these statutes the poor-tax assumes an entirely different character. By the Poor-Law Amendment Act of 1845 an entire railway is treated as a heritage to be valued *in cumulo*, and for the first time made a distinct subject of taxation. I entirely agree with the observations made by my noble and learned friend the Lord President in the case of *The Edinburgh and Glasgow Railway Company* v. *Adamson*, in the language which my noble and learned friend the Lord Chancellor has read, and which therefore I abstain from reading again. This rule of a mileage assessment was affirmed by this House in 1855. The rule given by this Poor-Law Act is wholly inconsistent with the exemption alleged to be contained in the Acts of 1836.

This mode of assessment, however, has been superseded by a different system under the Valuation of Lands Act, 17 and 18 Vict., cap. 91. In that Act the directions for ascertaining the subject of taxation and its value are very precise and peremptory. The cumulo yearly value or rent of the whole lands and heritages in Scotland held by any railway was, by that Act, first to be ascertained; and from the amount 3 per cent. of the whole cost of the stations, wharfs, &c. was to be deducted; and the proportion of such diminished cumulo rent or value corresponding to the lineal measurement of the portion of the line situate in each parish, as compared with the lineal measurement of the entire line, with the addition of 3 per cent. on the entire cost of any station, &c., of the railway within the parish, is to be deemed and taken to be the yearly rent or value of the lands and heritages in such parish belonging to or held by the railway company. By subsequent Amendment Acts some alterations are made in the deductions from the cumulo value, but they are immaterial for the present purpose.

The material conclusion is, that the poors-rate now assessed and levied on the railway is wholly different from the poors-rate that was levied in 1836 and is referred to in the two Railway Construction Acts passed in that year, which are relied on by the respondents, both in respect of the subject assessed and the mode of ascertaining the assessable value of that subject; and that, consistently with the observance of the directions either of the Poor-Law Act or the Valuation Acts, there is no room or power for giving effect to the exemption given to the lands taken by the railway company under the two Acts of 1836. No doubt some injustice has been done to the railway company, but it is probably due to the neglect of the company in not bringing their particular exemption under the Acts of 1836 before Parliament when the Poor-Law Act and the Valuation Act were being considered by it; and, in consequence of their not having done so, they have entirely lost the benefit of the exemption given them, which is in effect abrogated by the subsequent statutes. I think, therefore, that the interlocutor of the Inner-House of 12th December 1867, which is the only interlocutor appealed from, is erroneous, and must be reversed.

My Lords, It is obvious that the whole subject of the action of suspension which was brought in the Court of Session will thus be disposed of. Therefore, in conformity with what has been said by my noble and learned friend on the Woolsack, I think it will be convenient that your Lordships should preface your decree of reversal of the interlocutor by a finding that the railways are not exempt from liability to the poors-rates, but are to be treated as liable in conformity with the existing Poor Law Amendment Act and the Valuation Act. You will then by your decree reverse the interlocutor, and remit it to the Court below, to enable the Court below effectually to dispose of the two subjects of the action of suspension. I do not propose to suggest the exact words of the finding which is to preface our decree. My noble and learned friend Lord Colonsay will take care probably to have that in a right shape, but it will be in substance what I have mentioned.

Lord Colonsay—My Lords, In conformity with the opinion which has now been expressed, I think the course of procedure and form of judgment is exactly what my noble and learned friend has suggested—that there should be some declaration or finding of this house as to what is the true position of the relative liabilities of the parties. And I think that, this being a note of suspension, it ought to be remitted to the Court to dispose of the note of suspension in conformity with those findings, and to deal with the question of expenses in the Court below.

I confess that I have some difficulty in concuring in the grounds upon which the judgment is pronounced. I think, in the first place, that the interpretation of this clause in the local Act which has been given by my noble and learned friends is a sound one. I think it is a clause of exemption—not a clause of relief, but a clause of exemption. I think that that is made very clear by this,—that the liability is declared to rest upon the land. Then I think that the parochial burdens include poors-rates. And then the question comes to be, Whether by these subsequent Acts of Parliament the position of the parties is so altered and destroyed that either the railway is to bear the whole burden, or that the landowner is still to bear the whole burden, or is to be relieved from that which is now thrown upon the railway? There has been a good deal of difficulty about that, and the state of the legislation upon the subject is exceedingly unsatisfactory. I must say that I do not, in that view of the matter, regret the result at which my noble and learned friends have arrived with respect to the interpretation of these Acts, because I think it will put the matter upon a more simple and clear footing than it has hitherto stood. I think that the new mode of assessment prescribed for railways is applicable to the railway as a whole. I do not in the least differ from the opinion I expressed in the case of the *Edinburgh and Glasgow Railway*, which my noble and learned friends have concurred in, as to what is the meaning of the word "railway," and what it comprehends. But the question in that case was whether certain subjects in a particular parish were to be exempted from the valuation of the railway. I thought that the railway comprehended not merely the rails and the particular lands upon which the rails were laid, but the whole machinery and undertaking called the railway, and that the whole required to be valued.

But I am not satisfied that there is in all cases an inconsistency between the enactment for valuing railways and the exemption which these parties claim under this statute. If, for instance, a railway was made wholly within one parish, not going into any other parish, and wholly upon land acquired from any one person, it would be exempted, and in that case I apprehend that the word "railway" in the one Act would be equivalent with the word "railway" in the other, and that the liability would rest upon the landowner; but in other cases there would be very great difficulty. The question is, whether a rule which is not generally applicable, but only partially applicable, is to be held as overturning the state of law which existed before, or whether it is only to be held as creating a difficulty in the application of it?

But in this particular case it appears to me the railway company who claim an exemption from liability have so mixed up their acquisitions of land which were exempt in their hands with lands which were not exempt—they have so complicated the matter—that it is impossible or unfair to put upon a parochial board the duty of expiscating, as they seem to be endeavouring to do, the particular parcels, which seem to be almost infinite in number, and which are placed in different positions, with reference to the tenure by which they are held. I think, therefore, that they are not in a position in this cause to plead a suspension of the charge. I do not see very well how the matter is to work out in the end. The railway is to be liable to the assessment. Well, is the landowner to be liable as he was before the Act of 1845? Is he to bear a certain proportion of the assessment for land which is not in his possession? Can that legislation have altered a clause which was a clause of total exemption, imposing a burden upon another person, into a clause of relief of some kind? Is the railway company now to have relief against the landowner for something, and if so, for what? I see great difficulty in all that, but in this case I concur in the judgment. I think that, in the state of things into which the railway company have brought the matter, they are not in a position in which they are entitled to the right of exemption. I shall give what aid I can in framing the terms of the findings.

Appeal sustained.

Agents for Appellant—Morton, Whitehead, & Greig, W.S., and Connell & Hope, Westminster.
Agents for Respondents—John Galletly, S.S.C., and William Robertson, Westminster.

Monday, May 9.

HAY NEWTON & OTHERS *v.* HAY NEWTON.

(*Ante*, vol. iv, p. 192.)

Entail—Deathbed—Bond of Annuity—Bond of Provision—Deed of Locality—Faculty—Reduction—Reserved power—Terce. An entail contained the usual fettering clauses, but allowed a deed of locality in lieu of the wife's terce and bonds of provision for children. *Held* (affirming decision of the First Division) that a deed of locality and a bond of provision executed in terms of the entail were reducible as made *ex capite lecti;* that a bond of annuity in favour of the wife was struck at by the clauses of an entail executed subsequent to it in 1861; and that the power in the entail to grant deeds of locality was not a faculty.

These were three appeals from the judgment of the First Division of the Court of Session, arising out of the construction of the entails of the estate of Newton and bonds of provision granted by the late John Stuart Hay Newton of Newton, the father of the respondent and pursuer, who is the heir of entail in possession. The late Mr Stuart Hay Newton died in 1863, and when on his deathbed he executed a deed of locality binding his heirs to infeft his wife Mrs Hay Newton in liferent during all the days of her life in certain locality lands specified in the deed, and a bond of provision in favour of his younger children for £4000. In 1860 he had executed a bond of provision and annuity in favour of his wife for £500 a-year, purporting to do so under the powers of the Aberdeen Act. And in 1861 he had executed a new entail in accordance with the conditions on which the disentail had been consented, which contained the same clauses as to provisions to wives and children, and excluded terce. The respondent, the heir of entail, raised three several actions to reduce these deeds. The first action was to reduce the deed of locality; the second to reduce the deed of provision in favour of his mother under the Aberdeen Act; the third action was to reduce the bond of provision in favour of the two younger children. As to the first action, the original entail of the estate of Newton contained a clause to this effect, "reserving and excepting always furth and from the said clauses irritant full power and liberty to me and the said heirs and members of tailzie above mentioned to grant liferent infeftments to my lady and their ladies and husbands by way of locality, allenarly in lieu of their terce and courtesie, from which they are hereby excluded, not exceeding a third part of said lands, so far as the same is free and unaffected for the time with former liferents and real debts, and after deduction of the annual rents and personal debts that do, or may, affect the same;" and there was a like exception of provisions for the younger children. The pursuer contended that this deed was executed on deathbed, and was invalid.

The widow did not dispute that the deed in question had been executed by the late Mr Newton on deathbed, but she maintained these pleas;—"(1) That the action was excluded by a bond of provision or annuity executed in her favour by the deceased Mr Newton, in terms of the Aberdeen Act in 1860; (2) the bond was binding on the pursuer, and was valid and effectual, so far as regarded the lands therein described; and in so far as the deed of locality now sought to be reduced affected these lands, the pursuer's title to maintain the action was excluded; (3) the deed of locality had been executed in terms of reserved faculties in the deeds of entail, and was therefore effectual; (4) the plea of deathbed was excluded, in respect that the deed sought to be reduced was granted for onerous causes; and *separatim*, the defender was entitled to maintain the deed to the extent of her right of terce in the lands."

To meet the defence founded on the bond of annuity of 1860, the pursuer brought an action of reduction of that bond, principally on the ground that it was struck at by the prohibitions of the existing deed of entail. He contended that the bond was not delivered till within six days of the granter's death and while he was on his deathbed, and that the bond was revoked by a deed of entail