railway clerk knew of the existence of the two families, and therefore I do not think we ought to apply the literal interpretation here either. I think step-children are fairly included under the head of children, and when Mr Porteous told the clerk what he wanted to be done, he mentioned "children," and had no intention of drawing any distinction between the children of his first and those of his second marriage. They were all living in family together, receiving the same aliment, and, as I hope, all treated as equally the children of Mr and Mrs Porteous. I am therefore for answering the first question in the affirmative.

Lord Young—The only question of interest is whether the destination in the second and third mortgages is exclusively to the children of the second marriage, for if it is not, it is unnecessary to consider any of the other questions raised.

I am of opinion that a gift may be made by means of a railway bond or debenture. And it does not signify in the least that in the case of one of these debenture bonds here the father constituted himself a trustee. That is a very well-known practice in the law of this country, Nor do I doubt that in a mortgage a man may effectually give expression to his intention as to the disposal of the sum in the bond in case he should die before uplifting the mortgage. That is precisely the case of *Walker*.

But assuming all that, I am not disposed to construe critically any words to the effect of preferring the children of one marriage to those of another—words, I mean, which although a habile mode of making a general destination, do not form a final and deliberate expression of intention. They are not a habile mode of creating a preference of one family over the other. I do not think it would be proper to put such a construction upon such documents as we have here.

The Court answered the first question in the affirmative.

Counsel for First Party—Dean of Faculty (Fraser)—Guthrie. Agent—H. Buchan, S.S,C.

Counsel for Second and Third Parties—Balfour—G. R. Gillespie. Agents—Gillespie & Paterson, W.S.

Wednesday, November 12.

FIRST DIVISION.

[Lord Rutherfurd Clark, Ordinary.

THE NEWPORT RAILWAY COMPANY *v.* FLEMINGS.

Railway—Railway Clauses Consolidation Act 1845 (8 *and* 9 *Vict. c.* 33), *sec.* 6—*Superior and Vassal—Feu-Contract—Reserved Power—Access.*

In 1870 a railway company obtained an Act enabling them to pass through certain lands, and served statutory notice upon the proprietor on 26th July 1872. In January 1872 a feu had been given off, the feu-contract conveying the lands as laid down on a plan therein referred to, "together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." The reserved power declared that the superior should "have full power and liberty to vary and alter the said plan or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The railway commenced operations in 1877, and the vassal having claimed compensation under section 6 of the Railways Clauses Consolidation Act 1845, in respect that the operations, though they did not touch his feu, were injurious, as they cut off the existing accesses—*held* that at the date of the notice in 1872 there was in fact no such existing access, and (*dub.* Lord Deas) that there no claim lay against the company.

Observations upon the rights of parties in such cases.

Mr Just was proprietor of lands in the county of Fife known as Wellgate Park. He had been in process of feuing these since the year 1860, but the feuing had not made much progress. In January 1872 he feued a portion of his land to William Reid, who in 1874 disponed it to Mrs Fleming, the disposition being recorded in January 1875. In the feu-charter the feu was described as "All and Whole that lot or piece of ground marked lot No. on a feuing plan of that park of land called the Wellgate Park, belonging to the said Thomas Just, and lying on the south side of the turnpike road leading from Newport to Woodhaven, and which lot or piece of ground hereby disponed measures 41 poles and 13 yards imperial measure or thereby, and is bounded on the south by a road called the Kirk Road; on the north by a road or street 20 feet in breadth on the said plan; on the east by lot marked No. on the said plan, still unfeued; and on the west by a road or street of 24 feet in breadth, ... together with free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power aftermentioned. . . . . Declaring always that the said William Reid and his foresaids shall be bound at their own expense to form, level, and make the half of the breadth of the said streets opposite to the said lot of ground on the north and west, when the same are opened (but which shall not be opened, except in the option of the said Thomas Just or his successors, until the ground to the east and north thereof is feued on both sides), and which shall be made in strict conformity to said plan. . . . . Declaring that the said streets and footpaths when made shall remain common thoroughfares. . . . . And it is hereby expressly provided and declared that the said Thomas Just and his foresaids shall have full power and liberty to vary and alter the said plan, or streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit."

The Newport Railway Company obtained an Act of Parliament in 1870, under the powers in which they were enabled to enter upon and lay down a line through Mr Just's land. In pursuance of the provisions of their Act and of the Acts incorporated therewith, notice was served by them on Mr Just on 26th July 1872, and the amount of compensation due to him was ascer-

tained and paid, and a disposition granted in favour of the railway company. The company's operations were not begun till September 1877; and in the course of the following year Mrs Fleming and her husband made a claim against them for compensation under section 6 of the Act of 1845, in respect that the projected line, though it did not touch their feu, injured them by cutting off their accesses.

The railway company presented this note of suspension and interdict to have Mr and Mrs Fleming prevented from following out a notice or intimation made to them for payment of £755 as damages in consequence of interference with the accesses to their property, and from taking any further steps under a petition presented by them in the Sheriff Court at Cupar for having such compensation assessed, and to have a deliverance pronounced thereon suspended.

The complainers, *inter alia*, averred—"The access to the said feu is now, and has all along been, by a road along the south side thereof, known as the Kirk Road, and the said feu has also along and to the extent of its west boundary a private way or road running southwards, until at the south-west corner of the feu it joins the said road known as the Kirk Road. Neither at the date of the passing of the Newport Railway Act 1870, nor at the date of the notice of 26th July 1872, nor at the dates when Mr Reid and Mrs Fleming respectively acquired the said feu, nor at any other time, was there any road or way upon or across the ground acquired by the complainers as above mentioned, but the same was arable ground and under cultivation. In particular, there was not at any of the said dates, and there never has been, any road or access made or used upon or across the said ground acquired by the complainers leading to the said feu; and the feuars have no right to any such access. The sole access to the said feu is and has always been the access from the south, above described."

The respondents answered, *inter alia*—"Denied. Explained that the road on the west side of the female respondent's feu here referred to is one of the roads or streets forming accesses to the Wellgate feus as aforesaid. Further, explained that before the service of the said notice upon Mr Just it had been laid off as a street, was in part made, and formed in fact the leading access to the respondent's property and to other feus in said Wellgate Park. It . . . is only a servitude road. It is further explained that the operations of the complainers have the effect of intersecting and partly occupying to nearly its whole breadth the said road or street on the west side of the respondent's property, and thus depriving her, without compensation, of a portion of the property in which Mrs Fleming had a right of common property or common interest, and of cutting off her proper access to her feu by said street; of interfering with her accesses to her property otherwise; and generally of injuriously affecting her property. Moreover, even the Kirk Road, forming—the complainers allege—the sole access to the respondent's property, has been diverted by the complainer's operations, so as to affect the access to the respondent's property, and injuriously affect the same. For their said actings the complainers are legally bound to make compensation."

The complainers pleaded, *inter alia*—"(4) The respondents' pretended claim for compensation is unfounded and untenable in law, in respect that no access to the said feu has been interfered with or injuriously affected by the complainers in the execution of their works, and *separatim*, in respect that no access to the said feu ever existed upon or across the land taken by the complainers as above mentioned, or any part thereof."

The respondents pleaded—"(2) The accesses to the respondents' property having been interfered with, and their property thereby injuriously affected by the construction of the complainers' works, the respondents are entitled to compensation, and to have the amount thereof determined as aforesaid."

On 28th January 1879 the Lord Ordinary (Rutherfurd Clark), after proof led, suspended the proceedings and granted interdict as craved. His Lordship added the following note:—

"*Note.*—The respondent Mrs Fleming is the owner of a feu which adjoins the road leading from Newport called the Kirk Road. It was given off by Mr Just in January 1872 to William Reid, who disponed it to Mrs Fleming on 8th May 1874. The disposition was recorded in the Register of Sasines on 23d January 1875. The feu forms part of a field belonging to Mr Just, and lying between the Kirk Road and the turnpike road, and between Newport and Woodhaven. It had been in the market as a feuing subject from 1860, but it does not appear that the feuing made much progress till a recent date. In July 1870 the complainers obtained an Act of Parliament which enabled them to construct a railway through Mr Just's field. On 26th July 1872 they served a notice on Mr Just, taking a strip of land which ran through the whole field from west to east. It did not touch any part of the respondents' feu. It lay entirely to the north of the feu, and on this ground the railway has been since constructed. There is no passage across it save by an underbridge for foot passengers. The respondents claim compensation under the 6th section of the Railway Clauses Act, on the allegation that their feu has been injuriously affected by the construction of the railway. They say that their accesses have been interfered with. Their case resolves itself into two points, viz.:—(1) That their access by the Kirk Road has been injured in consequence of a deviation of that road, and that they have been deprived of a road leading through the centre of Mr Just's field from the turnpike road to the Kirk Road. The present proceedings have been raised in order to try their right to obtain compensation. Very little discussion took place on the first point. It was admitted by the respondents that they had no right to use the Kirk Road except as members of the public—in other words, that it was a public road. The case of the *Caledonian Railway Company* v. *Ogilvy* (March 30, 1856, 2 Macq. 229) seems to the Lord Ordinary to be conclusive against their claim. (2) On the second point the main question is, Whether at the date of the notice there was a road leading from the turnpike road across the land taken by the complainers to the Kirk Road? The Lord Ordinary is of opinion that there was not. He does not think it necessary to examine the evidence. It seems to him that the complainers have proved that no

such road existed. If the case of the respondents was well founded, it is remarkable that they took no steps under the Railway Clauses Act to preserve that road. This would, it is thought, have been the natural and appropriate remedy. (3) But the respondents further insisted that under their feu-contract they had a right to the road leading from the field to the turnpike road, on the stipulation that they should have right to the roads shown on the feu plan in so far only as the same may be open. It seems to the Lord Ordinary that the case of the respondents fails under this aspect of it, because the road in question was not open at the date of the complainers' notice."

The respondents reclaimed, and argued—At the date of the company's notice (26th July 1872) the road forming the access under the feu-contract was "opened," and they might have had compensation under section 6 for its loss. The reserved power in the contract gave the superior right to "vary or alter" the access, but not to destroy it altogether; the free ish and entry was an essential condition of the feu. The superior could have been interdicted from cutting off the access, and therefore so could the company.

The complainers (respondents) replied—In July 1872 there was no road; the land was a purely agricultural subject; but even if there had been a road, the proper remedy would have been under section 46, and not under section 6. The reserved power was for the superior's benefit, in view of the many accidents which might prevent the continuance of the feuing as originally planned.

Authorities cited—*Don* v. *North British Railway Company*, June 21, 1878, 5 R. 972; *Henderson* v. *Nimmo*, May 20, 1840, 2 D. 869; *Crawford* v. *Field*, October 15, 1874, 2 R. 20; *Glasgow Jute Company* v. *Carrick, &c.*, November 5, 1869, 8 Macph. 93; *Trustees of Free St Mark's Church* v. *Taylor's Trustees*, Jan. 26, 1869, 7 Macph. 415; *Barr* v. *Robertson*, July 12, 1854, 16 D. 1049; *M'Carthy* v. *Metropolitan Board of Works*, 1874, L.R., 7 E. and I. App. 243; *Ricket* v. *Metropolitan Railway Company*, L.R., 2 E. and I. App. 175.

At advising—

Lord President—The respondent in this case, Mrs Fleming, is owner of a feu which forms part of an area of ground called Wellgate Park, which was advertised for feuing some time back—about 1860. Mrs Fleming had acquired right to this feu in 1874 from a person of the name of Reid, who was the original feuar. Reid, again, had acquired his original feu from the Rev. Mr Just, the owner of the ground, in January 1872. Now, there is a feuing plan referred to in the feu-contract which it is necessary to understand, and it is also necessary to see for what purpose and to what effect this feuing plan is referred to at all. The railway company, the complainers, obtained an Act of Parliament in 1870, two years before Reid's feu was constituted, but did not give notice of their intention to take the land in question till July 1872, which was after the constitution of that feu, and they did not commence operations until September 1877. Now, the claim for compensation against the company was presented on the ground, not that any part of the respondents' feu was taken by them for their operations, but that the forming of the railway was injurious to the property within the meaning of section 6 of the Railways Clauses Consolidation Act 1845.

The claim was rested originally, in one part of it, on an alteration made in a road called the Kirk Road, which undoubtedly forms an access to Mrs Fleming's feu; but that point has not been argued before us, and I do not see how it could well be maintained, for Mrs Fleming's right in the Kirk Road is no more than that of any other member of the public.

The second ground of the claim raised a question of fact. Mrs Fleming contended that a certain road which was cut through by the company was an existing access to her feu at the time the railway was made. Now, on the evidence I am clearly of opinion with the Lord Ordinary that there was no such road in existence, and that the claim on that ground therefore falls. I also sympathise with his Lordship's remark that it is very strange that Mrs Fleming did not take the competent and proper remedy specially provided by the Railway Acts, viz., a claim for the substitution of a new road in place of that which had been taken away, or failing that for compensation. Whether a claim of compensation in lieu of a substitute road could be maintained, I shall give no opinion. I only go the length of saying that if there was an existing road, there was a remedy, and the circumstance of that remedy not being adopted gives an additional reason for coming to the opinion that no such road was in existence. All that is perfectly plain upon the evidence without any presumptions drawn from other sources.

The only remaining question is, whether Mrs Fleming had right, as in a question with her superior Mr Just, to have a road made in the line in which it is contended her access existed. This is a question of law on the construction of the feu right; and here it is necessary to keep in view what was the nature and condition of Wellgate Park, belonging to Mr Just, at the time the feu was constituted. It formed a parallelogram, roughly speaking, being bounded on the south by the Kirk Road, on the west by the Kirk Road also, on the north by a turnpike road, and on the east by another road, the precise nature of which is not clearly described. Thus it was bounded by roads on all sides, and the general notion of the feuing plan was that it was to be intersected by rectangular streets throughout when the feus were completed. But when Reid obtained his feu only some outside parts of the ground next the road had been given out, two feus having been given, one to Mr Don and one to Mr Calder, and Reid's was the third. There was another feu at the corner where the two Kirk Roads meet nearly at right angles, but that may be described as fronting to either. All the interior was at that date quite unfeued, and was in agricultural occupation. Now, keeping all these facts in view, and also that the feuing of the Park had proceeded very leisurely (it had been going on since 1860, and only a small portion had been completely feued in 1870), we may look at Reid's feu-contract and see if he had any right such as is alleged to belong to Mrs Fleming. The feu is described as—[*reads ut supra*].

Now, it is not disputed that the street or road or access to which Mrs Fleming alleges right is one of the streets referred to in this clause—that is, a street laid down in the plan, but to which

she is to have right only in so far "as the same may be opened." Then comes an obligation to "form, level, and make the half of the breadth of the said streets opposite to the said lot of ground on the north and west when the same are opened (but which shall not be opened except in the option of the said Thomas Just or his successors until the ground to the east and north thereof is feued on both sides), and which shall be made in strict conformity to said plan;" and then comes a declaration that the said streets "when made shall remain common thoroughfares." But the reserved power is thus expressed in an after part of the deed—"It is hereby expressly provided and declared that the said Thomas Just and his successors shall have full power and liberty to vary and alter the said plan, and streets or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." Taking these clauses together, they amount to this:—The proprietor exhibits a feuing plan and says—"It is my intention to feu out the ground in this manner; the streets are here laid down, which are to be made as the ground comes to be feued out; but while I give you a right of access by these streets as they may come to be made, I give no right save in so far as they shall be opened, and as they may be altered in any way that I or my successors may please when they come to be formed opposite or through those parts of the ground not already feued." Now, as to Reid's feu—that is, Mrs Fleming's—her access in the meantime, and till the other streets should be opened, was from the Kirk Road, and there was also part of a street formed running northward from the Kirk Road between Reid's feu and Don's feu, which was formed and opened. There is no dispute about that, but then that street was formed only so far as opposite or through the two feus of Reid and Don, the feus north of that being unfeued and in agricultural occupation. No road had been formed at the time the railway operations commenced, and the question whether Mrs Fleming has access from the north by means of an unformed street depends on whether the obligation by the superior to form the streets is effectual in any event. I apprehend it is not; the right is expressly limited by the condition that it should only emerge if these streets shall be formed and opened. The obligation is to give the feuars the benefit of them when opened, and the object of retaining this discretion to the superior is obvious. It may be that the feuing may be stopped altogether by a variety of accidents, and it would be strange if with the ground in a state fit only for farming purposes he should be bound to make streets crossing every here and there at right angles. That would be an obligation wholly inconsistent with the use of property for any purpose whatever. When one reflects on the varieties of accidents which may intervene, it is not surprising that a superior should be very careful in a matter of this kind. Feuing depends largely upon fashion, that is, upon caprice. People might desert Mr Just, or it might suit him to occupy the ground permanently in some other way, say by a factory. A railway might run through it, which is just what has happened, and it will suit Mr Just to have a railway intersect his ground and make it of more value. There is no end to the occurrences which might arise to prevent the continuance of the feuing by the original contract plan. So we have a reservation here, and we cannot wonder if the words are carefully expressed, and if Mr Just takes pains to prevent himself being laid under an obligation otherwise than to form the streets laid down in so far as the feuing had proceeded. I therefore think that this ground of claim fails, and that Mrs Fleming has no right of such a nature as to entitle her to damages or compensation under section 6 of the Act. I am for adhering to the Lord Ordinary's interlocutor.

Lord Deas—It appeared to the Court throughout the discussion of this case that it was unfortunate that there should be misunderstandings and disputes between the railway company and Mr and Mrs Fleming, and that it was very expedient that parties should settle the matter. They were allowed ample time and opportunity for so doing, but without result, and I regret that it has been so.

It is very far from being a clear case in the one way or the other, and it seems very adventurous for the parties to peril their interests on the legal result. That result depends much, if not altogether, on the terms of the feu-contract between Just and Reid (Mr and Mrs Fleming having come to be exactly in Reid's place); and I cannot say that I agree with the Lord Ordinary when he says that the case depends on whether when the railway was made there was or was not an existing road. I think the case depends on whether there was an obligation or undertaking that there should be a road in that direction, and the fair construction of the contract being that there was to be a road there sometime or other, I think Reid, and therefore Mrs Fleming, had a good claim against Just to have it done. And it seems to me that the railway company stood under the same obligation undertaken by Just. The terms of that obligation are not very clear, but the feu-contract bears that the vassal was to have "free ish and entry by the streets laid down on the said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power after mentioned." Now, the street for which compensation is claimed is admittedly one of these accesses, and the great inconvenience to Mr and Mrs Fleming in not having such access is plain—for instance, they might want additional building, or, again, they might not be able to get coals if their access is taken away. And it is taken away, for the railway passes over it by a bridge of such height and breadth as to make it impossible for carts or carriages to pass through. By this contract the vassals are to have "free ish and entry," and though there is a reserved power, I do not see that it is a power to the superior to do whatever he may think right. The streets are to be made and to remain common thoroughfares, and it is "expressly provided and declared that the said Thomas Just and his foresaids shall have full power and liberty to vary and alter the said plan, or streets or roads delineated thereon, in so far as regards the ground not already feued." Now, this does not seem to apply to the present case, for the superior is not given power to "vary or alter" so as to make no access at all. The contract goes on—"Which conditions, declarations, provisions, restrictions, and stipulations above written shall be engrossed and

validly referred to in all future transmissions and investitures of or in the said piece of ground above disponed, otherwise the same shall, in the option of the said Thomas Just or his successors in the superiority, be null and void;" and in a previous part of the deed these "conditions," &c., are declared to be real burdens. Now, this was one of the accesses which the superior undertook should exist, though he might "vary" it; and therefore I do not think the Lord Ordinary is right in grounding the case on the non-existence of the road. I am disposed to think that though there was not what could be called a road, yet there was from the first an access of some sort in this particular direction. There was an access by which the building materials were brought when the vassal built his house, and all driving was done along this way until the railway was formed. If there was an access, and the superior undertook that there should be an access, there is no ground for holding that because in some respects it could not be called a road the superior might take it away at pleasure. I think we decided something very like the reverse of that in the case of *Field* (Oct. 15, 1874, 2 R. 20). There was no road there, but carts were driven along what was to be a road, and we decided that under the obligation the superior was just as much bound as if the road had been actually made. I think the justice of the case, to the extent of Mrs Fleming being entitled to have a road there or to have compensation, is in her favour; but whether her claim is reasonable or unreasonable is a different matter. Very likely it was unreasonable; but what we have to do is to decide between the superior and the vassal whether there was an obligation that a road should exist, and secondly, whether it did exist. I have had great difficulty, and on the whole I am not able to say that Mr and Mrs Fleming have not some claim against the railway company.

Lord Shand—From the Lord Ordinary's note it appears that three points were maintained before him. As to the *first*, which was a complaint of injury to the access to the respondents' property through the deviation of the Kirk Road, we have heard nothing. The judgment on that point seems to have been acquiesced in. The *second* has scarcely been seriously maintained before us. The ground of right to compensation there was that there was an existing road marked and visible on the ground leading from the respondents' property to the turnpike road; but when asked why no proceedings had been taken under the Railway Acts to have it left open or to obtain a substituted one in its place, the reclaimers answered that they really could not say there was an existing road on the ground which could be vindicated in that way. In any case, it is plain from the proof that no such road did exist; if it had, it would certainly have been the subject of proceedings under the statutes. The only presentable case for the respondents is the *third* point. It is said for them that the effect of the company serving the notice when they did was to prevent Mr Just from implementing the obligation under which he lay to give them a road leading from their property northward to the turnpike. There is no serious question as to the law of the matter. The case of *M'Carthy*, L.R., 7 E. and I. App. 232, contains a careful review of the previous cases, and the result of these is, that if the respondents could show that the taking of the ground deprived them of a legal right of access for carts and carriages, then the company would be liable in compensation to them. If they could show that Just was bound under the feu-contract to give them an access by the line of road of which they say they are now deprived, and was so bound at the time of the notice, and that the railway company prevented him from giving them such access, then they would have a good claim of compensation against the company. But I am clearly of opinion with your Lordship in the chair that no such right can be maintained.

I attribute no consequence to the fact that the plan was not signed, for it is quite well identified in the clause. While it is identified for the purpose of the description of the ground, what is provided in the deed is "free ish and entry by the streets laid down on said plan." That, however, is effectually limited by what follows—"but in so far only as the same may be opened." It would be surprising if any superior in a feu-contract, in one of the earliest feus on the border of a large block of ground, were to bind himself to open all the streets as laid down. If the feuing failed, or if another purpose came to be desirable, he would find himself in a very unfortunate position. So here it is provided that the feuars shall have free ish and entry only in so far as the streets are opened—that is, if the feuing shall succeed in the lines laid down on the plan. The clause proceeds—"and not altered in virtue of the reserved power after mentioned." This power of alteration refers to the streets that are first opened; if once opened they shall remain open; but even then the superior has power to alter them. The case really turns on the question of fact—Was the street for which compensation is claimed opened at the time of the feu-contract or not? I am clearly of opinion with the Lord Ordinary that "the case of the respondents fails under this aspect of it, because the road in question was not open at the date of the complainers' notice." It would be tedious to go through the evidence, but it is important to notice that a plan is produced, and sworn to by Mr Ralph, civil engineer, who explains that in February 1872 he marked out the centre line to be taken by the railway, and put in the pegs himself. He produced a plan showing the ground as it then was. On Reid's feu, given off shortly before, the building was only beginning, and two other feus to the northwards were also in the same condition. That was all the ground then laid off by the superior. The other witnesses corroborate Mr Ralph's account. There was a large space of intervening agricultural subject, embracing two very large blocks of building ground, which might or might not be afterwards feued out. The question is, What streets were open then? Only the parts of two streets along the side of Mrs Fleming's feu. Now, see the terms of the feu-contract. The feuars are to have free access to the streets "so far only as the same may be opened;" and the conclusive answer to the claim here made is that the street was not open at the date of the feu-contract. Within three months after Reid took his feu the notice was served, and that action of the railway company therefore put a stop to the idea of the street being opened. It could then have been opened only with consent of the com-

pany. As a fact no road was opened there. It is argued that stones and coals were brought by this way, but that was not an opening of a street by Just, who was no longer proprietor, but merely a temporary use permitted of that ground which now belonged to the railway company.

The case may be really decided on this simple question. The superior was only bound to keep those streets open which he had once opened, and he had not opened this one. To make good the respondents' case it would have been necessary to have a much more special obligation in the contract. If the respondents were even in a question with Mr Just to take his obligation as it stands, it would be an injustice to say that he and his successors are bound to make streets for the construction of which they had given no obligation. The respondents may say—"We always thought we should have the benefit of this street;" but the superior's answer would be—"But I could not tie myself down. I did not know what I might want to do in such an event as that, which has occurred, of a railway company coming across my ground." The respondents have no case on which they can maintain their right to compensation in respect of failure to form a road, because they had no right to have it formed.

LORD MURE was absent, but it was stated that he concurred with the Lord President.

The Court adhered.

Counsel for Complainers (Respondents)—Balfour—R. Johnstone. Agent—J. Smith Clark, S.S.C.

Counsel for Respondents (Reclaimers)—Gloag. Agent—George C. Banks, S.S.C.

Wednesday, November 12.

FIRST DIVISION.

[Court of Exchequer.

THE INLAND REVENUE *v.* M'INTOSH BROTHERS.

Process—Appeal—Act 7 *and* 8 *Geo. IV. c.* 53 *(Excise Act), sec.* 84*—Where Case Stated by Quarter Sessions after Disposal of Cause.*

By section 84 of the above Act it is provided "that it shall be lawful for such Commissioners of Appeal and Justices of the Peace, at such general Quarter Sessions respectively as aforesaid, at their discretion, to state the facts of the case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer in England, Scotland, or Ireland, as the same shall have arisen therein respectively." Where the Justices at Quarter Sessions acting under this statute had "dismissed the appeal and affirmed the judgment of the Petty Sessions, and decerned"—*held* that it was incompetent for them to state a case for the opinion of the Court of Exchequer under the above-quoted section.

Observed that it was competent for the Justices in Quarter Sessions to pronounce a judgment which should in terms be subject to the opinion of the Court of Exchequer on a case stated, although that procedure was not literally in terms of the statute.

Process—Expenses—Crown—Where Case Incompetently Stated.

Circumstances in which the Court declined to give expenses against the Crown where they had presented an appeal which, though no objection was taken in the Single Bills, was at the discussion on the merits found to have been incompetently stated.

This was a case arising upon an information prosecuted on behalf of Her Majesty, and by order of the Commissioners of Inland Revenue, at the instance of William Steele, officer of Excise, against M'Intosh Brothers, spirit merchants, Leith, claiming certain penalties and the forfeiture of certain spirits in respect of alleged contraventions by them of the Statute 23 and 24 Vict. cap. 114, in connection with the process known as grogging—July 19, 1878, 5 Rettie 1097, and December 21, 1878, 16 Scot. Law Rep. 477, and 6 Rettie 443.

The information was first brought before the Justices of the Peace for the county of Edinburgh at a Petty Sessions held at Edinburgh on 26th November 1878. The respondents pleaded not guilty. A proof was led on the 12th December following, and on the 27th December the Justices gave judgment, finding the respondents not guilty of any of the offences charged. An appeal was thereupon taken to the Quarter Sessions, who on the 9th April dismissed the appeal and affirmed the judgment of the Petty Sessions. The minute of the Quarter Sessions of that date bore—"The agent for the appellant and the counsel for the respondents were then heard, and both parties intimated that they would request a case to be stated in the event of the judgment being against them. Thereafter the Justices dismissed the appeal and affirmed the judgment of Petty Sessions, and decerned. The agent for the appellant craved a case to be stated in terms of his previous intimation." And a case was accordingly granted.

Section 84 of the Act 7 and 8 Geo. IV. c. 53, in terms of which the case was stated, after providing for an appeal to the Quarter Sessions, enacted—"That it shall be lawful for such Commissioners of Appeal and Justices of the Peace at such general Quarter Sessions respectively as aforesaid, at their discretion, to state the facts of any case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer in England, Scotland, or Ireland, as the same shall have arisen therein respectively."

The respondents objected to the competency of the case, on the ground that it was not in terms of the above provision, having been stated after the Quarter Sessions had pronounced a final judgment.

Argued for the respondents—The true construction of section 84 of the Excise Statute was that the Quarter Sessions might, at their own discretion, state a case for the opinion of the Court of Exchequer—that is to say, when they really were in difficulty as to the law. But this must be done before they had pronounced a final