1857.
May 28th,
June 5th.

CALEDONIAN RAILWAY COMPANY, APPELLANTS.
LORD BELHAVEN ET AL., . . RESPONDENTS.

Minerals under a Railway—Security against Subsidence.—Circumstances in which it was held, reversing the decision of the Court below, that a Railway Company was entitled to demand security against damage before permitting an adjoining owner to work minerals under the line.

THE proceedings commenced with an application by the Railway Company, praying that the Respondents as owners of land adjoining the line might be restrained and interdicted from working mines and minerals under the line, until they had first given security against damage.

The First Division of the Court of Session, on the 20th June 1854, decided that "in the circumstances which had occurred, it was not incumbent on the Respondents to give the security required."

The Railway Company appealed; and the only question was, whether the case was not really governed by the decision of the House, pronounced on the 16th June 1856, in the *Caledonian Railway Company* v. *Sprot* (*a*), where the judgment of the Court of Session had been reversed.

Sir *FitzRoy Kelly* and Mr. *Rolt*, for the Appellants, contended that this case was identical with that decided last Session.

The *Attorney General* (*b*) and the *Lord Advocate* (*c*), on the other hand, maintained that the points of

(*a*) *Suprà*, vol. ii. p. 449. (*b*) Sir R. Bethell.
(*c*) Mr. Moncreiff.

difference were marked and material. As the House held the contrary, it is only necessary to give the following brief outline of the opinions delivered.

Lord Chancellor's opinion.

The LORD CHANCELLOR (*a*):

My Lords, I should feel extremely reluctant at any time upon an appeal from the Court of Session in Scotland to ask your Lordships to pronounce a decision favourable to that appeal, so as to reverse the decision which had been given by those very learned Judges, without hearing the case fully out, even although I might have formed a very strong opinion in the progress of the argument that the judgment of the Court below could not be sustained; and unquestionably I should not have taken that course in this case were it not that I feel perfectly satisfied that that which I am now about to ask your Lordships to do is in truth that which the Court of Session would itself now do, if this case had been before it in 1857; because, my Lords, the present case is substantially identical with the case that was argued in 1856 (*b*), and in which, the matter having been very fully considered, the decision of the House ultimately, after very great deliberation, was that the Court of Session had come to an erroneous view as to the rights of the parties in reference to the Garnkirk Railway, which had become incorporated with the Caledonian Railway, and your Lordships gave judgment accordingly, and upon principles which, as I shall presently point out to your Lordships, must govern the present case.

The present appeal was an appeal which must have been presented long before the decision by your Lordships' House in the last Session. It has been

(*a*) Lord Cranworth.

(*b*) See *Caledonian Railway Company* v. *Sprot*, *suprà*, vol. ii. p. 449.

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stated at the Bar, that since that descision has been pronounced, it has been acted upon by the Court of Session, not only in the case itself, where of course the Court of Session would act upon it, but in some other cases of a similar nature. Whether that is so or not, I do not know, but unless this case can be distinguished from the case in the last Session, which your Lordships have already decided, it must of course be governed by it (*a*).

In this case Lord Belhaven conveyed the land to the Wishaw and Coltness Railway Company in 1842 and the Company stipulated that they should have the right to prevent Lord Belhaven or any persons claiming under him from working the mines under the railway until proper security had been given for any damage that might be occasioned. That was an express stipulation between Lord Belhaven and the Railway Company. Those rights were therefore absolutely vested in the Wishaw and Coltness Railway Company immediately after the execution by Lord Belhaven of the conveyance in 1842. Afterwards, in the year 1849, the Act of Parliament passed, whereby that Company with which Lord Belhaven had contracted was incorporated with the Caledonian Railway Company. The Caledonian Railway Company thereupon became entitled to the same rights as had previously been possessed by the smaller Company, the Wishaw and Coltness Railway Company, with which Lord Belhaven had contracted. Those rights, therefore, remained exactly the same, except that the parties to them were Lord Belhaven and the Caledonian Railway Company, instead of Lord Belhaven and the Wishaw and Coltness Railway Company.

(*a*) See, however, vol. i. p. 791, where Lord St. Leonards says the House is not "bound to persevere in error." See further, on the same point, vol. ii. p. 626.

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It was argued, indeed, that there was found in the Statute under which the transfer took place, of the Wishaw Railway to the Caledonian Railway Company, a stipulation not found in the Garnkirk Act. I doubt whether there is not in substance exactly the same provision in the Garnkirk Act that there is in the Wishaw Act, but whether that be so or not I do not think it is in the slightest degree material. The stipulation in the Wishaw Act is found in the 21st section, "That so much of the Acts relating to the Wishaw and Coltness Railway as is inconsistent with this Act, or with the provisions of the Caledonian Railway Act (1845), and the Acts therewith incorporated, as extended to this Act, shall be and the same is hereby repealed." And then it is said that this stipulation as to requiring security before working the mines is inconsistent with the Act of 1849, which incorporates the Act of 1845, because there powers were given to work mines without insisting upon that stipulation. My Lords, that argument is founded upon an entire fallacy. The right of the Wishaw Company as the original contractors, and of the Caledonian Railway Company as their purchasers, depends now, not upon the provisions of the Act of Parliament, but upon the contract entered into between the Wishaw and Coltness Railway Company and Lord Belhaven in 1842. There is no doubt that the contract was entered into with reference to a prior Act. Even if we take it that that prior Act is entirely removed, does that signify? The contract is entered into with reference to the state of things existing under the prior Act. Under that contract so entered into, certain rights were acquired, and when it is said that the prior Act is repealed, that does not repeal the contract entered into under that prior Act, but the rights so acquired remain the same as they were.

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Then it was argued that this was altogether inconsistent with the General Act, and the rights that the parties acquired under it. I do not see that. The stipulation which the Company made to restrain Lord Belhaven from working the mines until he has given them certain security is not at all inconsistent with the rights given to him as a landowner under the General Act. It is an additional right. Lord Belhaven is restrained by his contract from working the mines without giving certain security, but subject to his doing that, which he has contracted to do, his rights under the General Act remain untouched.

My Lords, I can only say that I have sought in vain to find any distinction between this case, and that decided by your Lordships in the last Session. It appears to me that the only distinction is, that the parties are reversed. In the other case the landowner was the party moving as Pursuer, and the Railway Company were the Defenders. In this case it is the Railway Company who are moving as Pursuers, and the landowner is the Defender, but there is no substantial distinction between them. Even if I had doubted, which I confess I do not, the propriety of the decision which your Lordships arrived at, after an elaborate argument, it is infinitely more important to the public that your Lordships' decisions should be considered as final and be final, than that they should always be abstractedly right. Therefore even if I had doubted the propriety of that decision, which I do not, I should have advised your Lordships to adhere to it, being unable to discover any substantial difference between the two cases.

For the reasons which I have stated, I move your Lordships that the Interlocutor of the Court below be reversed, and that the case be remitted to the Court of Session, with a declaration as to the Interlocutor that they ought to pronounce.

Lord WENSLEYDALE:

My Lords, I take it that the only question in this case, is whether any substantial distinction can be made between this case, and the case of *The Caledonian Railway Company* v. *Sprot.* I can see none. I therefore concur entirely in the motion of my noble and learned friend, and recommend your Lordships to accede to it.

Interlocutors reversed, with a Declaration :—

That the "Lords of the First Division of the Court of Session ought to have sustained the reasons of suspension and interdict, and granted the interdict prayed for by the Appellants;" and with this declaration the cause was remitted to the Court of Session to do therein as should be just.