

1863.
Feb. 12th, 13th,
and 16th,
June 23rd.

EDINBURGH AND GLASGOW RAILWAY
COMPANY, AND GLASGOW, DUMBAR-
TON, AND HELENSBURGH RAILWAY
COMPANY, } APPELLANTS.
JOHN CAMPBELL, OF POSSIL, RESPONDENT.

Servitude—Right of Road by Reservation—Interdict.—

Circumstances in which the House (agreeing with the Court below) confirmed an Interdict issued at the suit of a party who had merely a servitude or easement entitling him to the use of a certain road sought to be deteriorated by the operation prohibited.

*Railway Notice—Lands Clauses Act.—*Per Lord Chelmsford: The clauses requiring notice are wholly inapplicable to a right of way.

ON the 8th November 1858, Mr. Campbell, of Possil, applied to the Court of Session for an interdict against the above Companies, calling upon the Court to restrain and prohibit them from proceeding with certain operations over a certain road which formed an important access to his property. It was alleged by him that the proposed operations, if permitted, would have the effect of “narrowing, obstructing, and darkening the passage in question greatly to his detriment.”

It appeared that the real object of Mr. Campbell was to prevent a bridge (by which the Edinburgh and Glasgow Railway Company’s line goes over his lands), from being widened 20 feet; and also to prevent the road aforesaid from being narrowed from 23 to 13 feet at the point where the expansion of the bridge was contemplated.

Mr. Campbell contended that the Edinburgh and Glasgow Railway Company were precluded from their

proposed operations by their agreement with him, under which they had originally acquired right to make the bridge, which they now sought to widen. He denied that they had any powers either from their own Acts or from the General Statute to do what they proposed to do. But above all, he insisted that the Railway Company had no right to make use of what he called his private road, or to deposit materials thereon, without giving the notice for purchase required by the 25th section of the Railways Clauses (Scotland) Act.

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The Appellants, on the other hand, maintained that the works proposed by them were authorized, in the first place, by the Act of incorporation of the Helensburgh Company, and, secondly, by the Act of incorporation of the Edinburgh and Glasgow Company. They asserted, thirdly, that the land on which the works were to be executed was in fact the property of the Edinburgh and Glasgow Company, and therefore, the works being essential to the safety and efficiency of their line, they were entitled to execute them.

They maintained that Mr. Campbell had no real proprietary right to the land; his interest being at the utmost but in the nature of a servitude or easement, which it was not incumbent on the Appellants to purchase from him, and therefore the case was not one requiring the statutory notice referred to.

On the 14th July 1860 the *Lord Ordinary* (a), having previously granted the interdict, declared it perpetual, and on the 20th June 1861 the First Division adhered to the *Lord Ordinary's* Interlocutor with costs.

It was in consequence of this decision that the present Appeal was tendered to the House.

(a) Lord Kinloch.

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The *Solicitor-General* (a), and Sir *Hugh Cairns* for the Appellants, directed attention to the case of *Hutton v. London and South-western Railway Company* (b), as deciding the very point now before their Lordships, "water" being taken for "land." Sir *James Wigram* held that in the case of damage to a party whose lands are not entered upon, but are injuriously affected by the exercise of the powers of a Railway Company upon their own lands, it is not unlawful for them to execute the works before the amount of compensation is ascertained, paid, or deposited. The distinction is between cases where lands are taken by a railway company, and cases where they are not taken, but are injuriously affected. The present case is of this complexion. Here no land is sought to be taken. There was originally the Helensburgh Company, to whom certain powers were given. The Edinburgh and Glasgow Company claim those powers, and there has been a conveyance by Mr. Campbell, whereby he has reserved to himself a right, not of property, but of servitude or easement, for the purposes of this road, a right which does not warrant his application for an interdict.

The Railways Clauses Act gives power to make this work ; and the substantial question is, Whether the Respondent has such an interest in the soil as to make it incumbent on the Company to purchase it? This proposition the Appellants deny. The only point of real importance in the case was, perhaps, whether, after the compulsory powers are expired, and after the additional time allowed for making works under a Railway Act is at an end, a Company can proceed without giving notice. In other words, can the owner of the dominant tenement insist that the

(a) Sir Roundell Palmer.

(b) *Hare*, 259. The Appellant's Counsel also cited *Lester v. Lobbley*, 7 Adol. & Ell., 124.

Company shall purchase his interest, where they do not require to take the land, and where their object is merely to get sidings ?

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Mr. *Rolt* and Mr. *Mure* for the Respondent. There was no power either in the Helensburgh Act or in the Edinburgh and Glasgow Act to authorize the operations here threatened ; in fact the Helensburgh Company do not require the works in question ; and at all events the statutory notice is imperative. A right of servitude is within the 8th Vict. c. 19. sections 25, 42, 132. The interpretation clause makes this clear. Servitudes are heritable rights. Mr. *Erskine* says enough to settle this point (a). The servitude here, therefore, is sufficient to support the application for this interdict, which has been properly granted, and ought not to be displaced.

The *Solicitor-General* replied.

The following opinions were delivered by the Law Peers.

The LORD CHANCELLOR (b) :

*Lord Chancellor's
opinion.*

My Lords, the present Appeal is brought against certain Interlocutors which had granted a perpetual interdict against the erection of a particular bridge over a road, to the right of user of which road the Respondent is entitled.

My Lords, the case has been the subject of considerable argument, but it appears to me, with deference, to be governed by a very short and simple consideration. My Lords, it is necessary in the first place to recollect that the compulsory powers of purchase given to one of the Respondent Companies, called the Helensburgh Railway Company, expired, I think, in the month of August 1860. Now the proposed extension of the bridge is to be made and con-

(a) B. 2. t. 2. s. 4 and 5.

(b) Lord Westbury.

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structed upon lands belonging to the other Respondent Company, the Edinburgh and Glasgow Railway Company, and it follows, therefore, that whether it be done by one Company or by the other Company, nothing can be done inconsistent with that contract with the Respondent, the original relator, by virtue of which contract the Edinburgh and Glasgow Company obtained the ownership of the lands upon which the additional bridge is now proposed to be constructed. It is immaterial, therefore, in my view of the case whether the one Company is proceeding to construct the bridge or the other Company, whether it be the Edinburgh and Glasgow Railway Company, or whether it be the Helensburgh Railway Company, inasmuch as the bridge to be constructed must be built upon the land acquired by the Edinburgh and Glasgow Railway Company from the relator. That bridge cannot be built either by the one Company or by the other, if the disponees, the Edinburgh and Glasgow Railway Company, are forbidden to make that extension of the bridge by the terms of the disposition by virtue of which they acquired this land from the Complainant. The question, therefore, to be determined really depends upon the extent and effect of the contract contained in that disposition. For I am by no means of opinion, and I trust your Lordships will concur in that view of the case, that under the 51st section of the Helensburgh Railway Company's Act, any disposition can be made by the Edinburgh and Glasgow Railway Company of any portion of their land, except such a disposition as without that section the Edinburgh and Glasgow Railway Company would be enabled to make. That section does not appear to me to confer either upon the Helensburgh Railway Company any power of demanding, or upon the Edinburgh and Glasgow Railway Company any power of granting the land,

beyond that power which the Edinburgh and Glasgow Railway Company might have exercised, by virtue of the disposition, independently of that section.

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The question, therefore, my Lords, is reduced entirely to the effect of the disposition made by the Complainant to the Edinburgh and Glasgow Railway Company. My Lords, that disposition is dated the 29th October 1841, and the contract appears to be of this nature. The Complainer sold and disposed of certain pieces of land lying on either side of the road leading from his estate to a place called Possil. There was a contract between him and the Edinburgh and Glasgow Railway Company that the railway should be carried over that road by a bridge of certain limited and restrained dimensions; and accordingly the disposition narrates that the plan, together with the elevation and sections and drawings of the intended bridge, had been exhibited to the Complainer, and that the railway was to be carried over a bridge at this particular spot in conformity with the plans so exhibited. That appears to me to be the effect of the contract as expressed in the disposition.

But there is another part of the contract contained in that disposition, and it is this. That the road should be of a certain width, save in a particular place, in which it passes under the span of the bridge. And I consider that it is the true effect of the disposition and contract by the Edinburgh and Glasgow Railway Company to make the bridge of this restricted extent, and also to maintain the road as part of the consideration given by them to the Complainer, and in respect of which the Complainer parted with his land.

Now, my Lords, what the Company propose to do is to make another bridge by the side of and in continuation of the existing bridge, making an addition (as is admitted by themselves) of about 23 feet to the

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width of the bridge. The bridge at present is of the width of 35 feet. Accordingly the proposed addition to the bridge will make the whole width of the bridge 58 feet, and the consequence is that the road under the bridge will to the extent of 35 feet be a continuous arch amounting to a small tunnel, and extending to the width of 58 feet; there are therefore two things to be done by the proposed works; the one a departure from the contract with regard to the extent of the bridge, and the other a violation of the contract with regard to the width of the road, and I think that both the one and the other are inconsistent with the terms of the disposition, and of the engagement therein contained. My Lords, as I have already taken the liberty of submitting to you, I regard these works as being done, if they can be done at all, by virtue of the ownership acquired by the Edinburgh and Glasgow Railway Company under this disposition. And then the simple question is whether these works are consistent with the limited nature of that ownership, and the engagements by which it was bounded. My Lords, I think you will concur with the majority of the Judges in the Court below, that as it is indisputable (for it does not appear to be seriously contended to the contrary) that the disposition of the 29th October 1841 was intended to have, and in law has the limited effect which I have ascribed to it, the proposed works of the Edinburgh and Glasgow Railway Company, or of either Company (for it is immaterial whether they be the works of the one or of the other, but if they are the works of the Edinburgh and Glasgow Railway Company, those works), must be such as are consistent with this contract, and if they are the works of the Helensburgh Railway Company, they must equally be such only as are consistent with the contract; for

the Helensburgh Railway Company can be regarded as nothing in the world more than a scion of the Edinburgh and Glasgow Railway Company in respect of these works. The question then resolves itself merely into the effect of the contract contained in this disposition, and, my Lords, I think it is perfectly clear that the works are inconsistent with the true intent and purport of that disposition, and that therefore they have been justly and properly perpetually restrained by the interdict contained in the Interlocutors which are the subject of this Appeal. I shall therefore submit to your Lordships that the Interlocutors ought to be affirmed and the Appeal dismissed with costs.

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Lord CHELMSFORD :

My Lords, I agree with my noble and learned friend that the Interlocutors appealed from ought to be affirmed throughout, exactly for the reasons which were given by the majority of the Judges of the First Division.

*Lord Chelmsford's
opinion.*

The questions upon the Appeal turn principally upon the effect of the disposition by Colonel Campbell in favour of the Edinburgh and Glasgow Railway Company, and the provisions of the Act for making the Helensburgh Railway.

By the disposition of the 29th October 1841, Colonel Campbell, for the sum of 1,450*l.*, alienated and disposed the whole of the *locus in quo* to the Company, reserving metals and minerals in and under the lands; and in respect of his disponees having agreed to form the road in question twenty-one feet wide along the west side of the field marked 25 on the plan annexed, and to erect (with others) "a bridge at the road leading to Possil," thereby discharged his disponees of all claim for any other accesses or com-

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munications over, under, or on the surface of the said railway, for any one part of the said lands to any other part, and accepted the same communications in lieu and in full satisfaction of every claim which he might be entitled to make for crossings, bridges, or accesses, under the Company's Act of incorporation.

Under this disposition the whole right to the soil of the ground over which the road was formed (with the exception of mines and minerals) passed to the Company, and Colonel Campbell became entitled, as against them, to the exclusive right of way over a road of the stipulated dimensions, with which the Company could not at any future time interfere.

These were the respective rights and interests of the parties when the Helensburgh Railway Act passed.

The two Companies are closely connected by the Act of incorporation of the Helensburgh Company. The railway was to be formed by a junction with the Edinburgh and Glasgow Railway. The Edinburgh and Glasgow Company are always to hold 8,000 shares, or one-third of the capital of the Helensburgh Company; they are to work the whole of the traffic of the line, and to appoint all the officers, clerks, and servants of that Company.

By the 26th section of this Act powers are conferred on the Helensburgh Company, the attempt to exercise which has given rise to the proceedings which are the subject of this Appeal.

Before considering this section it is necessary to observe that the compulsory purchasing powers of the Helensburgh Company expired on the 15th August 1857; but the time for the completion of the works not until the 15th August 1860. These circumstances must be borne in mind in examining the provisions of the 25th section.

The railway was to commence by a junction with the Edinburgh and Glasgow railway. This junction could not be formed without at least entering upon, and perhaps also without its being necessary to purchase and take some land of the Edinburgh and Glasgow Company. It would, of course, have been inconsistent, after giving power to make the junction, to qualify it with a provision for the previous consent of the Company. The section, therefore, provides that except for the purpose (by which I understand the *mere* purpose) of making and maintaining the junction, it shall not be lawful for the Helensburgh Company to take any lands of the Edinburgh and Glasgow Company, or to interfere with their line and levels without their consent, which they are required to give, subject to the decision of the Board of Trade. These powers to enter upon and take lands, and to interfere with lines and levels must of course be subject to the limitation clause as to compulsory powers. If the Edinburgh and Glasgow Company, therefore, had been hostile to the Helensburgh Company, they might effectually have withheld their consent and prevented their lands being taken or their line being interfered with after the 15th August 1857. But even before that time, if the Helensburgh Company had wanted lands of the Edinburgh and Glasgow Company for any other purpose than that of forming the junction, and the Edinburgh and Glasgow Company had refused to part with their lands because the purpose for which they were required would have abridged Mr. Campbell's right of road secured to him by the deed of disposition, it can hardly be supposed that the Board of Trade, whatever opinion they might have formed as to the nature or necessity of the works, would have compelled the Company to give their consent.

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The part of the 25th section requiring the Helensburgh Company to construct and maintain sidings and other works and conveniences necessary or convenient in connexion with the junction, and for preventing any danger, interruption, or inconvenience to the traffic of the Edinburgh and Glasgow Company, seems to have been introduced for the benefit of the latter Company. This is apparent from the provision, that if any difference should arise as to the nature or necessity of any such works, it shall be referred, not (as in the former case of the Edinburgh and Glasgow Company withholding their consent) to the decision of the Board of Trade, but either to their decision or to arbitration, at the option of the Edinburgh and Glasgow Company.

It is contended on the part of the Edinburgh and Glasgow Company that they were entitled to exercise the rights of the Helensburgh Company under this section, although for their own benefit and even to the destruction of the rights of road belonging to Mr. Campbell, with which it is admitted they were bound by the disposition of the 29th October 1841 not to interfere. I say the "destruction" of the road, because there is no argument that can be used to justify its diminution which would not equally apply to the whole road if it had been within the limits of deviation. That the work to be done was for the sole benefit of the Edinburgh and Glasgow Company seems to be very clearly established.

The part which the Helensburgh Company had principally to perform had been accomplished. The junction had been made at a point seven or eight yards distant from the bridge in question, and the line had been regularly opened for traffic. As the compulsory powers of purchase had expired at this time, the point of junction must be considered to have been then

definitely fixed. It was open, however, to the Edinburgh and Glasgow Company until the time for the completion of the works had expired to require the Helensburgh Company to construct such sidings and other works as might be necessary or convenient in connexion with the junction. As these were to be made at the sole costs and charges of the Helensburgh Company, it was not probable that anything of this kind would be done without the requisition of the Edinburgh and Glasgow Company. Accordingly the Helensburgh Company appear to have entertained no idea of making any sidings until they were required to do so by the Edinburgh and Glasgow Company.

There is no doubt that the siding originally proposed, and probably that upon which the two Companies ultimately agreed as to the expense and mode of performance of the work, was different from that which was begun to be executed, and which led to Mr. Campbell's interference for the protection of his road. It is unnecessary to consider the negotiations between the Companies, which resulted in an agreement that the Edinburgh and Glasgow Company should accept 250*l.* from the Helensburgh Company, and should construct the necessary siding at their own expense.

When the objection of Mr. Campbell to the prosecution of the work was urged upon the Edinburgh and Glasgow Railway Company their agents answered, "that the works had been contracted for in the name of the Edinburgh and Glasgow Company, but that that was mere matter of arrangement." "That the powers of the Helensburgh Company were undoubted, and the expiry of their compulsory powers did not prevent the voluntary cession of the land to them." When the threat of an application for suspension and interdict was made, the Edinburgh and Glasgow Company suggested that the Helensburgh Company should

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take back their money and do the work themselves. The Helensburgh Company agreed to proceed with the works and to defend any suit that might be brought by Mr. Campbell, upon the express understanding that they should be relieved of the whole costs of the works, and of the whole liabilities and costs connected with the threatened actions at law. And the Edinburgh and Glasgow Company agreed to give them this ample indemnity. There can be no doubt, therefore, that the proposed work was to be executed at the instigation, for the benefit, and at the sole expense and hazard of the Edinburgh and Glasgow Company.

The question is, Can the Edinburgh and Glasgow Company for their own purposes avail themselves of the powers of the Helensburgh Company, and by the exercise of them injuriously interfere with a right which they had created, and which they themselves could not lawfully impair? It has been contended that even if they could do so, they ought to have proceeded in the usual way to obtain possession of Mr. Campbell's road, or the part which they required, by giving the requisite notices under the Lands Clauses Act. As to the latter question, I have no difficulty in saying that if the Edinburgh and Glasgow Company were not prevented by their contract with Colonel Campbell from making the siding or permitting it to be made, they might effectually have brought the powers of the Helensburgh Company into action without the necessity of any previous notice of their intention to interfere with the road. There would have been nothing to prevent the two Companies co-operating in the work by mutual consent. No previous notice to Mr. Campbell would in my judgment have been necessary, because although his right of road might be a "tenement" or a "heritage," it does

not seem to be such an interest as could have been meant by those words in the interpretation of the word "lands" in the Lands Clauses Act. All the clauses of that Act with respect to the purchase of lands apply to the subjects which can be transferred to and used by the promoters of an undertaking, and are wholly inapplicable to a right of way, which is not to be conveyed, but to be extinguished. The mode of dealing with the rights of parties in private roads is prescribed by the Railways Clauses Act, which provides, not for their acquisition, but for the substitution of another road where they are interfered with pending the operations, and for the restoration of the old road when the works are completed. And in that Act no provision is made for any notice to be given to the owner of the private road before interference with it. The necessity of a previous notice seems to be assumed by the *Lord President* (a) as a means of invoking the interposition of the Board of Trade for protection of Mr. Campbell's rights. But the time for compelling the consent of the Edinburgh and Glasgow Company having passed, if they had refused their consent, an Appeal to the Board of Trade would have been incompetent, as there would have been no jurisdiction to entertain it. And this circumstance brings the case to the only point between the parties. It is admitted that the Edinburgh and Glasgow Company could not have derogated from their contract in respect of the road by the exercise of any powers of their own, and they might, by withholding their consent to the Helensburgh Company's obtaining any portion of their land, have prevented all interference with it. Their consent alone enabled the work to be done, and therefore, without entering into the ques-

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(a) See vol. 23 of the Second Series of Court of Session Cases, p. 1188.

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tion whether it was performed by the Edinburgh and Glasgow Company for themselves or as agents for the Helensburgh Company, or whether the siding was made in good faith or under the pretence of being for the Helensburgh Company, though intended solely to serve the interests of the Edinburgh and Glasgow Company,—on the short ground that the Edinburgh and Glasgow Company were bound by their contract not to injure or disturb the road in question, that the protection of it in its integrity was entirely within their power, and that the interference with it was with their sanction and co-operation,—I am clearly of opinion that the Companies ought to be restrained from proceeding with their intended works, and that the Interlocutors continuing the interdict granted for this purpose should be affirmed.

*Interlocutors affirmed, and Appeal dismissed,
with costs.*

LOCH & MACLAURIN—MAITLAND & GRAHAM.