

much on the same grounds. Accordingly, I shall only shortly state the views that have occurred to me in connection with the opinion delivered by Lord Benholme.

We have a letter withdrawing the admission of liability, and that letter shows that the board had admitted their liability. The other side reply—"You cannot withdraw, since by contract with us you admitted you were liable." I am of opinion that the following facts are certainly to be deduced from the case:—(1) That the two inspectors of Rathven and Elgin signed a minute of reference. (2) That the subject-matter of that reference was the liability of either parish for the support of the pauper Charlotte Grant. (3) That the parties chosen as arbiters were the Association of Inspectors, a body acting according to the ordinary practice in such cases. (4) That the decision given by the arbiters was against the parish of Rathven. Behind these facts there come several points, of these the chief are—(1) Was there authority given to the inspector of Rathven to refer? (2) Was there a valid reference? (3) Did they implement the award?

On the first of these points, I think that Bremner informed the board of the whole matter from first to last, and that they knew it as well as he did. On the second point, I am of opinion that the board, acting in full knowledge, not only homologated but obeyed the decision, and that afterwards it is too late to open it up. Lastly, I think that the board being quite cognisant, and having authorised the inspector, proceeded to implement the contract they had made with the parish of Elgin. This was not in a legal sense a valid reference or a reference at all, and if that parochial board had at any time refused to go on farther with it, they were quite entitled to stop. The same observation will apply to the award, but there is nothing in either case which can prevent them saying that they will act on it, and having done so, they are bound by the action.

The Court pronounced the following interlocutor:—

"Recal the interlocutor complained of: Find that the Parochial Board of Rathven agreed with the Parochial Board of Elgin to abide by the opinion of the Society of Inspectors referred to in the record as to the settlement of support of the pauper lunatic in question; find that an opinion of the said Society on that matter having been expressed and intimated to the parties, the Board of Rathven acquiesced in that opinion, and proceeded to implement their agreement by admitting their liability to pay and by paying to the Board of Elgin the amount of bygone board which had been paid by the said Parochial Board of Elgin to the pursuers, amounting to £85, 16s. 2d.; and further, find to the pursuers the board of the said pauper from March 1863 to December 1864; find that implement and payment were thus made by the Parochial Board of Rathven in the full knowledge of the material facts of the case, and find that in this way the Board of Rathven took fully and finally upon themselves the support of the said pauper, and that they cannot now, in a question with the Parish of Elgin, withdraw from the liability thus admitted and acted upon; and with these findings, remit to the

Lord Ordinary to proceed with the cause; find the Parish of Rathven liable to the Parish of Elgin in expenses since the date of the Lord Ordinary's interlocutor, &c.

Counsel for Inspector of Rathven—Dean of Faculty (Clark) Q.C., and Brown. Agent—Alex. Morrison, S.S.C.

Counsel for Inspector of Elgin—Lancaster and Moncreiff. Agents—H. & J. Inglis, W.S.

Counsel for Lunacy Board—J. A. Crichton. Agents—Philip, Laing, & Munro, W.S.

I., Clerk.

Monday, July 14.

FIRST DIVISION.

[Sheriff of Lanarkshire.]

HAY v. CITY OF GLASGOW UNION
RAILWAY COMPANY.

*Railway—Special Power—Road—Substitute Road—
Railway Clauses Consolidation Act, 1845, secs.
46 and 49.*

A railway company was by Special Act of Parliament empowered "to divert and stop up in the manner shown on the deposited plans" a turnpike road. This provision followed upon an agreement between the Railway Company and the trustees of the said turnpike road, whereby the railway company bound themselves to form a new line of road which was equally convenient to the general public. By this alteration of the road the proprietor of a rope-work, who before had access to the turnpike road, was deprived of all access in that direction. *Held* that the 46th and 49th sections of the Railway Clauses Consolidation Act applied, and that the railway company were bound to give an access to the rope-work equally convenient with that which they had removed.

This was a petition to the Sheriff of Lanarkshire by Mr James Hay, one of the partners, manager, and trustee for the Edinburgh Roperie and Sailcloth Company. The City of Glasgow Union Railway Company were respondents in the petition. The following were the circumstances of the case:—The Edinburgh Roperie Company were proprietors of a large rope-work, situated on the east side of the turnpike road leading from Glasgow to Cumbernauld, within the Barony parish of Glasgow. The Roperie Company had uninterrupted access by the said Cumbernauld Road from and to Duke Street and northward. By the City of Glasgow Union Railway Act, 1873, section 12, the respondents were authorized to make certain alterations on the Cumbernauld Road in these terms: "The Company may divert and stop up in the manner shown on the deposited plans, the turnpike road . . . numbered twenty-seven in the parish of Barony." This provision in section 12 followed upon an agreement entered into between the Cumbernauld Road Trustees and the respondents, the Railway Company, dated 25th and 27th September 1871, under which the Company, the second parties, undertook to form a new line of road, with a footpath 7 feet wide, the width to be not less than that of the present road, and by the second article of the said agreement "the second parties

bound and obliged themselves to free and relieve said Cumbernauld Road Trustees and their successors of all claims competent to the proprietors whose lands adjoin the existing road, or their tenants or others whose access from their lands to the new line of road may be cut off, or injuriously affected by the diversion of the said road," and of all expenses incurred by the road trustees in defending themselves against claims and actions thereon. The Respondents proposed to give as a substitute road, a road which would give an access to the petitioner's premises from the south, but which, in order to enable the petitioner to get to Duke Street, would involve a detour of 560 yards. This substitute road terminated at the south boundary of the petitioner's property in a *cul de sac*.

The petitioner, in these circumstances, prayed the Sheriff "to interdict, prohibit, and discharge the respondents and all others acting under their authority from entering upon, for the purpose of making alterations on, or any operations for the diversion or stopping up of the present line of Cumbernauld Road between Duke Street and a point about 300 yards or thereby to the north of the petitioner's property, or from in any way interfering with or prejudicing the present access from Duke Street along the Cumbernauld Road to the petitioner's property, and in particular to interdict, prohibit, and discharge the respondents from stopping up or diverting the portion of Cumbernauld Road between Duke Street and the said point about 300 yards or thereby to the north of the petitioner's property, until a 'new or substituted road of a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow,' in terms of sections 46 and 49 of 'the Railways Clauses Consolidation Act, 1845,' has been formed by the respondents, and to find that the proposed substitute road described in the petition, and about to be formed by the company, is not a substitute road in terms of the foresaid Act, and meantime to grant interim interdict as craved."

By section 46 of "The Railways Clauses Consolidation Scotland Act, 1845," which Act was incorporated into the respondents' various Acts, it is provided that "if in the exercise of the powers by this or the Special Act granted, it be found necessary to cross or use any part of any road, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the Company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall, at their own expense, maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be;" and by section 49 "if the road so interfered with cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow."

The Sheriff (DICKSON), on 10th April 1874, pronounced this interlocutor:—"Having heard parties' procurators on the pursuers' appeal—in respect there are not data before the Court for

disposing properly of the question—Remits to Mr David Rankine, engineer, Glasgow, to examine the ground in question in presence of the parties, or their representatives, and to report *quam primum* whether the road which the defenders propose to substitute for the part of the Cumbernauld Road to be diverted 'is equally convenient as the former road, or as near thereto as the circumstances will allow' (Railway Clauses Consolidation Act, 1845, sec. 49)—it being understood that while Mr Rankine's report will be received as *prima facie* evidence on the question of interim interdict, it will not be taken into view except of consent of parties in disposing finally of the merits of the cause."

Mr Rankine reported that, as narrated above, the access to the pursuer's property from the north would be entirely cut off, except by making a long detour, and that the only way of giving a more direct access northward would be by continuing the accommodation road northwards, where, as already narrated, it terminated in a *cul de sac*.

The parties having renounced further probation, Mr Rankine's report was held as the evidence in the case.

On 9th May 1874 the Sheriff pronounced an interlocutor granting interim interdict as craved, till the future orders of the Court, "but with leave to the respondents to move that it be recalled either upon formation by the respondents of the road and relative works recommended in Mr Rankine's reports, or upon the respondents lodging in process a minute (1) expressly admitting that the petitioner has a good claim to compensation on account of the access to his property being impaired by the respondents' proposed operations, and (2) agreeing to what the Court shall consider proper measures for assessing the said compensation; and remits the cause to the Sheriff-Substitute for farther procedure.

"*Note*.—There is no doubt that the respondents' proposed alterations on the road in front of the pursuer's premises would make these premises less accessible than at present, as the present access from the north by the road in front would be stopped, and instead of it there would be the route by the south to Duke Street and back, involving a detour of about 560 yards.

"According to Mr Rankine's report there are no engineering difficulties in the way of continuing the accommodation road to the north of the petitioner's property. Such a road, if not as convenient for the petitioner as the existing one, would be as 'near thereto as circumstances would allow,' in terms of section 49 of the Railway Clauses Consolidation Act, 1845. The defenders objected mainly on the ground of expense, estimated by Mr Rankine at £2300, but by their engineer (as stated at the bar) at £3500 or £4000. The Sheriff must at this stage be guided by the reporter's estimate.

"While admitting that the exorbitant cost of a substituted road is one of the 'circumstances' contemplated by the Act, the Sheriff does not think the estimated expense of the road as proposed by Mr Rankine in this case to be exorbitant. Nor does he think that the inconvenience to the respondents in regard to siding arrangements is a sufficient reason why it should not be made. It was said that the respondents now contemplate laying four lines of rails instead of two at this

place; but that is not on their plan, and must be a very recent suggestion, which it may not be necessary to carry out.

"In these circumstances, the Sheriff considers that the only road which the respondents propose to make for the petitioner is not—while that recommended by Mr Rankine is—in accordance with the statutory provision referred to. The respondents' agent urged that the proper course is to allow them to proceed with the road, and leave the petitioner to his claim of compensation for loss of access. But, on being pressed, he refused to admit that such a claim would be good; and indicated that, on the contrary, it would be resisted. The Railway Company thus propose to impair materially the accessibility to the petitioner's property, and to refuse to pay him any compensation in consequence. It is the more necessary to protect the petitioner's interests against parties who propose to deal thus unfairly with him.

"It is not necessary or expedient to decide at present as to the position of the parties if the respondents fully recognised the petitioner's right to compensation, and agreed to measures for making it effectual."

The respondents appealed.

The following authorities were cited—*Cathcart v. Sloss*, Feb. 11, 1865, 5 Macph. 521; *Watson v. Bartholemew*, 22 D. 693; *Marquis of Salisbury v. Great Northern Railway Company*, Nov. 19, 1858, 28 L. J. (Com. Pleas) 40; *Law v. Caledonian Railway Company*, June 13, 1851, 13 D. 1122; *Watkins v. Great Northern Railway Company*, May 2, 1851, 20 L. J. (Queen's Bench) 391; *Cott v. Caledonian Railway Company*, 3 Macq. 833.

At advising—

LORD PRESIDENT—The respondent in this appeal has a property occupied as a rope work, one end of which abuts upon the Cumbernauld Turnpike Road. The appellants, the City of Glasgow Union Railway Company, are by Act of Parliament of 1873 entitled to shut up the Cumbernauld Road at this point on substituting another road to the west. The consequence of those operations would be that Hay's property, which at present has an access from the Cumbernauld Road, would be deprived of all access from that side. The Railway Company contend that that is the necessary legal consequence of the exercise of the power given in the Act of Parliament, and that there is no remedy, even if Mr Hay's property is deprived of all access whatever.

In September 1871 the Railway Company entered into a written agreement with the trustees of the Cumbernauld Road, by which the Company undertook to make a diverted line of road on receiving a conveyance from the trustees of the portion of the old road adjacent to Hay's rope works. Now, I have no doubt that that agreement was beyond the powers of the Road Trustees. If the new road was made and the old one no longer in the opinion of the Trustees necessary, they could not shut up the old road without an application to the justices, all having interest being called. If that had been done, of course Mr Hay would have come forward and opposed an alteration of the road by which his access was cut off. So this agreement is of no consequence except as importing the consent of the Road Trustees to the Act of Parliament which followed upon this agreement. That Act, by the 12th section, provides that "The Company may

divert and stop up in the manner shown on the deposited plans the turnpike road . . . numbered twenty-seven in the parish of Barony." The road here referred to is the Cumbernauld Road, adjacent to Hay's works. Now, this is a special power, and the Railway Company in proceeding to shut up this road are acting in the exercise of that special power, and under no other provision of the statute, nor is it said that there is here any question of buying the land under condition of compensation. That being so, what remedy have injured parties, or parties who are deprived of access to their properties. The respondent says that that is all provided for in the 46th and 49th sections of the Railway Clauses Consolidation Act. The appellants, on the other hand, maintain that this is not the sort of case there provided for, but a case of the exercise of a special power under a Special Act, and not in any way coming under the General Act. That argument is very plausible, but I do not think it a sound one, nor that the authorities cited in support of it were applicable to this case. It is true that by force of the 12th section of the Special Act power is given to the Railway Company to divert the road as well as to stop up the portion diverted, and the effect of that is that for the old road a new one is substituted. But the question is whether that prevents the application of the 46th and 49th sections of the General Act. The 46th section provides what is to be done in the exercise of power conferred by the General Act itself or by a Special Act. The powers in the General Act here referred to are contained in the 16th section, and are to the following effect:—"Subject to the provisions and restrictions in this and the Special Act, and any Act incorporated therewith, it shall be lawful for the Company, for the purpose of constructing the railway or the accommodation works connected therewith, hereinafter mentioned, to execute any of the following works:—They may divert or alter the course of any . . . roads, streets, or ways; and they may do all other acts necessary for making, maintaining, altering or repairing, and using the railway."

Now, it was argued that in order to bring powers conferred by Special Act under the General Act, these powers must be *ejusdem generis* with the powers in this 16th section of the General Act. That may be so, but is not the special power which we are now dealing with of that nature? I think it is, for it is power to divert and alter a road—just one of the powers conferred by the 16th section of the General Act—and what is more, the same words are used. So it is very difficult to say that the Railway Company are not in the position contemplated by the 46th section of this General Act, and that that section does not apply. I think that it does apply, and if that is so then the 49th section also applies. That section provides "if the road so interfered with cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road or some other sufficient substituted road to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow."

But it is said that although these sections apply in words, they must be excluded, as a particular substitute road is provided by the Special Act, and the Railway Company cannot be compelled to make two substitute roads. That is true in the ordi-

nary case, but the Company must make the substitute road to be as convenient to everybody using the old road as circumstances will permit. But here the Railway Company is merely empowered by the Special Act to divert the old road, without it being declared that the diverted road is to be the substitute for the old road for all the purposes of the Railway Clauses Act. If there had been such a provision the case might have been different, but as it is I do not see anything to prevent the clauses of the General Act from applying to this case. The effect may be that the Railway Company will have to make two substitute roads, but that will be the effect of the Special Act taken along with the General Act, and so I think Mr Hay is entitled to demand a substitute road as nearly as possible as convenient as the old road. Now the parties in the Court below accepted Mr Rankine's report as proof in the cause, and he reports that the only way in which a substitute road can be made which will give to Mr Hay the access which he is deprived of by the operations of the Railway Company, is to make the accommodation road shown upon Mr Rankine's plan. Now I am of opinion that Mr Hay is entitled to have the works of the Railway Company stopped by interdict until that road is made.

LORD DEAS concurred with the Lord President.

LORD ARMILLAN—The operations of the Railway Company have undoubtedly left Mr Hay and another gentleman (whose case is the same) in a very singular position. Before these operations the complainant had full and convenient access, constantly used, and of great value to his ropery premises.

The Railway Company's operations—which they pleasantly call diverting a road—have had the effect of cutting off all the complainant's access by road in front of his property, literally blotting out his access, and shutting up his premises, sealing them up so far as they could do so. The respondents allege the sanction and authority of an Act of Parliament; and they offer to the petitioner no substitute—for a substitute road which he cannot reach is no substitute available to him, and affords no redress for the wrong done to him.

We must read and construe the statute on which they rely. We must consider the arguments by which their plea is supported. But surely that must be a potent reason, and a clear and strong provision, which can sustain operations inflicting injury so serious. The statute, in so far as enabling, must be construed fairly for promotion of the objects recognised and sanctioned by the preamble. But when private property is interfered with injuriously, and redress is refused, a statute founded on to justify such injury must be construed strictly against the promoters. Besides this, the Railway Clauses Consolidation Act must be read as incorporated with the Glasgow Union Railway Act, and any construction of the Private Act which tends to exclude the Railway Clauses Act must be unfavourably viewed.

I agree with your Lordships in your construction of the 46th and 49th sections of the Railway Clauses Act. I think it applies to all operations of the kind performed under the 16th clause of the Railway Clauses Act; and that the operations permitted under the special powers of the 12th clause of this Company's Act are very similar and *ejus-*

dem generis to those in the 16th clause of the Railways Clauses Act, and that both are therefore within the scope and meaning of the provisions of the 46th and 49th sections of the Railway Clauses Act. The diverting of a road is one of these operations under the 16th clause of the Railway Clauses Act, and under the 12th clause of the Local Act; and I think that the Company can be permitted to divert a road only on the conditions provided in the 46th section. The new road coloured blue on the plan is of no use to the petitioner. He cannot reach it. The respondents decline to execute operations to enable him to reach it. Of course that is no fulfilment of the condition of the Act, and affords to the petitioner no remedy or redress.

The facts and the effect of the respondents' operations appear from Mr Rankine's report. The petitioner's property is actually shut up. The Sighthill Branch Railway will be interposed between the petitioner's property and the new road, and the petitioner cannot reach the new road. Mr Rankine suggests a road as an accommodation road. That proposal the Company decline to accede to. Standing that refusal, it appears to me that a great injury is inflicted on the petitioner, and that nothing has been done, or is proposed to be done, to meet the justice of the petitioner's claim; and I do not understand that any compensation is offered.

In regard to the agreement between the Railway Company and the Road Trustees, I am of opinion that the Road Trustees did not represent and could not bind the petitioner. The Trustees had no power to shut up the road, and their consent cannot be pleaded by the Railway Company against the petitioner, if the statute does not afford the Company sufficient protection. I therefore agree with your Lordships that the complainant Mr Hay is entitled to access, and that the accommodation road suggested by Mr Rankine meets the justice of the case, and that interdict should be granted until the Railway Company undertake to make the said road.

The Court pronounced the following interlocutor:—

“Recal the interlocutors of the Sheriff-Substitute of 19th and 23d June 1874; interdict, prohibit, and discharge the appellants (defenders in the Inferior Court) from diverting or stopping up that portion of the Cumbernauld turnpike road which lies between Duke Street and a point 800 yards or thereby to the north of the respondents' (petitioners in the Inferior Court) property, until they shall have caused a sufficient substitute road to be made in terms of the report of David Rankine, civil engineer, No. 5 of process, and decern; find the appellants liable in expenses both in this and the Inferior Court; allow accounts thereof to be given in, and remit the same when lodged to the Auditor to tax and report.”

Counsel for Appellants and Respondents—Dean of Faculty (Clark), Q.C., Balfour, and Thorburn. Agents—Murray, Beith & Murray, W.S.

Counsel for Respondent and Petitioner—Watson, Alison and Mackintosh. Agents—Morton, Neilson & Smart, W.S.