Friday, March 8.

SECOND DIVISION.

STURROCK *v.* DUKE OF BUCCLEUCH.

Police—Street—Footway—Maintenance — Police and Improvement (Scotland) Act 1862 (25 *and* 26 *Vict. c.* 101), *sec.* 149—Casus Improvisus.

Section 149 of the Police and Improvement (Scotland) Act 1862 enacts—"The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct, and shall thereafter, from time to time, as occasion may require, repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground or pertinent of a house."

Held (Lord Rutherfurd Clark *diss.*) that the owner of lands abutting on any street for the continuous length of more than 100 yards was liable for one-third of the cost of upholding the footways before such lands, and no further, so long as the lands remained unfeued and unbuilt upon.

In the beginning of 1887 the Dalkeith Burgh Commissioners caused certain repairs to be executed upon the footpaths in Eskbank Road, Buccleuch Street, and the New Edinburgh Road respectively. All these footpaths faced property belonging to the Duke of Buccleuch, but the property was all unfeued and unbuilt upon, and not laid out as gardens or pleasure-grounds, and it abutted upon such streets respectively for a continuous length of more than 100 yards.

In February 1888 Thomas Sturrock, clerk to the Dalkeith Burgh Commissioners, raised an action in the Sheriff Court at Edinburgh against the Duke of Buccleuch for payment of £72, 12s. 3d., being the total cost of said repairs, for which the pursuer maintained he was liable under the 149th section of the General Police and Improvement (Scotland) Act 1862.

The said section provides that "The owners of all lands or premises fronting or abutting on any street shall, at their own expense, when required by the commissioners, cause footways before their property respectively on the sides of such street to be made, and to be well and sufficiently paved with flat, hewn, or other stones, or to be constructed in such other manner and form and of such breadth as the commissioners shall direct, and shall thereafter, from time to time, as occasion may require, repair and uphold such footways: Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding 100 yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground or pertinent of a house."

A proof was allowed before answer, and thereafter the Sheriff-Substitute (HAMILTON) on 26th June 1888 found that no relevant or sufficient defence had been stated to the action, repelled the defences, and decerned in terms of the prayer of the petition, &c.

"*Note.*—The sums claimed from the defender in respect of the footways in Buccleuch Street and the New Edinburgh Road respectively are clearly due. The defender objects that while the Commissioners called upon him 'to construct' good and sufficient footways in front of his property in said streets, their operations amounted only to 'a repair' of the existing footways. This objection, if it has any meaning at all, is an admission that the Commissioners did only such work as was necessary in order to put the footways—which had not previously been dealt with under the provisions of the General Police Act—in proper order in terms of the 149th section. . . .

"By the section of the Police Act already referred to—the 149th—the whole burden of repairing and upholding a footway within the burgh 'from time to time, when occasion may require,' is laid upon the owners of property fronting the street. This provision is not limited in any way, and must be held to apply to all owners indiscriminately, even though their lands may be unfeued or unbuilt on." . . .

The defender appealed to the Sheriff (CRICHTON), who on 10th August 1888 pronounced the following interlocutor:—"Finds in fact . . . (4) That the footways on the east side of Buccleuch Street and east side of New Edinburgh Road had been originally constructed by the Road Trustees many years ago; (5) that in 1882 the Commissioners of Police of Dalkeith constructed a footway in front of the whole of the property of the defender situated in Eskbank Road; (6) that the lands or premises of the defender front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length exceeding one hundred yards, and are unfeued and unbuilt upon; (7) that the work executed did not consist of constructing new footways, but in repairing those that had already been formed; (8) that the cost of making the said repairs amounted to £72, 12s. 3d., the sum now sued for: Finds in point of law . . . that under section 149 of 25 and 26 Vict. cap. 101, the defender is bound to repair

and uphold said footways, or to pay the expense of upholding and repairing them where the repairs are executed by the Commissioners of Police: Therefore decerns against the defender in terms of the conclusions of the petition, and decerns, &c.

"*Note.*—Two questions of importance and difficulty with regard to the provisions of the 149th section of the Police and Improvement (Scotland) Act 1862 are raised in this case. . . .

"The defender is proprietor of lands within the burgh of Dalkeith, which abut on the three roads or streets mentioned in the petition for a continuous length exceeding 100 yards, and are unfeued and unbuilt on. At two of these roads or streets, viz., Buccleuch Street and New Edinburgh Road, footways had been constructed many years ago. At Eskbank Road a footway was constructed in 1882 by the Police Commissioners, and the defender paid one-third of the expense. These footways having got out of repair the Commissioners in 1886 resolved that they should be put in proper order. Accordingly they served on the defender a notice, calling upon him 'to construct a good and sufficient footway on part of the lands or premises,' of which he was owner in the three roads or streets above-mentioned, according to specifications which were to be seen at the office of the Commissioners. This notice contained an intimation that if the work was not executed by the defender within eight days it would be executed by the Commissioners at the defender's expense. The defender did not execute the work, and it was done by the Commissioners of Police. The cost of this work is sued for in this action. . . .

"The defender maintained that the 149th section of the Act did not impose upon him the burden of repairing footways which had been formed on roads or streets along which his lands fronted or abutted for a continuous length exceeding 100 yards.

"It is clear that under the first part of this section the owners of lands or premises fronting a street for less than 100 yards are bound not only to construct footways, but to keep them in repair and uphold them. The second part of the section relieves the owners of lands which front or abut for a continuous length of more than 100 yards of two-thirds of the expense of the construction of the footways, at least until the lands are feued or built on. It is true that this part of the clause says nothing as to the persons who are to keep these footways in repair after they are constructed. The Sheriff, however, although not without hesitation, has come to be of opinion that the defender is bound to keep them in repair, or, if they are repaired by the Commissioners, to repay them the expense of doing so."

The defender appealed to the Court of Session, and argued—The Act laid upon him the burden of paying one-third of the construction of such footpaths, but nothing more. He had paid that, and was not liable for any part of the cost of repairs. It was only "such footways" as the owners had to construct entirely at their own expense that they had also to keep up. If the Legislature had made no provision as to repairs, the Commissioners should pay for them out of the rates. It was the ratepayers who alone derived benefit from these footpaths. If he was liable at all it must only be in the same proportion as for the construction, namely, for a third.

Argued for the respondent—The burden lay upon the owners of lands abutting upon any street to keep up the footways in every case, whether they had paid the whole original cost of construction or not, and whether their property was of the continuous length of 100 yards or not. That was plain from the first part of the 149th section. The second part introduced an exception, but that exception applied only to construction. Upon that view the provisions of the statute were complete. The appellant desired to make out there was a *casus improvisus* here, which was quite unnecessary—*Police Commissioners of Old Aberdeen* v. *Leslie, &c.*, March 18, 1884, 11 R. 733.

At advising—

Lord Young—The question in this case relates to the liability of the Duke of Buccleuch to repair and uphold certain footways constructed in 1882 by the Police Commissioners of Dalkeith in front of certain property of the Duke in Dalkeith. The answer to it depends on the proper construction of section 149 of the General Police Act 1862. The Sheriff has found in fact "that the lands or premises of the defender front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length exceeding one hundred yards are unfeued and unbuilt on," and though some observations adverse to that finding were made at the debate the parties ultimately were agreed that it is right. The next material finding is that the work executed "did not consist of constructing new footways, but in repairing those that had already been formed," and the next that "the cost of making the said repairs amounted to £72, 12s. 3d., the sum now sued for."

These are the material facts. The question in the case does not regard any of them. It is the question of law whether on these facts the Duke is liable to pay the whole expense of the repairs, or is exempt from liability for them, or is bound to make payment in respect of them, but only to the extent of one-third. We heard argument in support of each of these views, and no other view was urged upon us. Now, the first part of section 149 relates to the construction by owners of footpaths fronting their properties, and the repairing and upholding them when formed. The second part of the section is a *proviso* confined to a case in "which it shall not be lawful for the commissioners of police" to require the owner to construct the footway. It is thus expressed—"Provided always, that where the lands or premises of any owner front or abut on any street for a continuous length exceeding one hundred yards, and such lands or premises are unfeued or unbuilt on, it shall not be lawful to the commissioners to require such owner to construct such footway, but the commissioners may themselves cause such footway to be constructed in so far as they think proper, and shall be entitled forthwith to recover from such owner one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out or used as a garden or pleasure-ground o pertinent of a house."

Now, I think there is no room for ambiguity there. Where it is lawful for the commissioners to require the owner to construct a footway in front of his property he must at his own expense construct and maintain it. That is the first part of the clause. But the second part limits the power of the commissioners to require owners to construct footways in cases contemplated by it. Where the owner's lands front the street for more than 100 yards, and are unfeued and unbuilt on, then it shall not be lawful for the commissioners to require the owner to construct the footway. Now, the operation of this upon the first part of the clause is manifest. The commissioners have unlimited power to oblige the owner to uphold the footway where it is lawful to require him to construct it, but that does not apply where, under the second part of the clause, it "shall not be lawful" for them to force him to construct the footway. Now, according to the findings in fact which I have read, the lands here in question are within the provisions of the second branch of the section. It is "not lawful" for the Commissioners to oblige the Duke to construct the footway opposite to them. But under the section it was lawful for them if they saw fit to construct it themselves, and "forthwith" to recover from such owner "one-third of the expense thereof, and the remaining two-thirds thereof whenever the lands fronting or abutting on the footway so constructed by them are actually feued or built upon, or laid out and used as a garden or pleasure-ground or pertinent of a house." The Commissioners constructed the footpath. They were therefore entitled to recover one-third of the expense of construction. The question, however, is, what liability the Duke is under, if any, for the repair of what it was "not lawful" to call upon him to construct? In the second part of the section, unlike the first, there is no provision as to the expense of repairs. But the footpath must be upheld, and there are only two persons —the Duke and the Commissioners—to do it; whether one of them is to do it alone or whether they are to do it between them. The Act says nothing on the subject. Yet a rule must be extracted from it under which the footpaths are to be upheld. I think the fair and reasonable view, and that which must be imputed to the Legislature, is that the cost of upholding the footways should be divided in the same proportion as the cost of constructing them. There seems to be good reason for that, and no reason to the contrary. The two alternatives to that course are, first, that the Commissioners shall pay two-thirds of the cost of construction and all the cost of upholding. I think that alternative is not reasonable, and I reject it. The other alternative is that the owner shall pay the whole expense of upholding. An argument worthy of consideration presented in favour of that alternative is that the first part of the section lays on the owner the whole cost of upholding as well as that of constructing, and that while the second part relieves him to a certain extent of the cost of construction it does not relieve him at all of the cost of maintenance, but says nothing upon that subject. That view does not commend itself to my mind. I think that, taking the first part of the section in connection with the second, the obligation to bear the whole expense of upholding is imposed only with respect to footways which it is lawful for the Commissioners to compel owners to construct. The owners are in that case to repair and uphold "such" footways. I should not be disposed to adopt the view that owners are also liable to uphold footways which it is not lawful for the Commissioners to compel them to construct, even if it were more plausible than I think it is. I should rather, if that were necessary, be ingenious to avoid it, for the reason and equity of the matter are that the cost of constructing and upholding shall be divided between the parties according to the same rule.

I am of opinion that the defender is liable in one-third of the expense of repairs, but no further.

Lord Rutherfurd Clark—I incline to the opinion that the Sheriff is right. I think that the meaning of section 149 is that the police commissioners are entitled to require footways to be constructed in front of all properties within their jurisdiction at the expense of the owners, and that when these are constructed the cost of maintaining them is laid on the owner. In certain circumstances indeed, which occur here, the obligation to construct is not laid on the owner, but the footways may be constructed by the commissioners themselves, and they are entitled to recover from the owner one-third of the expense of construction forthwith, and the remainder when his lands are feued or built upon. But I think that when the footway is constructed the obligation of upholding it rests with the owner. As I read the section the obligation to uphold is without exception; the only exceptional case is that in which the owner is not obliged to construct the footway but the commissioners may do so.

Lord Justice-Clerk—I have had some difficulty in coming to a conclusion as to the interpretation of the clause which rules this case. I confess my first leaning was to the third of the three views to which Lord Young has alluded, and which has not been adopted either by his Lordship or by Lord Rutherfurd Clark. My impression was that the obligation on owners to maintain footways depended on whether they were "such" footways as the Commissioners are entitled to require owners to construct as provided by the first part of the section. Where land is unfeued and unbuilt upon for a length of 100 yards the Commissioners are not entitled to require the proprietor to construct any part of the footway. It is only after they have done it themselves that they can exact one-third of the expense from the proprietor. It seemed to me therefore difficult to read the words "such footpaths"—which refer back to footpaths which the Commissioners can require the proprietor to construct—as applying to footpaths as to which the Commissioners have no such power. But after further consideration I have come to the opinion that the result at which Lord Young has arrived is not only reasonable in itself, but is consistent with the terms of the section, that the measure of the obligation of maintenance is to be found in the extent of the obligation to pay the cost of construction. As the cost of construction is laid upon the owner, so also, and to the same extent only, is the cost of upholding laid upon him. The defender here is liable in one-third of the expense of construction,

and I think it is a fair reading of the statute that he is liable in one-third of the expense of maintenance.

Lord Lee concurred with the Lord Justice-Clerk and with Lord Young.

The Court pronounced this interlocutor:—

"Find in fact (1) that the lands of the defender referred to in the record front or abut on the east side of Buccleuch Street, the south side of Eskbank Road, and the east side of New Edinburgh Road for a continuous length of 100 yards, and are unfeued and unbuilt upon; (2) that the work in respect of which the sum sued for is claimed by the Commissioners of Police was executed not in making new but in repairing existing footpaths *ex adverso* of the said lands: Find in law that in terms of the second branch of the 149th section of the General Police and Improvement Act 1862 the defender is liable for one-third of the cost of upholding the said footpaths, and no further, as long as the ground opposite to said footpath remains unfeued and unbuilt upon: Therefore recal the judgments of the Sheriff and the Sheriff-Substitute appealed against: Ordain the defender to make payment to the pursuer of the sum of £24, 4s. 1d. sterling, being one-third part of the sum sued for: Find no expenses due by either party to the other, and decern."

Counsel for the Pursuer—Comrie Thomson—MacNeill. Agent—Thomas Sturrock, S.S.C.

Counsel for the Defender—R. Johnstone—C. K. Mackenzie. Agents—Gibson & Strathern, W.S.

Friday, March 8.

SECOND DIVISION.

SIR ARCHIBALD D. STEWART *v.* HIGHLAND RAILWAY COMPANY.

Railway—Lands Clauses Consolidation (Scotland) Act 1845, *sec.* 120—"*Superfluous Lands.*"

Held that a piece of ground, acquired by a railway company under compulsory powers, which had not been used or disposed of by the company more than ten years after the completion of their works, for which they had no immediate use, and which could only be utilised if additional ground were acquired under special Act of Parliament, had become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 19) provides—"With respect to lands acquired by the promoters of the undertaking, under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:" . . . Section 120. "Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

In the year 1856 the Perth and Dunkeld Railway Company, in pursuance of the Perth and Dunkeld Railway Act 1854, and the Lands Clauses Consolidation (Scotland) Act 1845, gave notice to Sir William Drummond Stewart, heir of entail then in possession of the entailed estates of Grantully, Murtly and others in the county of Perth, that they required to purchase and take for the purposes of their undertaking certain portions of the said estate of Murtly and others, including, *inter alia*, one acre and one hundred decimal or thousandth parts of an acre or thereby, bounded on the south by the public road leading from Murtly to Dunkeld, and on the other sides by the adjacent portions of the said estate of Murtly, all as delineated and coloured red upon a copy of the Ordnance Survey map produced. The amount of compensation payable for the lands so taken having been fixed by a jury and duly paid, the land was subsequently conveyed by Sir William to the said railway company.

The Highland Railway Company were incorporated by the Highland Railway Act 1865 (28 and 29 Vict. cap. 168), and by that Act the Perth and Dunkeld Railway Company was united with the Highland Railway Company, and the latter company acquired the railway lines, stations, buildings, and works which had been constructed and the property which had been acquired by the former company under the Perth and Dunkeld Railway Act 1854. Section 2 of the said Act incorporated the Lands Clauses Consolidation (Scotland) Act 1845. The said land was used by the Highland Railway Company as a spoil bank when they were making their tunnel at Murtly, but it was never required or used by them for the purposes of their undertaking, and was not sold or disposed of by them.

In April 1888, more than ten years having elapsed since the expiry of the statutory period assigned for the completion of their undertaking, Sir Archibald Douglas Stewart, Baronet, heir of entail in possession of the estates of Grantully, Murtly and others in the county of Perth, and duly infeft therein conform to decree of special service in his favour as heir of tailzie and provision of his brother the late Sir William Drummond Stewart, Baronet, dated 22nd May 1871, and with warrant of registration thereon recorded in the division of the General Register of Sasines applicable to the county of Perth, 5th June 1871, raised an action against the said railway company to have it declared that the said piece of ground, not having been required or used by the defenders or their predecessors for the purposes of their undertaking prior to the date of citation to follow thereon, had become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation (Scotland) Act 1845, and had vested in and become the property of the pursuer as owner of the lands