

JUNE 23, 1863.

THE EDINBURGH AND GLASGOW RAILWAY CO. and THE GLASGOW, DUM-BARTON, AND HELENSBURGH RAILWAY CO., *Appellants*, v. JOHN CAMPBELL, *Respondent*.

Railway—Conveyance of Land—Interdict—Servitude Road—Railways Clauses Act, 8 and 9 Vict. c. 33, § 16.—*The E. Railway Co. under their Act requiring to cross C.'s farm road by a bridge, obtained a disposition of the land, and this specified the width of the bridge. Afterwards the E. Co. by agreement with the G. Company sought to widen the bridge by 20 feet—the land, on which the addition was to be made, being their own. No notice of this had been given to C., and the compulsory powers of both Railway Co's had expired.*

HELD (affirming judgment), *That C. was entitled to interdict, as the E. Co. were bound by the terms of the disposition, and had nothing but the limited right there specified.*<sup>1</sup>

This was an application for an interdict. The Inchbelly turnpike road touches the estate of Possil belonging to the suspender, John Campbell, on the east, and from that road a farm or occupation road runs westward to Possil House and the Possil turnpike road. The Edinburgh and Glasgow Railway runs northward through the estate towards its eastern extremity, and crosses the farm or occupation road by means of a bridge, under which the road runs. The arch of the bridge is 35 feet long from east to west, and the width of the roadway under it is 15 feet. The bridge has wing retaining walls on both sides—on the western side of the bridge the retaining wall on the north of the road being 37 feet long, that on the south of the road being 34 feet long; and as these retaining walls diverge as they go westward from the bridge, the roadway between them is wider than it is under the arch. At the western extremity of the retaining walls the width of the road is 23 feet. Immediately to the north of the bridge, and on the western side of the railway, the Edinburgh and Glasgow Railway is joined by the Glasgow, Dumbarton, and Helensburgh Railway.

The railway companies proposed, with the view of constructing at the point of junction a siding said to be equally necessary for both railways, to add 20 feet to the western side of the arch over the occupation road, thereby, to that extent, darkening the road, and narrowing it to 15 feet. The effect of this would be to lengthen the bridge from 35 to 55 feet, the roadway for the additional space of 20 feet to be covered by the bridge being darkened and narrowed. Operations having been commenced, to the effect of building massive walls within the retaining walls on the west side of the arch, the complainer presented the present note of suspension and interdict against the two railway companies and the contractor, to have them interdicted “from erecting, or proceeding with the erection of a bridge or other work on any part of the farm or occupation road leading from the Inchbelly Turnpike Road, &c., or from making any building, or erection of any nature whatever, upon or over the said road, which may have the effect of narrowing, obstructing, and darkening, or otherwise injuriously altering or affecting the said road and the access to his estate afforded by it, and from using the said road by carting or depositing stones and lime, and other building materials, thereon, and by hewing and dressing the said stones, or in any other way.”

The Edinburgh and Glasgow Co. had acquired the land from the estate of Possil, on which the railway is constructed, from the complainer's father, the late Colonel Campbell of Possil. The company had given the requisite statutory notice for the acquisition of the land under the compulsory powers conferred upon them by their Act (1 and 2 Vict. c. 58, local); but they afterwards arranged with Colonel Campbell the price to be paid for the land taken and the accommodation works to be made for the use of the estate. Accordingly, upon 29th October 1841, Colonel Campbell executed a disposition in favour of the railway company.

The disposition of the land described the bridge by reference to a plan, and it was built according to the plan, and exclusively used by the complainer as an accommodation for the lands of Possil.

The Glasgow, Dumbarton, and Helensburgh Co. and the Edinburgh and Glasgow Co. afterwards agreed, that this bridge should be extended, and the former Co. had power to take the lands

<sup>1</sup> See previous reports 21 D. 265; 23 D. 1182; 31 Sc. Jur. 142; 33 Sc. Jur. 593. S. C. 4 Macq. Ap. 570; 1 Macph. H. L. 53; 35 Sc. Jur. 607.

from the latter Co. But the compulsory powers of both companies had expired, and no notice of the extension had been given to Mr. Campbell.

The Court of Session granted interim interdict against the proposed operation.

The appellants' reasons of appeal were—1. Because the works in question may be lawfully executed by the Helensburgh Company, under the powers conferred on them by their Act of incorporation. 2. Because the works in question are works which the Helensburgh Company are authorized and directed by their Act of incorporation, and in particular by the 25th section thereof, to execute; and because the works have been sanctioned and approved of by the Edinburgh and Glasgow Railway Company. 3. Because the ground on which it is proposed that the works shall be executed is the property of the Edinburgh and Glasgow Railway Company, and their consent to the same being taken and used for the works having been obtained, the respondent has no right to prevent the execution of the works, or to interfere therewith. 4. Because, even supposing, that the proposed works are not works of the nature of those authorized and directed to be made by the Helensburgh Company's Act, they are works which are to be constructed wholly upon ground belonging to the Edinburgh and Glasgow Company, and being works necessary for the due, safe, and efficient working of their line, are works which the Edinburgh and Glasgow Company is entitled to execute. 5. Because the respondent has no right or title to interfere with the proposed operations, and because no grounds exist entitling the respondent to interfere with the execution of the works, either in respect of the terms of the disposition granted by his father to the Edinburgh and Glasgow Company in 1841, or of want of notice or otherwise. 6. Because the appellants have not failed in the observance of any of the statutory provisions in reference to the proposed works and the land on which they are to be constructed, but, on the contrary, have fulfilled all such provisions.

The respondent stated the following reasons:—1. The Edinburgh and Glasgow Railway Company are precluded from making the operations complained of by the agreement under which, in the year 1841, they acquired right, for the purposes of their railway, to the bridge over the road in question. 2. The said operations were never carried on, or intended to be carried on, by or for behoof of the Helensburgh Railway Company. That company had no interest in the works, and only appeared in the field at the instigation of, and for the purpose of enabling the Edinburgh and Glasgow Company to execute the same, on the false pretext that they were the works of the Helensburgh Company. 3. The appellants are possessed of no powers, either under their own Acts or the general Acts incorporated therewith, to execute the works complained of. At all events they were not, in the circumstances, entitled to execute the said works, and were effectually barred from carrying out or being in any way accessory thereto. 6. The appellants were not entitled to enter upon and use the respondent's private road, by carting and depositing materials thereon, without giving the requisite notice under § 25 of the Railways Clauses Act.

The *Solicitor General* (Palmer), and *Sir H. Cairns* Q.C., for the appellants.—The interlocutor of the Court below was wrong. When the respondent conveyed to the company his land on which the bridge or viaduct was built, all the interest that the respondent retained in such land was a right of way over it. *Hutton v. L. & S. W. R. Co.*, 7 Hare, 259; *Lester v. Lobley*, 7 A. & E. 124. He had no right to prevent the company from using the land in any way they pleased, which did not obstruct this right of way. What is now proposed to be done is done under the authority of the Statute which authorizes the Helensburgh Company to form a junction with the line of the Edinburgh and Glasgow Company, and to do the works that were necessary for that purpose. The extension of the viaduct does not materially abridge the right of way. Though no express power was given by the Helensburgh Company's Act to widen the viaduct, a general power to make and construct bridges or other works and conveniences, was contained in the Railway Clauses Act. The company has not declined to give compensation for damage, if any.

*Rolt* Q.C., and *Mure*, for the respondent.

*Cur. adv. vult.*

LORD CHANCELLOR WESTBURY.—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 using which road the respondent is entitled.

The case has been one attended with considerable argument, but it appears to me, with deference, to be governed by a very short and simple consideration. 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 in the month of August 1857. Now the proposed extension of the bridge is to be made and constructed 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 owner, 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 owner. 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 acquire 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 25th 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.

The question, therefore, is reduced entirely to the effect of the disposition made by the complainant to the Edinburgh and Glasgow Railway Company. 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 the 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, 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 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 under 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 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.

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. I think you will concur with the majority of the Judges in the Court below, that 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, on 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, these works must be such as are consistent with this contract; and if they are the works of the Helensburgh Railway Company, the works 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 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 these interlocutors ought to be affirmed, and the appeal dismissed, with costs.

LORD CHELMSFORD.—My Lords, I agree with my noble and learned friend, that the interlocutors appealed from ought to be affirmed, though not exactly for the reasons which were given by the majority of the Judges of the First Division.

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 £1450, 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 21 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 communications 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 said communications in lieu and full satisfaction of every claim, which he might be entitled to make for crossing 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 8000 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 to 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 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.

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 station, 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 definitively 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 cost 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 works, 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 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 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 cost 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 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 Railway Clauses Act, which provides, not for their acquisition, but for the substitution of another road, where they were 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 as a means of involving 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 has 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 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 question, 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 containing the interdict granted for this purpose should be affirmed.

*Interlocutors affirmed, and appeal dismissed with costs.*

*For Appellants, Loch and Maclaurin, Solicitors, Westminster.—For Respondent, Maitland and Graham, Solicitors, Westminster.*

JULY 28, 1863.

GREENOCK POLICE TRUSTEES, *Appellants*, v. SHAWS WATER JOINT STOCK COMPANY, *Respondents*.

Assessment—Annual Value—Water Rents—Occupiers—Valuation Act, 17 and 18 Vict. c. 91—*A Water Company were assessed according to the annual value of their lands. In this value were included annual sums paid for the use of the water under feu contracts by mill owners who feued lands from the Water Company along the line of the aqueduct. The occupants of these mills were, under the Police Act, assessable, at their option, by a rate on the yearly value of their mills, or at a rate on their horse power. In an action by the Water Company against the Police Trustees, concluding for declarator, that the defenders were not entitled to assess them in respect of these annual sums paid by the mill owners,*

HELD (reversing judgment), *That the sums paid by the mill owners formed part of the annual value of the subjects occupied by the water company, whether the solum of the aqueduct where it passed the mills was or was not feued to the mill owners by the terms of their feu contract.*

OBSERVED, *That in any view, the assessment could not be challenged, because it was based on the annual value stated in the valuation roll, against which the Water Company had not appealed in the mode provided by the Valuation Act.*<sup>1</sup>

This action was brought by the Shaws Water Company against the defenders, to have it found and declared, “That in levying assessments under the Statute 3 Victoria, chap. 27, intituled, ‘An Act for the further improvement of the town of Greenock, for better lighting and supplying the same with water, for regulating the police thereof, and for other purposes connected therewith,’ the defenders, as trustees acting under the said Statute, are not entitled to impose on, or levy from, the pursuers, assessments in respect of any annual duties payable to the pursuers under feu contract with the proprietors of any mills or other buildings erected upon any of the falls or mill sites held of the pursuers upon or along the Shaws Water aqueduct, or in respect of any right or interest the pursuers may have in such falls or mill sites, or in the falls or other buildings erected thereon: And the said defenders ought and should, by decree foresaid, be interdicted, prohibited, and discharged from imposing or levying any such assessment, or troubling or molesting the pursuers for payment thereof in time coming,” etc.

The pursuers were incorporated in 1825, by the Act 6 Geo. IV. c. 120, for the purpose of collecting the Shaws Water and applying it to the twofold purpose of supplying water to the town of Greenock, and water power for the use of mills and manufactories on the line of their aqueduct. The Statute empowered them to construct reservoirs, aqueducts, and other works necessary for the purposes of the company, and also to acquire ground along the line of their waterfalls for the erection of mills and manufactories. These powers had been acted on, and the company had been in use to feu out waterfalls and mill sites, in respect of which the feuars were taken bound to pay certain annual duties for the ground and falls, and water passing over the same.

<sup>1</sup> See previous reports 24 D. 1306 : 34 Sc. Jur. 636. S. C. 4 Macq. Ap. 593 : 1 Macph. H.L. 59 : 35 Sc. Jur. 639.