a claim to exercise the powers of the Entail Amendment Act, which only authorises the estate to be burdened in respect of expenditure on improvements. Neither is it proposed, under the present procedure, in any way to combine the two statutes—the Drainage Act and the Entail Amendment Act, or to convert the burden constituted under the one Act into the different burden authorised by the other. The question is simply whether, by full payment or redemption of the rent-charge, it is not taken entirely out of the way as if it had never existed? Undoubtedly that is the practical effect, as regards freeing the estate and future heirs from all burden under it; and there is therefore no ground in equity, or with reference to the fair interests of the future heirs, for reverting to its former existence, as constituting an impediment to the exercise of the powers of the Entail Amendment Act. Nor do I think there is in that statute any provision, express or implied, making the powers under it inapplicable in such a case. The 38th section of the Drainage Act is referred to in the argument as bearing upon this matter. But it only regulates the incidence of the burden on successive heirs during the subsistence of the rent-charge; and I do not think it throws any light upon the present question, which proceeds on the assumption that the rent-charge has been brought to an end by the heir who made the improvements.

"In the view which I take of the case, it is necessary for the petitioner to satisfy the Court as to the improvements and the expenditure upon them, that no portion of the rent-charge remains a burden on the estate. Upon his doing so I am of opinion that he will be entitled to the authority for which he applies."

At advising—

The LORD PRESIDENT, LORDS DEAS and ARDMILLAN, concurred with the Lord Ordinary and the majority of the consulted judges.

LORD CURRIEHILL concurred with Lord Barcaple.

Agent for Petitioner—G. Cotton, S.S.C.

Agent for Curator *ad litem*—James Finlay, S.S.C.

Thursday, July 11.

MERCER *v.* ESK VALLEY RAILWAY CO. AND OTHERS.

Interdict — Private Road — Property — Sub-Lease. Circumstances in which the Court granted interim interdict against a railway company constructing railway works on ground belonging to the complainer, and using, for access to their works, a road passing through his grounds, the railway company founding on, as their title, a sub-lease from the tenant of the complainer's lands.

Mr Mercer, proprietor of the lands of Kevock Mill, Lasswade, presented a petition against the Esk Valley Railway Company, the North British Railway Company, and the Shotts Iron Company, asking to have them interdicted from proceeding further with the construction of a railway siding, loading bank, access, and other works, at a point of the complainer's lands at Kevock Mill, and from passing along or using in any way that part of the private road leading from the Lasswade public road to Kevock Mill, which passes through the complainer's lands.

The Esk Valley Railway Company was incorporated in 1863, and obtained power for making a line of railway from near Eskbank to a point near Springfield paper works, passing through the complainer's lands. The complainer alleged that the line, as constructed by the Esk Valley Railway Company, was not on the line sanctioned by their act of incorporation, nor within the limits of deviation allowed by the railway acts and the act of incorporation, nor on a line agreed to by the complainer, in certain agreements which he set forth, but on ground belonging to the complainer, to which the railway company has no title whatever. He complained, farther, that the levels, gradients, and curves of the line, as constructed, were disconform to the said act and agreements, and that the railway company had wrongfully failed to implement the obligations undertaken by them in the said agreements, in consideration of which the complainer had consented to the deviation from the Parliamentary plan. In 1867 the Esk Valley Railway Company had leased their line to the North British Railway Company. Recently they had commenced to construct a siding, loading-bank, and access to loading-bank, at a point on the line as at present constructed through the complainer's lands, and had intimated to the complainer their intention to use these works, when completed, as well as the road leading from the Lasswade public road, through the complainer's property, to Kevock Mill, for the purpose of conveying ironstone from the mineral field leased by the Shotts Iron Company from Sir George Clerk, to the line of railway. The road which the respondents so proposed to use was, the complainer alleged, a private road, forming part of his property.

The defenders relied chiefly upon a sub-lease from the tenant of Kevock Mill of the ground for the siding, and contended that, as his sub-tenants, they were entitled to the use of the road in question, to which he had right, for the purpose of access to the ground so sub-let.

The Lord Ordinary (MURE) granted interim interdict, holding it to be clear from the admissions on record, that a part of the ground on which the access to the loading-bank in question had been formed was beyond the ground which the company were to take for the purposes of their Act, and that the complainer was entitled to interdict, unless it could be shown that the tenant of Kevock Mill had power to sub-let the ground for the purposes to which it was proposed to apply it, and to give them and the other respondents right to use the road to Kevock Mill as an access to the loading-bank. His Lordship was inclined to hold that the tenant had no such power, and that the complainer was entitled to interim interdict during the trial of the question of right.

The Railway Companies reclaimed.

DEAN OF FACULTY MONCRIEFF and J. M'LAREN for them.

A. R. CLARK and SHAND for complainer.

The Court adhered.

LORD PRESIDENT—Interim interdict is always a matter of delicacy and importance. I have no doubt in this case that the Lord Ordinary was quite right. There were two matters involved in the present application—(1) the use of a bit of ground coloured dark brown on the plan, and (2) the use of the road leading from the public road to Kevock Mill. As to the first, it is conceded that the Railway Company have not obtained any title from the proprietor. As to the other ground taken for their railway,

they did obtain a title in regular form, but they seek to add to that a bit which the proprietor will not give them, and they have endeavoured to get a title by means of a sub-lease. These proceedings of the Railway Company have, at the first aspect of the case, a doubtful appearance, which is not removed on looking at the facts. Somerville, the tenant, has a lease of Kevock Mill and the adjoining lands, but he is plainly not entitled to use Kevock Mill except as a paper mill, and it is quite as clear that he is to hold the lands for agricultural purposes; but the purpose for which he has sub-let this piece of ground is to make a railway station—not a siding for his own accommodation—but a station of the railway, for the use of the public of the locality. That seems to me at present to be an inversion of the use for which this land was let to Mr Somerville. On the passed note, that may be seen to be too strict a view, but that is the view I am inclined to take at present. I think the title the Railway Company has acquired to the bit of ground is good for nothing in the present case. No doubt the complainer gave some ground himself as proprietor, but that is an altogether different case.

As to the use of the road, that is still clearer. The notion of this being a public road is out of the question. It never led farther than Kevock Mill, and the only character that it ever had was as the mill of a barony. That is not a public road, it is only a road for those going to the mill. The tenant of Kevock Mill, no doubt, is entitled to use it, but he attempts to communicate it to the Railway Company. That is just as strong an infringement of the rights of the proprietor as the other. But it is said, that when land is acquired for making a railway, every occupation road is given by implication for the use of the land acquired. According to that view, if a railway crossed a private avenue, they would be entitled to use it as an access to the railway, because getting ground through which the private road passes.

LORDS CURRIEHILL and ARDMILLAN concurred.

LORD DEAS declined.

Agents for Complainer — Tods, Murray, & Jamieson, W.S.

Agents for Respondents—White-Millar & Robson, S.S.C.

Friday, July 12.

SECOND DIVISION.

M'COWAN *v.* SHIELDS AND OTHERS.

Prescription — Part and Pertinent — Acquiescence. Two conterminous proprietors both claimed a piece of ground. The defender having had possession for upwards of forty years, without a title, pleaded that the pursuer was barred by prescription and also acquiescence. Pleas repelled (the Lord Justice-Clerk dissenting).

This was a question which related to the property of a piece of ground lying between the pursuer's feu and ground held by the defenders under a ninety-nine years' lease. The pursuer Robert M'Cowan purchased in 1864 a cottage and piece of ground situated in the Holm of Cumnock. In the disposition the subjects are described as "All and whole that garden or piece of ground at the back of the Holm of Cumnock, sometime possessed by the deceased James Kirkland, and which he conveyed to David Kirkland by disposition and deed of settlement dated the 18th day of February 1824, and recorded in the Books of Council and Session the 4th day of January 1827, the same being described in the prior writs thereof as 'all and haill these two roods and twelve falls of ground or thereby, being the fourth and fifth lots of the holm called the Bridgend Holm of Sharkstone, as the same were pitted off separately, as mentioned in a feu disposition of the same granted by the Right Honourable William Earl of Dumfries to James Johnstone, dated 19th day of December 1767, and are now bounded by the lot of ground feued to James Perry on the east, by a ditch dyke and the high road upon the south and west, and by the water of Glaisnock on the north parts.'" The defender, David Shields, is a tenant, under the Marquis of Bute, of a piece of ground adjoining on the west. In the assignation and translation in favour of his author, the subjects to which he has right are described as "All and haill that piece of ground at the east end of the street called Bridgend, consisting of 23 falls 2 ells or thereby, bounded on the south by the highway, on the west by ground now belonging to Andrew Gemmel, writer, Glasgow, on the north by the water of Glaisnock, and on the east by the feu sometime of James Johnstone." James Johnstone was a predecessor of the pursuer. It is maintained by the pursuer that the defender, who has acquired additional ground by building a wall opposite his own ground, has taken possession of part of the property of the pursuer, extending to four falls and eleven ells or thereby, and on part of it has erected a washing-house, the chimneys of which are only a few feet distant from the windows of the pursuer's house.

The pursuer has brought this action of declarator, removal, and damages, and pleads (1) That by virtue of his titles, being owner of the ground of which the defender has illegally taken possession, a decree declaratory of the pursuer's right, and decerning the defender to remove, should be pronounced. (2) The said ground of which the defender has taken possession being within the boundaries of the pursuer's feu, as these are set forth in the titles of the property; and *separatim*, having for forty years prior to the usurpation complained of been possessed as part and pertinent thereof, he is entitled to decree of declarator and of removing. (3) The usurpation complained of being inconsistent with the defender's titles, his defences are unfounded, and decree as complained for should *de plano* be pronounced. (4) *Separatim*, that the pursuer is entitled to decree of removal. And (5) That the pursuer is entitled to damages.

The defender pleads—(1) That by virtue of his tack having right to the ground, and to erect buildings thereon, he is entitled to absolvitor. (2) The pursuer's title being a bounding title, and exclusive of the ground in question, the defender ought to be assoilzied. (3) The pursuer not being owner of the ground in question, the defender is entitled to absolvitor. (4) The pursuer is not entitled to support the conclusions of his action by averments of prescriptive possession, no such ground of action having been set forth in his original summons. (5) The pursuer's author having acquiesced in the operations complained of, the defender is entitled to be assoilzied. (6) The pursuer having suffered no damage, the defender is entitled to be assoilzied.

The Lord Ordinary allowed both parties, before answer, a proof of their respective averments on re-