tive rights which the city of Edinburgh or the inhabitants of Edinburgh, whom the Magistrates represent, had acquired in discharging sewage into the Figgate Burn. I can only say that I see no such right averred in this Special Case. Therefore I think that plea is not a good plea; and I concur in the judgment proposed.

The Court, without specifically answering the question proposed, dismissed the appeal and affirmed the judgment of the Sheriff, and remitted to him to proceed with the cause.

Counsel for Appellants (Magistrates of Edinburgh)—Solicitor-General (Asher, Q.C.)—Mackintosh—Mackay. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Respondents (Magistrates of Portobello)—Keir—Harper. Agent—R. P. Stevenson, S.S.C.

Friday, November 10.

FIRST DIVISION.

[Sheriff of Aberdeen and Kincardine.

BARCLAY *v.* GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Reparation—Railway—Level-Crossing—Landlord and Tenant—Title to Sue—Acquiescence—Railways Clauses Consolidation Act 1845 (8 *and* 9 *Vict. cap.* 33), *secs.* 39, 40, *and* 52.

A line of railway passing through a farm crossed a road by means of a level-crossing which was constructed in terms of an award pronounced in an arbitration between the railway company and the proprietor of the farm at the time of the formation of the railway line. The road was not one of those maintained by the road trustees of the district, but the public had a right-of-way over it both as a footway and for wheeled traffic. For twenty-four years after the formation of the level-crossing no complaint was made by anyone that any other means of crossing the railway ought to have been provided. At the end of that time the tenant of the farm (who had been tenant for more than twenty years) raised an action against the company for the value of two cattle which had got on the line at the level-crossing and been killed by a passing train, maintaining that the road was a public carriage road which the company were, under the Railways Clauses Consolidation Act 1845, bound to have either carried over the railway by means of a bridge, or to have obtained the sanction of the Sheriff or Justices of the Peace to cross by a level-crossing. *Held* (1) that the pursuer could only sue such an action as tenant of the farm, and in so suing was bound by the arbiters' award pronounced between his landlord and the defenders, and had therefore no title to found on the alleged neglect of statutory requirements; (2) that the pursuer having used the level-crossing without objection for more than twenty years was barred from insisting that the defenders had not complied with the statutory requisites in regard to its formation; (3) (on the facts) that no negligence had been proved against the defenders.

The Railways Clauses Act 1845 (8 and 9 Vict. cap. 33), enacts by sec. 39—"If the line of railway crosses any turnpike road or public highway . . . . either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge, ... provided always that with the consent of the Sheriff or two or more Justices, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

Section 40 provides:—"If the railway cross any turnpike road or public carriage road on a level, the company shall erect and at all times maintain good and sufficient gates across such road, on each side of the railway, where the same shall communicate therewith, and shall employ proper persons to open and shut such gates, and such gates shall be kept constantly closed across such road on both sides of the railway, except during the time when horses, cattle, carts, or carriages passing along the same shall have to cross such railway; and such gates shall be of such dimensions and so constructed as when closed to fence in the railway and prevent cattle or horses passing along the road from entering on the railway." . . .

Section 52 provides—"If the railway shall cross any highway other than a public carriage-way on the level, the company shall, . . . if such highway be a bridle-way, erect and at all times maintain good and sufficient gates . . . on each side of the railway where the highway shall communicate therewith."

Section 53 provides—"When the company shall intend to apply for the consent of the Sheriff or two Justices as hereinbefore provided [in sec. 39, *supra cit.*], so as to authorise them to carry the railway across any highway other than a public carriage road on the level, they shall, fourteen days at least previous to the time at which such application is intended to be made," give certain notice, "and if it appear to the Sheriff or to any two or more Justices acting for the district in which such highway is situated, after such notice as aforesaid, that the railway can, with a due regard to the public safety and convenience, be carried across such highway on the level, it shall be lawful for such Sheriff or Justices to consent that the same may be so carried accordingly."

Section 60 provides—"The railway company shall make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, . . . sufficient fences for separating the lands taken for the use of the railway from the adjoining lands not taken, and protecting such land from trespass, or the cattle of the owners and occupiers thereof from straying thereout by reason of the railway, together with all necessary gates, made to open towards such adjoining lands, and not towards the railway." . .

James William Barclay, M.P., tenant of the farm of Auchlossan, in the county of Aberdeen, raised this action against the Great North of Scotland Railway Company, concluding for the sum

of £32, being the value of two heifers which had strayed on to the defenders' line of railway, and which had been killed by a passing train on the morning of 14th October 1880. The defenders' line of railway passed through the pursuer's farm, and at a wood at the south side of the farm intersected a road leading to Kincardine O'Neil. At this point there was a level-crossing, which was constructed in 1859 under a decree-arbitral pronounced in an arbitration entered into between Colonel Farquharson of Finzean, proprietor of the farm, and the Deeside Railway Company (now amalgamated with and forming part of the Great North of Scotland Railway system) with reference to certain portions of Colonel Farquharson's estate of Lumphanan which were required by the railway company, and for the taking of which compensation was claimed by him.

The findings of the arbiter, so far as material to this question, were that the Deeside Railway Company were to make and maintain certain accommodation works, among which were the following two level-crossings, which were about 800 yards apart.:—"(11) *Mains of Auchlossan.*—A level-crossing to be made . . . . with a turnstile gate for foot-passengers in connection with the same." "(13) *Mains of Auchlossan.*—A farm road level-crossing to be made in the muir numbered 193 on said plan, or at the road numbered 195, which leads to Kincardine O'Neil by Wester Kincardine."

It was by means of this latter crossing, made by the Deeside Railway Company at the "road 195" in terms of the alternative given by the arbiter in the decree-arbitral just quoted, that it was alleged the pursuer's cattle gained access to the defenders' line of railway, and were killed in the manner already mentioned. It appeared from the evidence that there were two gates at this crossing suitable for carts to go through, but no wicket gates. The mode of fastening the gates was by means of a bolt running into the posts, and at the time of the accident the gates only swung one way, namely, out from the railway line. The railway company treated the road which crossed the line at these gates as an accommodation road for which they were not bound to provide a gatekeeper, and took no charge of the gates whatever. There was no evidence as to how the cattle got on to the line, but as their footprints were seen within the railway enclosures near the crossing, it was conjectured that the gates must have swung open, or been left open by some one passing along, and that the cattle must in this way have strayed from their pasture in the adjoining field and wood, and by means of the open gate gained access to the railway. There was a confliction between the parties as to the nature of the road which crossed the railway at the level-crossing. The pursuer in his original petition described it as a "thoroughfare" from one public road to another, but on a revisal of the pleadings being allowed by the Sheriff-Substitute, as after mentioned, he averred that it was a "public carriage road." The defenders defined it as "an unfenced track running through wooded hill pasture." The evidence proved it to be a track from six to nine feet wide which was used by people walking to market, and also as a drove road, and now and again used for the passage of carts and other two-wheeled machines. It was not a made-up road, nor was it among the roads contained in an exhaustive list of the roads under the charge of the road trustees of the district, prepared by the road surveyor of the district.

The pursuer pleaded, *inter alia*—"(1) The road in question being a public carriage road in the sense of section 39 of 8 and 9 Vict. c. 33, and the defenders having no authority by their special Act to carry their line across the said road on the level, they were not entitled to construct a level-crossing at the said point. (2) Alternatively, the road in question being a highway in the sense of sections 39 and 53 of 8 and 9 Vict. c. 33, and the defenders not having obtained the consent of the Sheriff or Justices in terms of said sections of said Act to carry their railway across it on the level, they were not entitled to construct a level-crossing at the place in question. (3) In any case, the said railway being carried across a public carriage road on the level, the defenders were bound to comply with the provisions of section 40 of 8 and 9 Vict. c. 33, and section 6 of 26 and 27 Vict. c. 92 [the Railway Clauses Act 1863, which provides that the company shall erect and maintain a lodge at the point where the railway crosses on the level a turnpike road or public carriage road]. (4) Alternatively, the said railway being carried across a highway on the level, the defenders were bound to comply with the provisions of section 52 of 8 and 9 Vict. c. 33. (5) Or alternatively, the said railway being carried across said road on the level, the defenders were bound to comply with the provisions of section 60 of 8 and 9 Vict. c. 33. (6) The defenders having neglected statutory precautions which were binding on them, negligence on their part is to be presumed. (8) The pursuer having sustained the loss claimed in consequence of the defenders' fault, neglect, or negligence, in one or more of the ways above set forth, the defenders are liable for the same."

The defenders pleaded, *inter alia*—"(2) The road in question not being a turnpike road or public carriage road in the sense of the 40th section of the Railways Clauses Act, the defenders are under no obligation to protect the level-crossing in the manner provided for by that section. (5) The level-crossing in question being a farm road level-crossing, provided for the accommodation of the pursuer's farm, the duty of keeping the gates thereof closed and fastened lay on the pursuer himself. (10) The pursuer having not only acquiesced in the sufficiency of the level-crossing in question, but having neglected statutory remedies within his power if he were dissatisfied with said crossing, is not now entitled to sue for damages."

By interlocutor of 16th March 1881 the Sheriff-Substitute (Dove Wilson) allowed the pursuer to amend his record to the effect of averring that the road in question, which he had previously designed as a public thoroughfare, was truly a "public carriage-road."

To this interlocutor the following note was appended:—"The pursuer does not complain that the defenders have constructed a level-crossing at the place where they had no business to put one, or that they have constructed it and its adjuncts improperly, or that they have allowed the gates to get into disrepair; what he avers is, that the gates being under the control of the defenders, and being neglected, they were left open or insufficiently fastened. This is an averment that the defenders were bound to see that the

gates when not in use were kept closed and were properly fastened. As the only way in which the defenders could discharge this duty would be by placing a watchman at the place, it is equivalent to an averment that they ought to have done so. But the defenders are only bound to this duty in the case of the road being a public carriage road (8 and 9 Vict. c. 33, sec. 40), and unless it is averred that the road was of this description there is no relevant averment that they were under the duty which they are said to have broken. If the road be a public bridleway or footway, or a private way, the defenders were under no obligation to keep the gates closed, or to station watchmen at the crossings (8 and 9 Vict. c. 33, sections 52 and 60)." . . . .

The record having been amended by the pursuer by the addition of the averment referred to, and proof having been led, the Sheriff-Substitute on 23d December 1881 pronounced this interlocutor—"Having resumed consideration of the cause, finds in fact (1) that the road marked A B C on the Ordnance plan is a public road leading from the Deeside and Alford road to the village of Kincardine O'Neil; (2) that it has been used for forty years and upwards for gigs, carts, and other wheeled vehicles, for horses, cattle, and other animals, and for foot-passengers; (3) that the defenders' railway crosses the road on the level; (4) that the defenders have not cited any Special Act of Parliament authorising such a crossing; (5) that the level-crossing was made about the year 1858, in virtue of a deed of submission between the proprietor of the adjacent ground and the defenders; (6) that the pursuer was no party to the submission, and is not proved to have been aware of it before he took his farm in 1860; (7) that during the night before or morning of 14th October 1880 one of the gates of the level-crossing was left open by some person unknown; (8) that in consequence thereof the pursuer's cattle, then grazing on the adjoining field, strayed upon the defenders' railway; (9) that two of these cattle were killed by a passing train, causing loss to the pursuer to the amount sued for; and (10) that the pursuer did not by his own fault or negligence contribute to causing the loss: Finds in law (1) that the road in question was a public carriage road within the meaning of the Railways Clauses Consolidation Act of 1845; (2) that the construction of a level-crossing for it across the railway without a Special Act authorising it was illegal; (3) that the clause in the decree-arbitral in the submission authorising it was *ultra vires;* and (4) that the pursuer not being in any way a party to the submission, is not barred by it from suing: Therefore decerns against the defenders as prayed for.

"*Note.*— . . . . The level-crossing was constructed in pursuance of a decree-arbitral pronounced in a submission between the defenders and the proprietor of the lands tenanted by the pursuer. It may be conceded that this decree followed by possession is equivalent to an agreement between the defenders and the proprietor. This agreement is of course of no value as against the public, as these parties could not abridge the public rights; but it is said that as the pursuer is occupier he cannot have any higher rights than the owner, and that as the proprietor would clearly be barred by the agreement, so also is the tenant. This would be true if the pursuer's only title to sue were that of occupier. For example, if the question were one of accommodation works for the adjoining land, in which no one had an interest except the adjoining owner or occupier, the pursuer would be bound by the agreement (*Colley* v. *London and North-Western Railway*, 1880, 49 L.J., Ex. 575). But the pursuer's sole right is not that of occupier. He has a right to sue as one of the public. The statutory provisions dealing with public roads are not (like those dealing with fencing) cases where the obligation imposed is only for the benefit of the adjoining occupiers. Here the statutory obligation was in favour of the public, and anyone (not acting illegally at the time) must be entitled to sue for damages caused by its breach. This being so, the pursuer does not require to found on his title as occupier. The position of matters is changed, and he is not affected by the agreement unless it can be proved that he was in some way a party to it so as to give to it the effect of depriving him of his rights as one of the public. The mere becoming tenant of the farm does not make him a party to the agreement. There was nothing in that act to bring to his knowledge that the road was a public one and that it had been regularly dealt with. On the contrary, if he had complained immediately after taking his farm that the field was insecure, he would have been, I think, entitled to insist on the illegality being remedied. Mere silence then and since does not take away his right to complain. If it could have been proved that he had derived benefit in any way from the irregularity—for example, that he had got the field at a lower rent in consequence of its insecurity—he might have been foreclosed, but the mere refraining from complaint is not acquiescence in a thing which is illegal. I therefore think nothing has occurred to bar the pursuer from recovering the damage he has suffered."

On appeal the Sheriff (GUTHRIE SMITH), on March 14, 1882, recalled this interlocutor and found it "proved that the road in question, which is crossed by the line at a level, is a highway other than a public carriage road within the meaning of the Railways Clauses Act; that the company never had, and were not bound to have, a man in attendance to close the gates after persons passed over, and therefore that their being open, whereby the pursuer's cattle got on to the line and were killed on the date libelled—14th October 1880—was not the fault of the defenders." He therefore assoilzied the defenders from the conclusions of the action, with expenses.

"*Note.*—The pursuer's cattle would not have been killed if the gate through which they strayed on to the line had been kept shut. The question is, was it the fault of the company that it was left open?

"The Railways Clauses Act (8 and 9 Vict. c. 33), sec. 39 *et seq.*, deals with three different kinds of roads—turnpike roads, public highways used by carriages, and public highways not used by carriages. It is in the case of the first and second only that the statute requires gates to be erected at a crossing with a man in charge. In regard to the third class, being less important, the company are only bound to erect and maintain 'good and sufficient gates' (sec. 52); and apparently under sec 39 the consent of the Sheriff may be got to this being done if after public advertise-

ment he should be of opinion that, 'consistently with a due regard to public safety and convenience,' the line may cross the road on a level.

"When the railway was made, nearly five and twenty years ago, it did not appear to anybody that the road in question was of sufficient importance to require a completely equipped crossing. It was a public road no doubt, which could not be shut up. People passed that way, and sometimes it was used by carts. A witness for the pursuer says once a gig was seen, but the possibility of taking a gig along, except at a walking pace, and with exceptional precautions, seems doubtful. In fact, it is a mere track—an old bridle-path—not managed by the road trustees, and on the point of obliteration from non-use and neglect combined. Accordingly, when the accommodation works for Auchlossan farm were under the consideration of the arbiter, the order he pronounced was this—'A farm road level-crossing to be made in the moor 193, or at the road No. 195 which leads to Kincardine O'Neil.' The Sheriff does not agree with the defenders that the terms of this order are conclusive of the question; for being a public highway the arbiter had no power to deal with it. It must be taken to mean —'I shall give you an additional road to 193, unless road 195 is not to be shut up, in which case the other will be unnecessary.'

"With the consent of the proprietor and the tenant of Auchlossan the matter was so arranged. An ordinary level-crossing was not made at 193, but at 195 gates were placed, which people were left to open and shut for themselves when they came to use the road.

"The Sheriff is not going to hold at this distance of time, after the railway has been in use and operation for so many years, and everybody has been satisfied with the arrangements made—proprietors, tenants, and even the pursuer himself—that the railway company completely misunderstood their duty with respect to the road. They treated it as a bridle path. They made the provision required by section 52. If they did not get the consent of the Sheriff, the time is long past for making the informality an article of charge. They acted on reasonable grounds. Nobody said they were wrong, and the Sheriff is of opinion that the charge of negligence wholly fails."

The pursuer appealed to the Court of Session, and argued—The Railways Clauses Act imposes certain statutory obligations upon railway companies with reference to different kinds of roads, one of which is, that they are not to cross these roads except as the Act provides. This road had been proved to be a public carriage road, used by carts and sometimes by gigs. As it was not suggested that they had any powers under their Special Act, the company had all along been acting *ultra vires*. If not a public carriage-way, this road was at any rate a public highway, and the railway company had failed to act up to the requirements of sec. 39 of 8 and 9 Vict. c. 33. There are only three classes of roads recognised by the statute, —footways, cattleways, and ways for wheeled vehicles. This was not an occupation road for the use of the farm; it was used by the public, by carts, and sometimes by gigs. The railway company had omitted to get the statutory approval of the Sheriff or Justices. As there had been no previous accident calling for interference on the pursuer's part, it could not be said that he acquiesced in the state of matters to the extent of being now barred from complaining.

Authorities—8 and 9 Vict. c. 33, secs. 39, 40, and 52; *Mackenzie* v. *Banks*, June, 19, 1868, 6 Macph. 936.

Argued for respondent—The road in question was not a public carriage road in the sense of the statute 8 and 9 Vict. c. 33. It was merely an accommodation road, and being so the railway company had completed all their statutory obligations with reference to it; besides, the crossing had hitherto always been held as sufficient. This was "a highway other than a carriage-way," and therefore did not fall within secs. 39 and 40 of the said Act. There was no statutory regulation for the preservation of a road of this kind, and there was here in addition acquiescence by the pursuer in what the railway company had done. The pursuer must found his claim either as being entitled to an occupation road or as one of the public —as tenant of the farm of Auchlossan he was barred from maintaining this action, inasmuch as he derived his right solely through his landlord, who was one of the consenting parties in the formation of the road. If the claim was made as one of the public, then he had no right to allow his cattle to stray unprotected, and there was contributory negligence. As to the failure on the part of the railway company to obtain the consent of the Sheriff or Justices, it could not be shown that the accident in question arose in any way from this failure. The track here referred to was not a road at all, but merely a sort of right-of-way. "Public carriage-way" is not a *nomen juris*. Sec. 39 supplies the statutory division of roads, from which it follows that if not a public carriage road, then the provisions applicable to carriage-ways other than public carriage roads must apply. To render the company liable in the present case personal fault must be alleged.

Authorities—8 and 9 Vict. c. 33, secs. 39, 40, 42, 43, 44, 47, 52, 54, 60; Stair, ii. 10, 7; *Sutherland* v. *Thomson*, February 29, 1876, 3 R. 489; *Matson* v. *Baird*, November 9, 1877, 5 R. 87; *Dunoon Case—Mackintosh* v. *Moir*, March 2, 1872, 10 Macph. 517; *Ellis* v. *London and S.-W. Railway Co.*, 26 L.J., Ex. 349.

At advising—

LORD PRESIDENT—This is an action of damages brought by the pursuer as tenant of the farm of Auchlossan, in the county of Aberdeen, to recover damages in respect of two heifers belonging to him as tenant of that farm having been killed upon the defenders' line of railway. The cattle are alleged to have strayed upon the railway, and it is said that they obtained access to the railway through the fault of the railway company. It is not in evidence where these cattle were—where they were pasturing when they are said to have strayed upon the railway during the night of the 13th or morning of the 14th of October 1880—and in that respect the proof is very unsatisfactory. But I think it is in evidence that they got upon the railway through this gate which opened thereon, and that having got upon the railway through the gate they strayed up the line towards the farm-steading of Auchlossan for some 600 or 700 yards, and were there overtaken by a train and killed. The way in which that is established is by tracing the footsteps of the cattle through the gate in question and up the line of railway,

and therefore I think it may be considered sufficiently established that the cause of the misfortune was that somebody left that gate open. The Sheriff-Substitute and the Sheriff, I think, both came to the conclusion that it has not been proved who left the gate open, and therefore the mere circumstance of the gate having been left open by somebody would certainly not impose liability upon the defenders, and if the case stood there the only conclusion one could come to would be that the pursuer had not made out his case. But then he alleges fault of a different kind on the part of the defenders, which amounts to this—He says there should have been no gate there, and that if there had been no gate there the thing would not have happened. And the reason why he says there should have been no gate there is that this was an unauthorised level-crossing, which the defenders were not entitled to make—that it was a crossing upon a public road—and whatever the nature of the public road might be, they did not take the proper steps to legalise this level-crossing. If it was a public carriage-way within the meaning of the Railway Clauses Act 1845, then they were bound to construct a bridge either over or under the road, and if it was some public way other than a public carriage-way, then they were bound to apply to the Sheriff for authority to make the level-crossing, and he would have prescribed the conditions upon which it was to be made. But they did neither the one nor the other, and consequently the pursuer says this is an illegal erection, and the defenders are liable in damages for the accident that occurred in consequence of this gate having been left open. I do not think it necessary, so far as this case is concerned, to consider whether that plea is well-founded in itself, because I have come to a pretty clear opinion that whatever may be the merits of that plea upon the statute this pursuer is not entitled to maintain it. The road in question is certainly proved to have been a public road in this sense, that it has been used by the public from time immemorial, chiefly as a bridle-way and footpath, but also certainly as a cart-road and a road used by carriages of other kinds besides carts. That use has been occasional, but still sufficient to make out that it is a road open to the public for these different purposes. But then it is an entirely unmade road. It is not under the superintendence of any body of trustees or managers of any kind. There is nobody who is under an obligation to keep it in repair, nor is it, nor has it ever been, so far as we see, kept in repair. And therefore it is a road respecting which it was not at all unnatural that the parties interested in it might act upon a misunderstanding as to the way in which it should be dealt with. And accordingly we find that in the year 1858, when this railway was about to be constructed, there was an arrangement made between the proprietor of Mr Barclay's farm and the railway company as to the way in which this road was to be dealt with where the railway crossed it. Mr Farquharson and the railway company entered into an arbitration regarding a variety of matters in dispute between them, and among other things the arbiters disposed of the matter of this crossing of the road, and the level-crossing, as it now stands, was made in conformity with the award of these arbiters. No doubt that is not binding upon the public, who are entitled to use this road, nor is it binding upon parties other than the public who were not parties to that submission. But the pursuer of this action does not claim his damages as one of the public. The ground of his claim of damages is that he has been injured as the tenant of the farm by the loss of two of his cattle, and that claim he cannot sue as one of the public—he can sue that claim only in his character of tenant of that farm, and, as such, owner of the cattle that were destroyed. Now as tenant of that farm, he comes in place of Colonel Farquharson, the proprietor, and although he may not be personally bound by that decree-arbitral, he took his farm from Colonel Farquharson burdened by that decree-arbitral, and he took it very soon after that decree-arbitral had been pronounced, when the whole matter must have been fresh in the recollection of everybody concerned, for his lease began in 1860. He saw the manner in which the railway went through the farm. He saw that there were two level-crossings—one at his farm-steading, which was designed specially for his own use as occupier of the farm, and this other level-crossing within 700 or 800 yards of it. And I think he was bound to enter upon the possession of that farm with these conditions before his mind—that he had two level-crossings to deal with, and that he must conform the mode in which he was to occupy the farm to the fact that there were two level-crossings adjacent. He made no complaint of this level-crossing being there. Nobody made any complaint. Everybody acquiesced in the propriety of what had been done; and after twenty years, Mr Barclay, as tenant of this farm, for the first time raises this objection that that level-crossing is an illegal erection. And he does that, if I am not mistaken, for the first time in an amendment of the record that is before us. That is perhaps not very material, but it shows how completely this is a new idea that has come into the mind of the pursuer in the course of the carrying on of this process against the railway company. Now, I am of opinion that Mr Barclay as tenant of this farm is not entitled to maintain that objection under the statute which we have had so fully argued, and which, if it were necessary to decide it, one cannot help seeing is a very important question. But I am glad to be relieved from the necessity of deciding any such important question in a matter of such trivial importance as the claim which is now before us.

Upon these grounds, and not on the ground that I agree with any of the grounds of judgment adopted by the Court below, I am for refusing the appeal.

Lord Mure—I have come to the same conclusion. In this case, in the year 1858, under an award pronounced in a submission between the proprietor of this estate and the railway company—a demand apparently having been made on the part of the proprietor of this estate that he should be accommodated at this farm by a level-crossing made on this road at the expense of the railway company—the arbiters ordered the construction of the following work:—"*Mains of Auchlossan.*—A farm road level-crossing to be made in the muir numbered 193 on said plan, or at the road numbered 195 which leads to Kincardine O'Neil by Wester Kincardine." That is matter of express decision between the proprietor

of the estate and the railway company, and that order of the arbiters was obeyed by the railway company. That award is dated in 1858, and it appears upon the evidence that the railway was taken across this road, and the level-crossing made, somewhere about the year 1859, at all events before 1860. Now, this was the provision of a road for the benefit of the tenants upon that farm, or the landlord if he happened to occupy it, and not with any reference to the public at all. Well, possession and occupation of the farm has been had since that period down to the date of the present action without a word of complaint being uttered by the proprietor or by the tenant as to the insufficiency or the alleged illegality of this level-crossing. The public have not complained, the road trustees of the district have not complained, and it is in the evidence of Mr Milne, who appears to be the surveyor or officer of the road trustees, that this track or road crossed by the railway is not even to be found in the list of the roads in the district, and in his opinion the trustees have nothing to do with it. Therefore the question comes to be, whether the destruction of these cattle that had strayed on to the railway is a claim that can be made at the instance of the present tenant upon the ground that what was done in 1858 was all wrong, that there should have been a bridge over this road under the statute, and that the company having omitted to build a bridge (though not asked to do it either by the road trustees or the proprietor) are liable for the damage. Now, I agree with your Lordship that it is not necessary for the decision of this case to enter upon an examination of the clauses of the statute and of the evidence to see whether the Sheriff-Substitute or the Sheriff has taken a sound view of the evidence as to the character of the road and as to whether it is a public carriage road or a mere bridle-way. That, I think, is not necessary, for I agree with your Lordship that the knowledge of the proprietor and of the tenants of the kind of occupation that they were to have by means of this road made at the instance of the proprietor, and their acquiescence in it, and making no attempt under any of the clauses of the statute to have a road across by a bridge over the railway or a bridge under the railway, such as is now said should have been made—having made no attempt in that direction for the last twenty years—these parties are barred by acquiescence in the nature of that crossing from making a claim against the railway company in the way in which the pursuer has done, upon the ground which the pursuer now puts forward. Colonel Farquharson, the proprietor, is beyond all question barred. When the question was raised in argument whether he could have made a claim for the loss of cattle, it was frankly admitted that no claim could be made on his part, and I cannot see that the tenant is in any better position. It is in virtue of the right he gets from the proprietor that he is using this crossing at all when he requires to use it, or that his cattle are in the fields in the neigbourhood of this railway, and he went there and took possession of that farm in the knowledge of that level-crossing which was made before he became tenant of the farm. Mr Morrison Barclay, the pursuer's brother, who appears to have been joint-tenant originally, says—"The road A B C is of no advantage to the farm of Auchlossan; it simply runs through a bit of woodland on the outskirts of it. Near the point A is a level-crossing on the road." And then he says—"I never saw that our cattle were in danger from the level-crossing, and I never complained to the railway company of it, and I never asked keys for it." That has been the state of matters since 1860. Alexander Barclay gives evidence very much to the same effect, and they seem to be perfectly well aware that this wood which it is said the cattle were in when they came on to the road and strayed down to the railway was not fenced. They say distinctly that they were planting an additional plantation through which the road ran three or four years ago, and that one part of the road was fenced off, and that the part at the crossing was not. In that state of matters I think it is quite impossible to hold that the tenant or the proprietor who had this road made for the benefit of his farm should be able to turn round now and say—"I am one of the public, and because it is a public road I claim damages for the loss of my cattle." I agree with your Lordship that the way in which the cattle got on to the railway is by no means satisfactorily made out. It is a mere inference from the footmarks of the animals at the gate that some animals or other came in at that particular gate. Where the cattle were we have no evidence to show. For anything that appears on the evidence, these cattle may have got on at the level-crossing at Auchlossan and wandered along the line. I see by the plan that the wood is fenced off from the field by a fence, and they may have got on to this road by getting out of the field, which probably was not sufficiently fenced, and straying into the wood and getting upon the public road. I am not clear that, apart from the plea of acquiescence in the character of the road, this ground of defence might not have been raised on the part of the railway company, that there is no distinct and clear evidence as to how the cattle got there through anything but the fault of the pursuer himself in allowing his cattle to stray out of the field, and not having the woods and fields sufficiently fenced. Accordingly I am satisfied that we should arrive at the same result with the Sheriff, though not precisely on the same grounds.

Lord Shand—I agree with your Lordships that the judgment of the Sheriff ought to be adhered to. In this case, as your Lordships have already observed, there is a remarkable blank in the evidence, and I have felt it is in that respect a case that is not very satisfactory to deal with. It is a very curious circumstance that neither the railway company nor the tenant who is suing this action should have thought fit to give the slightest information in the evidence as to where these cattle were before their bodies were found upon the railway. Whether they had been put out weeks before upon pasture in the neighbourhood, or put out the night before, or where they came from, is an utter blank in the proof, and in that respect I do not think I have seen anything less satisfactory. It is said the cattle are found there, and the only other piece of evidence as leading to the inference that their deaths are to be accounted for in the way stated by the pursuer is that there are cattle marks at this gate which was found open; but all information to show whether the pursuer was in fault in neglecting to have his cattle properly

herded, or in a properly fenced field, or as to where they came from, is entirely denied to us. However, taking the case as we have it, I agree with your Lordships in the ground of judgment that has been announced. When this railway was formed, now 24 years ago, I think the company and the proprietor entered into a contract by which they agreed to refer to a man or men of skill the amount of compensation to be paid in respect of the ground taken and damage done to this part of the estate of Finzean. It was part of that contract that in estimating the damages or the compensation to be paid the arbiters should have in view the accommodation works for this property—I should say in respect of this particular farm of Auchlossan. Of course if accommodation works are withheld the damage is greater; if these are given the damage and compensation is less; and the arbiters had therefore to take into view the accommodation works as part of their award. Now, we find that under this contract of arbitration the arbiters by one of their findings provided that a farm-road level-crossing should be made in the muir number 193 on the plan, or at the road number 195 which leads to Kincardine O'Neil by Wester Kincardine. The latter of these alternatives was adopted. The level-crossing was made under this award in pursuance of the contract of arbitration, and the road number 195 is the road in question on which this level-crossing exists, and exists in respect of the decree of those arbiters. If the landlord had intended to make any objection to that finding, and to maintain that this was a public road which must be carried by a bridge over the line, or which must be taken under the line as a turnpike road or a public carriage-way, then was the time he was bound to take up that position. He accepted this as an accommodation for his farm, and I do not think we could listen now, in a question with the landlord, to any contention that it was not so accepted, after the crossing had been made under the circumstances I have now stated, without any remonstrance or objection, and had been acquiesced in for the long period of time I have mentioned. The question remains whether this pursuer Mr Barclay is in any better position. I agree with your Lordships in holding that he is not, in this question. It is not the case of a stranger to the district or a person residing at some distance having himself or some of his property injured by the use of this road. It is the case of the tenant upon this very ground, in the use of that ground for pasturing purposes for his cattle, suffering an injury in respect—as he says now—that this level-crossing should never have been there, or if there, should have been more carefully guarded from being a source of damage. I hold that in this question Mr Barclay, as the tenant of this farm, is in the same position as his landlord, and I think it is not wonderful we should have to add to that the element that he has himself been there for a considerable time, and without objection of any kind to this level-crossing, which no doubt was used more or less in connection with his farm.

While, however, this is the ground of action, I think it right to add that if it had been necessary to deal with the case on the merits I should have been prepared to affirm the judgment of the Sheriff, although I must confess I have felt the question raised as to the obligations of the company with reference to this road to be attended with very considerable difficulty. The road is certainly not a turnpike road, and in my opinion, looking to the evidence we have had in regard to it, it is not a public carriage-way in the sense of this statute. The pursuer himself when he came into Court had not the courage to call it a road at all, for in his original petition I find that it is described as a thoroughfare from one public road to another public road, and I am not surprised, when I see the evidence, that that was the position he took, and that it was only after it was pointed out by the Sheriff-Substitute, apparently in his note, that something a great deal stronger was required to make the case relevant, that additions were made averring this was a public road, and averring every possible alternative under the statute which could infer liability against the railway company. For my part, I would have some difficulty in calling it a road at all. It is a right of road or a right of passage, but one has considerable difficulty in calling it a road in the proper sense. It runs through a wood for a considerable distance. It has apparently never been made as a road, and has no marked or continuous track. The ground or *solum* of it is, it would appear, regularly pastured by cattle. It has gates and fences across it. It is upon a very steep incline at some parts, and has boulders on part of what is called the roadway, and marshy ground and even pools upon other parts. The breadth of it appears to be from 5 to 6 feet. It is not under public management of any kind, and indeed Mr Milne, the surveyor of roads, explains in regard to it that while he has rather an exhaustive list of roads for the district—he has a list of roads of three classes: old well-made turnpike roads, old accommodation roads well-made though not so broad, and inferior roads leading through hilly districts, and narrow—this road is not in his list under one or other of these categories. It appears, in regard to the use of it, that it has been used by foot-passengers, and I think to some extent by cattle being driven along it; that there is an occasional use of it by carts, but I rather take it that has been to a very modified extent. Some witnesses say there is not such a thing as a cart to be seen on it in the course of a week or even more; and I observe that the leading witness for the pursuer—I think I may call him the leading witness, because no fewer than thirteen other witnesses are held as concurring with him, and he therefore appears as having the weight of fourteen witnesses—he says he has gone the road with cattle, and has occasionally used it with carts. He cannot say whether he went with loaded carts. The road is of such a character that it is really a difficulty to take a loaded cart along it, and there is no evidence of course that carriages are used, though there appears to have been a stray gig now and again taken with great care from one end to the other by some adventurous persons in the neighbourhood. Now, taking the evidence as a whole, I have come to the conclusion that it is rather a road which I should hold fell under section 52 of the statute as being a highway other than a public carriage-way. It is undoubtedly a bridle-way—a bridle-way which, I must admit, is occasionally used by carts, unloaded generally; but taking it so, it humbly appears to me that the

Sheriff is right in holding that that is not within the sense of the statute a public carriage-way. When we are dealing here with a road which at its best is from 5 to 6 feet in width, it is worthy of observation that the provisions of the statute, sections 42 and 43, which provide for public carriage-ways, and enact that if such a carriage-way is carried over the line then the bridge must contain a clear breadth of 25 feet—if the railway is carried over the road it is the same, 25 feet must be allowed. That plainly does not point at a road of this kind, which at its best is from 5 to 6 feet wide, and that is one of the material circumstances, in my mind, in holding that this is really not a carriage-way within the meaning of the statute. It is true that even taking it as a highway, not a carriage-way within the meaning of the statute, this company, or the predecessors of the company, the Deeside line, ought to have obtained the authority of the Sheriff twenty-four years ago to the putting of these gates there, and should have presented an application to that effect. Well, there is no evidence that such an application was presented. Whether the company might not fairly say now that after such a lapse of time it is to be presumed that was done regularly I am not prepared to say, but I am of opinion that after such a lapse of time, the arrangements of the company having been accepted without challenge or objection by any person whatever, it is out of the question now to say that the arrangements in reference to this road shall be held illegal from an absence of this formality. I cannot doubt that if such an application had been presented to the Sheriff or the Justices the arrangements which the company made would have been sanctioned; and on the whole matter I am of opinion that the Sheriff's judgment should be adhered to. Of course I put my judgment, as your Lordships have done, on the first point you have dealt with, but I thought it right, as I had formed a view on the merits of the case, that I should express it for the benefit of the parties.

The Court pronounced this interlocutor:—

"Recall the interlocutor of the Sheriff-Substitute dated 23d December 1881, and of the Sheriff dated 14th March 1882: Find that on the night of the 13th or morning of 14th October 1880, two heifers, the property of the pursuer, were killed on the line of railway belonging to the defenders: Find that the said heifers found their way from the pursuer's farm on to the line of railway through a gate at a level-crossing which had been left open: Find that the pursuer has failed to prove that said gate was left open through any fault of the defenders, or anyone for whom they are responsible: Find that the level-crossing in question was made in terms of a decree-arbitral, made in a submission between Colonel Farquharson, the owner of the pursuer's farm, and the railway company in 1858: Find that from 1858 to the present time no one interested in the road crossed on the level has complained of the said level-crossing: Find that the pursuer, as tenant under the said Colonel Farquharson, has occupied the said farm continually since the year 1860, and has used the said level-crossing without objection: Find that in these circumstances the pursuer is not entitled to maintain any of the first six pleas stated by him on record: Therefore assoilzie the defenders, and decern," &c.

Counsel for Appellant (Pursuer) — Solicitor-General (Asher, Q.C.)—Pearson. Agent—Alexander Morrison, S.S.C.

Counsel for Respondents (Defenders)—Jameson—Ferguson. Agents—Gordon, Pringle, Dallas, & Co., W.S.

Friday, November 10.

SECOND DIVISION.

[Sheriff of Stirling, Dumbarton, and Clackmannan.

EWART *v.* BROWN.

Reparation—Excessive Punishment of Pupil by Schoolmaster—Assault.

In an action of damages against a teacher by the father of one of his pupils, on the ground that he had inflicted an excessive punishment, resulting in a serious illness, on the pursuer's son, it was proved that the defender had hit the boy a slight blow on the head with a "pointer," but not with any intention of injuring him, and not in a manner likely to cause serious injury. It was not proved that the illness from which the boy subsequently suffered was caused by what the defender had done. *Held* that in the circumstances the defender was not liable in damages for an assault upon the boy, but in respect that he was in the wrong in having used the "pointer" for such a purpose he was not entitled to his expenses.

John Ewart, shoemaker, residing in Alva, for himself and as administrator-in-law for David Ewart, his son, raised an action in the Sheriff Court at Stirling against James Vernon Brown, headmaster of Alva Academy, under the following circumstances:—Upon Wednesday the 14th September 1881 the defender struck the pursuer's son, who was a pupil under his charge, upon the head with a wooden rod or pointer. It was proved that the defender did not give this stroke in anger or with intent to hurt the boy, and it was proved that the stroke was not a severe one. The defender was not in the habit of using the "pointer" as an instrument of punishment, but occasionally he used it to attract the attention of boys who were not attentive to their work. The boy deponed that he felt stupified by the blow. He, however, joined his companions' games, and returned to school in the afternoon. He was at school on Thursday, but not on Friday. There was no school on Saturday, but he was out on that day, and though he deponed that he suffered from sickness and pain that day, persons who knew him well observed nothing the matter with him. He did not leave his bed on Sunday. On Monday a medical man named Lindsay was sent for and saw him. There were then no external marks on the boy's head. Congestion of the brain came on, and he was ill for six weeks. A second doctor saw him on September 28th. He differed from the first in this respect, that he did not attribute the illness to the blow.