out) occupied by the testator, as he occupied Kirkconnel and Bargatton, that is, as tenant. Robert therefore takes one-half of the stock, &c., on Kirkconnel and Bargatton, the other half falls into residue.

4. The fourth parties concede that they cannot maintain the affirmative of the question. But the third party does. He maintains that the provision in his favour vested *a morte*, and that when he attained twenty-five years of age both capital and interest of the provision became his indefeasibly, and that therefore he may insist on payment now without awaiting the arrival of the more postponed term of payment fixed by the testator. The case of *Miller's Trustees* was cited as an authority for this contention. I deem it unnecessary to consider whether this question is ruled by the case of *Miller's Trustees*, because it appears to me that there is sufficient ground for refusing effect to the contention of the third party in the fact that there are purposes of the trust yet to be fulfilled which forbid the trustees paying to the third party just now the provisions in his favour under the testator's settlement. The ground I refer to is this—The trustees are directed (and are bound) to pay certain beneficiaries interest on the amount of their bequests at the rate of 4 per cent. for some years to come. We are informed that the income of the estate will not suffice for this, and that to some extent this direction will require to be met out of capital. It is at present impossible to say how far this application of the capital may reduce the amount of the legacy or provision to each beneficiary, and (as was observed by the Lord President in *Miller's* case) "where there are trust purposes to be served which cannot be secured without the retention of the vested estate or interest of the beneficiary in the hands of the trustees . . . the right of the beneficiary must be subordinated to the will of the testator." The fifth question therefore should be answered in the negative.

5. I have already answered this question. The direction to pay interest at 4 per cent. is explicit, and the trustees must obey it. The right to interest at 4 per cent. on their respective provisions for the period mentioned by the testator is as clearly due to the beneficiaries as the provisions themselves. If the income of the estate does not suffice to pay the interest the deficiency must be supplied from capital.

6. I think the residue vested in the residuary legatees *a morte*. There was nothing to suspend vesting although the period of payment or division was postponed. The residuary legatees named were the three sons of the testator, and they were to take the residue "equally." Under such a provision I think, in conformity with the decision in *Paxton's* case, that the share of William, who predeceased, did not accresce to the other two. That third must be dealt with as intestate succession of William Graham.

LORD JUSTICE-CLERK—That is the opinion of the Court.

LORD MONCREIFF was absent.

The Court pronounced this interlocutor—

"Answer the first alternative of the first question therein stated in the negative, and the second alternative of the said question in the affirmative: Answer the second question therein stated in the affirmative: Answer the third and fourth questions therein stated by declaring that the second party is entitled to succeed to the leases of Kirkconnel and Bargatton in terms of the destination therein contained, and to delivery of one-half of the stock, cropping, and others thereon, but not to the stock, cropping, and others upon Auchengashel and Tannymaws, and that the other half of the stock, cropping, and others upon Kirkconnel and Bargatton, as well as the whole stock, cropping, and others upon Auchengashel and Tannymaws, falls into residue: Answer the fifth question therein stated in the negative: Answer the first part of the sixth question in the affirmative, and the second part of said question by declaring that any deficiency falls to be made good out of residue of the deceased John Graham's trust-estate: Answer the seventh question therein stated by declaring that the residue of said estate vested *a morte testatoris*, and that the deceased William Graham's share did not at his death accresce to the second and third parties but became intestate succession of the said deceased William Graham: Find and declare accordingly, and decern."

Counsel for the First and Second Parties—Jameson, Q.C.—C. N. Johnston. Agents—Scott & Glover, W.S.

Counsel for the Third Parties—H. Johnston, Q.C.—Inglis. Agents—J. C. & A. Steuart, W.S.

Counsel for the Fourth and Fifth Parties—W. Campbell, Q.C.—Hunter. Agent—Alex. Wylie, S.S.C.

Thursday, November 30.

SECOND DIVISION.

[Sheriff of Renfrewshire.

CARSLAW *v.* ROBERT M'ALPINE & SONS.

Railway—Construction of Railway—Use of Private Road — Interdict — Railway Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *secs.* 25 *and* 51.

By section 51 of the Railway Clauses Consolidation (Scotland) Act 1845 it is provided—"If in the course of making the railway the company shall use or interfere with any road, they shall from time to time make good all damage done by them to such road; and if any question shall arise as to the

damage done to any such road by the company, or as to the repair thereof by them, the same shall be determined by the sheriff and two justices," &c.

Under section 25 of the Act power is given to a railway to occupy temporarily private roads within 500 yards of the railway on giving three weeks' notice and paying compensation to the owners and occupiers.

In an action of interdict by the tenant of a farm on which a private road was situated, against the contractors for the construction of the extension of a railway, *held* that a railway company or their agents have no power under section 51 to make use of a private road without acquiring legal right to do so either in terms of section 25 of the statute or at common law. Interdict *granted* accordingly.

Alexander Carslaw, farmer, Eastwood Mains, Giffnock, raised an action in the Sheriff Court at Paisley, against Robert M'Alpine & Sons, contractors, Glasgow, praying the Court "to interdict the defenders and their sub-contractors, servants, and workmen from entering, without the pursuer's consent, on the private road leading from the turnpike road (from Paisley to East Kilbride) past the pursuer's farm-steading up to the point where that private road is intersected by the extension of the Lanarkshire and Ayrshire Railway, which private road is situated on the farm of Eastwood Mains, in the parish of Eastwood and county of Renfrew."

The pursuer averred that the defenders had, without having paid the pursuer any wayleave therefor, used the private road since the commencement of the construction of the railway for the purpose of carting their material, and had rendered it of no use to the pursuer through having cut it up by their traffic; and that the defenders had failed to repair it when called upon by the pursuer, and continued to use it. They also denied that the road or any part of it had been scheduled and taken by the Railway Company.

The pursuer pleaded—"(2) The pursuer being tenant of the said farm, having exclusive right to the said private road, and the defenders having without authority entered thereon, and having refused or delayed after notice to withdraw, the pursuer is entitled to interdict as craved."

The defenders averred that the private road was necessarily used under the statutory powers competent to the Railway Company, and the defenders as their agents, in pursuance of the Railway Clauses Consolidation (Scotland) Act 1845 and the Lanarkshire and Ayrshire Railway Act 1897.

The defenders pleaded—"(1) All parties not called; (2) no title to sue; (3) the action is incompetent; (4) the defenders Robert M'Alpine & Sons having acted in pursuance of statutory authority, they are entitled to be assoilzied."

On 3rd March 1899 the Sheriff-Substitute (HENDERSON) pronounced the following interlocutor:—"Finds that the pursuer in applying for interdict against the defenders using the road in question has made use of a wrong remedy, in so far as under the provisions of section 51 of the Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) a statutory remedy for any grievance which he may have is provided, which statutory remedy is exclusive of the present action: Therefore dismisses the petition."

The Sheriff-Substitute in his note based his judgment on the principle laid down in *Watkins* v. *Great Northern Railway Company*, 1851, 16 A. and E. 961; 20 L.J., Q.B. 391.

The pursuer appealed to the Sheriff (CHEYNE), who on 20th March 1899 affirmed the interlocutor of the Sheriff-Substitute.

The pursuer appealed, and argued—The judgment of the Sheriffs was erroneous. It rested on a misconception of the powers of a railway company under the Act of 1845. If a railway company or their agents wished to occupy temporarily a private road during the construction of the railway, they required to give three weeks' notice and pay compensation as laid down in section 25 of the Act. No such procedure had been gone through here. Section 51 was one of a number of sections in the Act under the general heading of "Crossing of Roads and Construction of Bridges." It gave no title to a railway company to take possession of a private road; it only enacted that they must make good all damage caused by them after they had begun to use or interfere with any road, in terms of the powers given to them in other sections of the Act. In the case of *Watkins, supra*, the railway company had interfered with the road in terms of the legal authority given them in the statute. That case had therefore no bearing on the present. In the present case he was not asking for damage caused by a legal act, but for interdict against the defenders doing what they had no legal power to do, either at common law or under the statute —*Caledonian Railway Company* v. *Colt*, August 3, 1860, 3 Macq. 833, opinion of L.C. Campbell, 839.

Argued for defenders—The pursuer's case on record contained no averment of illegal use, and illegal use was not argued by him in the Sheriff Courts. No objection had been made to the Railway Company using the road when they commenced to do so, and it was too late to object now. Section 51 of the Act applied. The pursuer was entitled to damage under that section if they could prove it, but they were not entitled to interdict the defenders from using the road—*Watkins, supra*. In any event, the people who should have been sued were the Railway Company—*West Riding and Grimsby Railway Company* v. *Wakefield Local Board of Health*, 1864, 33 L.J., M.C. 174. The present defenders were only acting for them as agents.

LORD JUSTICE-CLERK—This action has been brought against certain contractors who were using this private road, and the pursuer desires that they should be stopped.

The pursuer says that this is a private road, that it is being used without authority, and that it is being injured. In ordinary circumstances there could not be any answer to this except that the defenders had power to use the road under the statute. But I think there is nothing of that kind in this case. I think section 25 is applicable. It says—[*His Lordship quoted the section*]. Under that section three weeks' notice is to be given to the proprietor of a road having a right to object, and if he does object, the objection can be dealt with by certain procedure prescribed by the Act. Nothing of that kind was done here. The defenders do not now say that any notice was given to the other side. In these circumstances the defenders, I think, are unable to show any agreement with the pursuer to use this road, or to show that it was used under any statutory right existing in themselves or in those who employed them. In these circumstances it appears to me that the decision at which the Sheriffs have arrived is erroneous. The only section of the statute which is founded on in support of the Sheriffs' judgment was section 51, but section 51, as I read it, has nothing whatever to do with a right to use a road or a right to continue to use a road. Section 51 relates only to the manner in which the matter is to be dealt with after a road has been used, for the purpose of ascertaining what the parties who used the road under a statutory right are to pay in respect of the damage to the road. I am of opinion that the decision is wrong, and that the pursuers are entitled to interdict.

LORD YOUNG—I understand this case, which is very brief, and I think quite relevant, to be so simple as this, that the pursuer, who is tenant of a farm, complains that the defenders have illegally entered upon and used and cut up a private road on his farm. His case is, not that they have legally entered upon it and used it and are liable in damages or compensation for the loss which he has suffered in consequence of their legal use; that is not his case; it is not an action for damages, and it is not an action for interdict founded upon a legal use. It is very difficult, indeed, to see how an action for interdict could be founded upon an averred legal use. His claim for interdict is founded, I think, entirely upon the allegation that the use was without authority of statute or anything else, for there could be no better authority than the authority of statute, and that he is entitled to have it stopped. Now, the pleas-in-law in answer to that are four in number. The first three are—"All parties not called; no title to sue; the action is incompetent." Now, looking only to the record here, I see no statement whatever to support the plea of "all parties not called." Neither do I see anything to support the plea of "no title to sue." If the use of a road like this is an illegal one, or if the road is injured by anyone, the tenant who will suffer is the party best entitled to say so. He is, at least, a party who is entitled to sue, and therefore I should repel that plea just as much as the first. The third plea is—"The action is incompetent." To say that an action for interdict against the continuance of an illegal use of a road is an incompetent action is simply to be ridiculous. The fourth plea for the defenders is—"The defenders having acted in pursuance of statutory authority, they are entitled to be assoilzied." If the defenders could have shown statutory right, they could not be interdicted from doing that which is authorised by statute. But after listening to their argument, and hearing the sections of the statute on which they found, I am of opinion that what they have done is not authorised by statute. What the Sheriffs have not expressly but impliedly done by their judgment is to sustain all or one or other of the defenders' pleas. I cannot sustain them. Nor do I think the judgment in the English Courts referred to by the Sheriff-Substitute has any application. I have endeavoured to point out in the course of the debate, with a view to helping argument, that where a statute gives authority for a certain thing to be done, if any private individual, proprietor or otherwise, suffers from what the statute authorises to be done, the statute must of necessity, if it is thought a desirable thing to do, provide for satisfaction being given to that sufferer, for otherwise he would have no satisfaction or reparation at all. The common law of this country gives no reparation to anybody who suffers from a legal act, an act authorised by Act of Parliament. If the Legislature has thought it a necessary thing to be done, anybody who suffers must take the consequences, and so it is that in all modern statutes authorising anything to be done in the public interest provision is made for reparation to individual sufferers. But statutes are not uncommon—special statutes prohibiting certain things under penalties—which make provision for compensation to an individual sufferer, and these, as I understand, are generally if not always cumulative remedies, the authorities being numerous, illustrative of the proposition that a legislative remedy of that kind, for what would be an injurious act at common law, is a cumulative remedy, and does not exclude a remedy at common law, especially the remedy of interdict. But here we have nothing to do with statute, for this is a case in which interdict is asked of proceedings unauthorised by statute and illegal. I therefore think that we should dispose of the whole case now by granting interdict in terms of the prayer of the petition.

LORD TRAYNER—I think the pursuer might have set forth more clearly than he has done the ground upon which interdict is sought. At the same time, I think the pursuer's averments are sufficient to infer his right to the remedy he seeks. The pursuer, who is the tenant of a farm, across which there runs a private road—the private road being therefore part of his tenancy—complains that the defenders, in the execu-

tion of their contract with the Railway Company, have invaded his right without leave from him, and without authority from anybody. If that is so, then they are simply trespassers, and the remedy of interdict is the proper remedy to apply against trespass, at least in the first instance. The answer of the defenders is, not that they got leave (for there is no averment whatever that they got leave from the pursuer), but that the Railway Company had authority under statute for using the road, which authority enured to the contractors, who were doing the Railway Company's work. Well, if the Railway Company had got authority for what the defenders have done, I think that would have been a successful defence. But when we come to inquire into the fact, it stands in this way:—under sections 25 and 26 of the Railways Clauses Act there is provision made for a railway company, in the pursuance of works authorised by their special Act, entering upon or taking over private roads. But it is not said in this record, and it was not stated at the bar, that the Railway Company here had taken any proceedings under sections 25 or 26. We must therefore take it that the Railway Company never had got authority, either under the Railway Clauses Acts or under their own special Act, to use this private road. If that is so, if the Railway Company had no authority to use the road, it is quite clear that the contractors had none. This brings us back to the position that the contractors were trespassers, and that, I think, was their real character. In these circumstances only one course can be taken, and that is that the defenders must be interdicted from continuing their trespass, and accordingly I think the interlocutors of the Sheriffs are wrong and should be recalled, and that interdict should be granted in terms of the prayer.

LORD MONCREIFF — I am of the same opinion. The defenders' counsel criticised the pursuers' averments. Probably they might have been made more precise, but I think we can gather from them that the defenders, without any legal authority, had entered upon and used this road. But the charge of irrelevancy being want of precision, the obvious retort is that it lay upon the defenders to justify the use they were making of this private road, and to state the part of the statute upon which they relied. But all they say is that they were using that road under statutory powers bestowed upon them by the Railways Clauses Act 1845 and the Lanarkshire and Ayrshire Railway Act of 1897. I think it was for them to state what part of the statute they founded upon. They have not done so, and what is more, when they were asked to state what section of the statute authorised them to use the road they were unable to do so. Now, I think the only part of the statute which gave them right to use that road is section 25 of the Act of 1845, and that only on condition of their giving notice to the landlord and tenant, and paying compensation. The Sheriffs have dismissed the action, apparently sustaining the third plea-in-law for the defenders on the ground that the action is incompetent, being excluded by the statutory remedy provided by the Railways Clauses Act 1845. The section on which the Sheriffs rely does not, I think, justify their conclusions, and no notice having been given under section 25, the act of the contractors, I think, was illegal.

The Court recalled the interlocutor appealed against, granted interdict in terms of the prayer of the petition, and decerned.

Counsel for Pursuer — Dundas, Q.C. — Clyde. Agents—Smith & Watt, W.S.

Counsel for Defenders — Shaw, Q.C. — Grierson. Agents—Macpherson & Mackay, W.S.

Thursday November 30.

FIRST DIVISION.

[Lord Low, Ordinary.

MILNE & COMPANY *v.* ABERDEEN DISTRICT COMMITTEE OF COUNTY COUNCIL.

Jurisdiction—Exclusion of Review—Roads and Bridges (Scotland) Act 1878 (41 *and* 42 *Vict. cap.* 51), *sec.* 51—*Extraordinary Expenses—Certificate of Surveyor—Allegation of Fraud—Reduction of Award of Sheriff—Competency.*

By the 57th section of the Roads and Bridges Act 1878 it is provided that where "by the certificate of the surveyor" it appears to the local authority that extraordinary expenses have been incurred in repairing highways, "having regard to the average expense of repairing highways in the neighbourhood," owing to damage caused by "excessive weight . . . or by extraordinary traffic" passing over the highway, such authority may recover in a summary manner before the sheriff, "whose decision shall be final," the amount of such expenses "as may be proved to the satisfaction of the sheriff to have been incurred."

An action was raised for the purpose of reducing a decree of a sheriff, which found that certain extraordinary expenses had been incurred by a local authority by reason of damage arising from excessive weight, and decerned against the pursuer for payment of that amount. There was also a conclusion for reduction of the certificates granted by the road surveyor. The pursuer's averments contained a general allegation that the certificates were granted falsely and fraudulently, but no specific grounds of fact were alleged by him in support thereof. It was further averred that the certificates were not in terms of the statute, because the surveyor in framing them had no regard to the average expense of