contained, then the pursuers are entitled to succeed, whereas if the second charter-party was a separate and independent contract, then the pursuer's claim cannot be maintained. I think it is immaterial whether the contract contained in the said charter-party was set forth in a separate instrument or was indorsed on the back of the first charter-party. Wherever its terms are to be found the question is the same: Was the second charter-party a continuance of a former one, or a new contract altogether? On that, which is really the only question in the case, I am unable to agree with the Sheriff-Substitute. During the currency of the first charter-party the defenders intimated to the shipowner that they would not continue to hire the vessel under its terms. They thus declined to exercise the option given to them to continue the then current charter for six months longer. In that intimation the shipowners acquiesced, but they offered the same ship to the defenders for hire on different terms. The terms of the first charter were, payment of £330 per month with the option to the charterers to (1) cancel the charter at the end of the first month on giving notice, or (2) to continue the charter for six months at the same rate of hire. The second charter gives the charterers no option to cancel the charter at the end of the first month; it fixes the hire for six months at £320 per month, and gives the option to continue the charter for six months at the rate of £325 per month. I think these differences show that the two contracts are different in material respects, and that the one cannot be regarded as a continuance of the other. It was said that the difference between the contracts as regards the amount to be paid for hire was small, and so it is. But that is a mere accident. If there had been a sudden rise or fall in freight, as happens occasionally, the difference between the rate of hire in the two contracts would no doubt have been greater than it is. But great or little does not vary the question. I think the second charter-party was a separate and independent contract, and is not a continuance of the first contract which was stipulated for. Nor do I think that the second contract was one within the contemplation of the contracting parties when the first contract was made. The only thing then contemplated was a renewal for six months of the one contract on the same terms. What was contemplated as possible or probable has not occurred. The terms of the first contract have been set aside, and a new contract made on terms which were not in contemplation. I am therefore of opinion that the appeal should be sustained and the defenders assoilzied.

The LORD JUSTICE-CLERK, LORD YOUNG, and LORD MONCREIFF concurred.

The Court pronounced this interlocutor—

"Recal the interlocutor of the Sheriff-Substitute of Lanark dated 9th March 1900 appealed against: Find in fact (1) that the charter-party dated 13th March 1899 was not a continuance or renewal of the charter-party dated 8th October 1898; and (2) that the said charter-party mentioned was not the result of any negotiations on the part of the pursuers: Find in law that the pursuers are not entitled to charge any commission in respect of the said first-mentioned charter-party: Therefore assoilzie the defenders from the conclusions of the action, and decern," &c.

Counsel for the Pursuers—Clyde. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Defenders — Salvesen, Q.C.—A. S. D. Thomson. Agents—Whigham & MacLeod, S.S.C.

Friday, June 15.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

POLLOCK v. NORTH BRITISH RAILWAY COMPANY.

Railway—Accommodation Works—Claim of Damages at Common Law for Failure to Provide Accommodation Works Timeously — Substituted Road — Level-Crossing — Private Farm Road — Interference with Road—Special Damage—Railways Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 33), *secs.* 46, 48, *and* 60.

A farm having been divided into two parts by a railway line, compensation for lands taken and for severance was paid to the proprietor upon the footing that a level-crossing was to be provided by the company as a means of communication between the steading and the fields on the further side of the line. A level-crossing was accordingly formed at a place where the railway was crossed by a farm road which had existed before the railway was made. The part of this road which crossed the line at the level-crossing was duly paid for and acquired in property by the company. The line was originally constructed and for some years was used as a single line for local traffic, and during this time the level-crossing afforded a sufficient means of communication. The railway company subsequently obtained an Act of Parliament under which they were empowered to double their line and to extend it to join a main line. The tenant of the farm, after operations under this Act had been commenced, made a demand upon the railway company for an accommodation bridge and approaches in place of the level-crossing, upon the ground that when the line was doubled and connected with the main line, the number and speed of the trains would be so much increased as to render the level-crossing useless. The railway company refused to comply with this demand, and litigated the question for more than a

year in the Sheriff Court, but it was ultimately decided that they were bound to provide the bridge demanded by the tenant. This they proceeded to do, but meantime the doubled and extended line had been opened, and the tenant had suffered damage through the want of a sufficient and convenient means of crossing the railway on his farm. *Held* that the railway company were liable at common law to the tenant for the damage resulting from their failure timeously to provide the accommodation bridge in terms of their statutory obligation as judicially determined.

Opinions, per the Lord Justice-Clerk, Lord Trayner, and Lord Kyllachy (Ordinary), that they were not liable for special damage under section 48 of the Railways Clauses Consolidation (Scotland) Act 1845.

Opinion per Lord Moncreiff *contra.*

This was an action at the instance of Walter Pollock, farmer, Yoker Mains, Yoker, Renfrewshire, against the North British Railway Company, in which the pursuer concluded for payment of £200 in name of damages sustained by him through the defenders' failure timeously to provide a certain accommodation bridge and approaches, or a sufficient substituted road.

The pursuer was the tenant of the farm of Yoker Mains near Yoker in Renfrewshire, and entered to that farm in 1883 under a nineteen years' lease. The farm, which was situated on the road between Glasgow and Yoker, was 120 acres in extent, and was occupied as a dairy farm.

The defenders were the successors of the Glasgow, Yoker, and Clydebank Railway Company (the latter company having been amalgamated with the defenders' company by an Act passed in the year 1896, which came into effect on 1st August 1897), and as such, owners and occupiers of a line of railway which ran through the pursuer's farm. By the amalgamating Act the defenders became liable for the whole obligations of their predecessors.

The Glasgow, Yoker, and Clydebank Railway was originally constructed in the year 1882 by the Glasgow, Yoker, and Clydebank Railway Company under powers contained in the Glasgow, Yoker, and Clydebank Railway Act 1878. This line divided the farm of Yoker Mains into two nearly equal parts, and separated the part to the north of the railway from the farm steading. The part of the farm to the north of the railway was about 68 acres in extent. Land was taken by the Railway Company and bridges were formed for a double line of rails, but originally only a single line of rails was laid down through the pursuer's farm. The time provided for the completion of the railway under the Act of 1878 was five years. In 1881 the then tenant of Yoker Mains, William Renwick, was served with a notice under the said Act of 1878, in which the Railway Company intimated their intention to take certain portions of the farm. On 12th August 1882 William Renwick, in consideration of a payment of £80 made to him by the Railway Company, granted to them a discharge of all claims for loss and damage, whether temporary or permanent, sustained and to be sustained by him as tenant and occupant of said portions of land by or through the taking thereof, or by operations under the said Act, or by the construction of works thereby authorised, or which he could claim or demand under the Lands Clauses Consolidation (Scotland) Act 1845, or otherwise. The proprietor of the farm of Yoker Mains, Mr Alexander Spiers of Elderslie, was served with a similar notice in March 1881. A claim for compensation was made on his behalf in 1883, and this claim was submitted to arbitration. In May 1885 his commissioners granted a disposition whereby they disponed the portions of land taken to the Railway Company in consideration of a certain sum, being the amount fixed by arbitration as the sum to be paid for the lands taken by the Railway Company, and for severance or other injuries affecting the remaining lands belonging to Mr Spiers, conform to decree-arbitral dated January 1885, whereby it was declared that the said sum was in full satisfaction of all claims competent to Mr Spiers or his commissioners or the heirs of entail, "except the claim for gates, drains, &c., for which the sum of £137 was awarded by the said oversman to be paid by the said Railway Company to and applied by" Mr Spiers' commissioners "in executing accommodation works so far as not already done." Among the portions of land so disponed was a part of a farm road connecting the farm-steading of Yoker Mains with the northern part of the farm. A level-crossing was formed for the accommodation of the farm of Yoker Mains, so as to enable the road in question still to be used as a communication between the steading and the part of the farm lying to the north of the railway. This road was an ordinary farm road having a definite line, and made up with ashes and other material. It led from the steading to a central point on the farm, from which point access was obtained by gates to the various fields. The only means of access from the steading to the part of the farm lying to the north of the railway line were (1) this level-crossing and (2) a circuitous route by a public road bounding the farm on the east. The distance from the steading to the further side of the railway by the level-crossing was between 400 and 500 yards. The distance round by the public road was about 1400 yards. It was matter of admission in the present case that the claims of the landlord and of the tenant referred to above were settled by the Railway Company on the footing that the severed portions of the farm were to be connected by a level-crossing at the place where the farm road crossed the line.

The line was opened for traffic in 1882, and from that time till May 1897 it was used as a single line with local trains which passed at intervals of twenty minutes. During this time the pursuer enjoyed a right-of-way across the railway by the

level-crossing referred to above, and this was sufficient for his purposes. Under the conditions then obtaining he was able to drive his cows across the railway, which in the ordinary course of the management of his farm as a dairy farm he required to do four times a day during the period of the year when the cows were in the fields.

In 1893 the Glasgow, Yoker, and Clydebank Railway obtained an Act of Parliament authorising them to extend their railway to Dalmuir, and to double their line, and thereafter the railway across which the pursuers' road passed was in the first place doubled, and in the second place extended so as to join the main line of the North British Railway from Glasgow to Helensburgh. The result was that when opened for traffic in May 1897 the double and extended line became the main line (particularly for passenger traffic) between Glasgow and Dumbartonshire. By that time also the Yoker and Clydebank Company had been taken over by and amalgamated with the North British Railway Company, and the railway thereafter formed part of the North British system.

After the 1893 Act was obtained and operations under it commenced the pursuer perceived that in consequence of the doubling and extension of the line the number and speed of the trains run would be greatly increased, and he came to the conclusion that it would be dangerous and indeed impossible to drive fifty or sixty cows across the line by the level-crossing four times a-day. Accordingly in 1895 he gave notice to the Yoker and Clydebank Railway Company that he claimed to have a bridge with approaches substituted for the level-crossing. The Railway Company refused to accede to this demand, and the pursuer and his landlord upon 11th June 1896 presented a petition in the Sheriff Court at Glasgow praying the Court to ordain the Railway Company to provide an accommodation bridge and approaches, which should be in lieu and place of the level-crossing, "all in terms of and to the effect provided by the Railways Clauses Consolidation (Scotland) Act 1845, and particularly section 60 thereof." The Railway Company lodged defences. On 14th August the Sheriff-Substitute repelled certain pleas for the defenders and allowed a proof. The defenders appealed to the Sheriff (BERRY), who on 24th February 1897 adhered. Thereafter proof was led, and on 14th July 1897 the Sheriff-Substitute issued an interlocutor ordaining the defenders to provide an accommodation bridge with suitable approaches. and finding the defenders liable to the pursuers in expenses.

Under section 150 of the Railways Clauses Consolidation (Scotland) Act 1845 this interlocutor might have been appealed to the Sheriff, but the Railway Company did not avail themselves of this right of appeal. If they had done so, the Sheriff's judgment in such an appeal would not have been appealable to the Court of Session (section 150, *cit.*) It would not have been competent for the Railway Company to appeal from the Sheriff Substitute's interlocutor direct to the Court of Session—*Main* v. *Lanarkshire and Dumbartonshire Railway Co.*, December 19, 1893, 21 R. 323.

The Railway Company proceeded, in compliance with the Sheriff-Substitute's interlocutor, to provide the accommodation works decerned for, but these works were not completed and ready for use until March 1898. Meantime the double and extended line had been for some time in use, and the pursuer, having during that time been unable to use the level-crossing, and having not yet been provided with any other means of crossing the line at that point, had in consequence suffered considerable pecuniary loss and inconvenience in the management of his farm, for which he claimed damages in the present action.

He averred—"(Cond. 9) . . . . The Railway Company ought to have caused a sufficient road to be made before interfering with the existing road used by the pursuer for access to that part of his farm to the north of the railway line, but this they culpably failed to do, and it was only after ten months delay that they provided a sufficient road. The said delay, which was most unjustifiable, was productive of the said special loss and damage to the pursuer, caused thus through the fault of the defenders as above condescended on, for which he is entitled to reparation both at common law and under statute, and in particular section 48 of the Railway Clauses Act 1845. . . . . (Cond. 10) The loss and damage sustained by the pursuer has been occasioned by the failure of the defenders, the said Glasgow, Yoker, and Clydebank Railway Company, to implement their obligations by providing an accommodation bridge in terms of the statutes when called upon to do so by the pursuer, and they are bound to make good to the pursuer the loss he has thereby sustained."

The defenders pleaded, *inter alia*, as follows:—"(2) The defenders having doubled their railway and used the same as doubled, under statutory powers, should be assoilzied, with expenses. (4) The defenders should be assoilzied, in respect that the pursuer has suffered no special loss and damage through any failure on the part of the defenders' predecessors to provide a sufficient road between the intersected parts of the pursuer's farm. (5) The defenders, as soon as they were ordained to provide additional accommodation works for the farm, having carried out the order of the Court forthwith, are not liable to the pursuer in damages, and decree of absolvitor should be pronounced, with expenses. (7) The defenders should be assoilzied, in respect that the provisions of the Railways Clauses Consolidation (Scotland) Act 1845, founded on by the pursuer, are not applicable in the present case, where the *solum* of the road, so far as within the fences of the railway, is the property of the defenders."

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33) enacts as follows:—Section 46—"If, in the exercise of the powers by this or the special

Act granted, it be found necessary to cross, cut through, raise, sink, or use any part of any road, whether carriage road, horse road, tramroad, or railway, either public or private, so as to render it impassable for or dangerous to passengers or carriages, or to the persons entitled to the use thereof, the company shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with, and shall at their own expense maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with, or as nearly so as may be." Section 47—"If the company do not cause another sufficient road to be so made before they interfere with any such existing road as aforesaid, they shall forfeit twenty pounds for every day during which such substituted road shall not be made after the existing road shall have been interrupted; and such penalty shall be paid to the trustees, commissioners, surveyor, or other person having the management of such road, if a public road, and shall be applied for the purposes thereof; or in case of a private road the same shall be paid to the owner thereof; and every such penalty shall be recoverable with costs by action in any competent court." Section 48—"If any party entitled to a right-of-way over any road so interfered with by the company shall suffer any special damage by reason that the company shall fail to cause another sufficient road to be made before they interfere with the existing road, it shall be lawful for such party to recover the amount of such special damage from the company, with expenses, by action in the Court of Session, if the damage claimed exceeds twenty-five pounds, or in the Sheriff Court if the damage claimed does not exceed twenty-five pounds, and that whether any party shall have sued for such penalty as aforesaid or not, and without prejudice to the right of any party to sue for the same." Section 49—"If the road so interfered with can be restored compatibly with the formation and use of the railway, the same shall be restored to as good a condition as the same was in at the time when the same was first interfered with by the company, or as near thereto as may be; and if such road cannot be restored compatibly with the formation and use of the railway, the company shall cause the new or substituted road, or some other sufficient substituted road, to be put into a permanently substantial condition, equally convenient as the former road, or as near thereto as circumstances will allow; and the former road shall be restored, or the substituted road put into such condition as aforesaid, as the case may be, within the following periods after the first operation on the former road shall have been commenced, unless the trustees or parties having the management of the road to be restored by writing under their hands consent to an extension of the period, and in such case within such extended period — that is to say, if the road be a turnpike road, within six months, and if the road be not a turnpike road, within twelve months." Section 60—"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway — that is to say, such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway, as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made; and such works shall be made forthwith after the part of the railway passing over such lands shall have been laid out or formed, or during the formation thereof: . . . Provided always, that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, and that the company may, in lieu of such accommodation works, make compensation to the owners and occupiers of the lands for the want thereof, in such manner as may be agreed upon between the company and such owners and occupiers, nor to make any accommodation works with respect to which the owners, lessees, and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making of them."

By interlocutor dated 29th December 1899 the Lord Ordinary (KYLLACHY), after a proof, assoilzied the defenders from the conclusions of the action, and found them entitled to one-half of their taxed expenses.

Opinion.—[*After stating the facts*]—"The object of the present action is to recover special damages on this ground, the action being brought under the 46th and following sections of the Railways Clauses Act, sections which are familiar, and which I need not recite at length.

"The Railway Company have stated several defences to the action, and there has been some proof and discussion, which in the view I have come to take might perhaps have been avoided.

"The defenders' first point, and that on which they mainly relied, was this — They contended that the road in question is not a road in the sense of the 46th section. There was accordingly evidence led as to its construction and character, and the effect of that evidence may be sufficiently gathered from the plan with its descriptive lettering. Without going into detail, but having in view that the road was a made road in a definite line leading from the steading to a central point on the farm, from which point access is obtained by gates to the various fields, I see no sufficient reason for excluding the road from the scope of the statute. I may note that this question was considered and opinions expressed upon it in the case of *Carruthers*, 15 D. 591, referred to at the discussion.

"The defenders' next point was that the interference complained of is with a part of the road which is their own property, and which they took and paid for under their original Act of 1878, or rather under

the Lands Clauses Act therewith incorporated. They contend in these circumstances that their recent operations—I mean those connected with the doubling of their line at the level-crossing—were in exercise of their proprietary rights, and not, as assumed by the pursuer, in exercise of powers conferred by the Railways Clauses Act, or by their Special Act of 1893. They seem, in short, to consider that the case is the same as if, when the railway was first made and the road first interfered with, the pursuer had demanded a substitute road under the 46th section of the Railways Clauses Act, and they were defending themselves against that demand.

"Now, I am quite prepared to hold that if the Railway Company had, say in 1878, when their original line was made, shut up and appropriated this part of the road which they had taken and purchased, the pursuer's predecessors would have had no claim whatever under the 46th section and following sections of the Railways Clauses Act. Their remedy in that case would, I think, have been compensation and nothing else. That, I think, is decided by the case of *Campbell*, 17 D. 613. At all events, I concur with the opinion to that effect expressed in that case by the first Lord Curriehill.

"In my view, however, that is not really the position with which we have here to deal. The Railway Company did appropriate part of the road. There is no doubt about that. It is admitted that they purchased and paid for it. But they at the same time or subsequently made in effect a new road, granting to the pursuer's predecessors a right-of-way over the railway, which made the farm road continuous as before. As it happened, the crossing over the railway was on the level, but the position would, I apprehend, have been just the same if it had been by a bridge with approaches either over or under the line. And what I have now to consider is not as to the original interference with the original road, but as to an alleged interference with what I have called the new road—the road as it has existed since about 1882. It is, in my view, a mere accident that that road had a particular origin, and consists partly of a right-of-way over the railway, and crosses the railway on the level instead of by a bridge with approaches. Accordingly, if the pursuer's complaint had here been that the Railway Company had, under the powers of their 1893 Act, rendered his road at the level-crossing physically impassable (as, for example, by raising or lowering the level of the railway at that point), or had done anything of that description, I do not, I confess, see how the fact of the operation being within their own property could afford the company a defence as against an action such as the present.

"This, however, brings up what I conceive to be the true question—Have the Railway Company in fact interfered with the pursuer's road in the sense of the 46th section of the Railways Clauses Act? In other words, did they by their recent operations 'cross, cut through, raise, sink, or use any part of this (any) road, so as to render it impassable for or dangerous to passengers or carriages, or to persons entitled to the use thereof?'

"I assume, in the pursuer's favour, that the doubling of the line was not authorised by the original Act, or, if so, that the power of doubling had expired, and that when exercised it was so by virtue only of the powers contained in the Act of 1893. But making that assumption, it appears to me that the pursuer has still to show that the road has been interfered with in the sense and to the effect of the 46th section of the statute.

"Now, I have, I confess, had some difficulty on this question—the question which I think is the real question in the case. But in the end I have come to be of opinion that the pursuer has failed to make good his point.

"It is clear that the only physical interference with the road is the laying down of a second line of rails. It is also I think clear that *per se* that operation did not render the road, *i.e.*, the level-crossing, impassable or dangerous. The pursuer's complaint really is that as the result of the doubling of the line, or of the doubling plus the extension to Dalmuir, a greatly increased use of the railway—that is to say, a greatly increased traffic—has been made possible, and has in fact resulted. That is what the pursuer's case really comes to, and I do not see my way to hold that that is the kind of interference which the 46th section contemplates. I think that what it contemplates is interference by the *construction* of the railway and danger resulting therefrom. It does not, I think, contemplate interference which merely facilitates increased traffic, and danger resulting from that increase. Such increase of traffic may give rise to a claim for additional or different accommodation works under the 62nd section of the statute, and that redress the pursuer has in fact obtained. But to bring in the provisions of section 46 and the following sections something more seems to me to be necessary. In saying so I do not overlook the reference to 'use' in the 46th section. But considering the context and reading the section as a whole, it seems to me that the 'use' contemplated is use incident to the construction of the railway, and nothing else. And accordingly on the whole matter I am of opinion that the defenders were not bound to give the pursuer a substitute road as a preliminary to their recent operations, and that therefore they are entitled to be assoilzied.

"As to expenses, I consider that looking to the course the case has taken I shall do justice between the parties by finding the defenders entitled to one-half of their taxed expenses."

The pursuer reclaimed, and argued—The defenders' predecessors were bound to provide an accommodation bridge "forthwith" after the railway as authorised by the Act of 1893 was formed—Railways Clauses Consolidation (Scotland) Act 1845, section 60.

It was *res judicata* that they were bound to do so. Instead of doing as it had been found that they ought to have done "forthwith," they delayed to do so for a considerable time, with the result that the pursuer suffered damage through want of the accommodation to which he was entitled. For such damage the defenders were liable at common law apart from the provisions of the 1845 Act as to damages. It was said that the defenders and their predecessors were entitled to litigate, and that as any delay which had taken place was due to honest litigation between the parties, the defenders were not liable in damages for resisting the pursuer's demand, although it had been found that they had done so erroneously, and that they were only liable for the expenses of the litigation, in which they had been found liable to the pursuer. This view was erroneous—*Houldsworth* v. *Brand's Trustees*, January 8, 1876, 3 R. 304, *per* Lord Ormidale. (2) But further, the defenders were liable for special damage under section 48. Section 46 did not apply merely to interference with use during construction, but also to interference at any time subsequent to the completion of the line. The defenders here admitted that compensation was paid at the time when the line was originally formed upon the footing that there was to be a level-crossing for the use of the farm. The defenders consequently could not now maintain that they, having paid compensation for and acquired an absolute right of property in the road at the place in question, could do what they liked with it without incurring any further liability. If the line here had been originally made double, and the traffic had been subsequently so increased in amount and speed as to make the level-crossing useless, that would have been interference with use within the meaning of section 46. It might be that the line might have been doubled under the powers contained in the original Act of 1878 without applying for a new Act, but the line could not have been converted into a through line without the authority of the 1893 Act. The doubling of the line would not in itself have made the level-crossing useless if the line had not at the same time been converted into a through line. The case of *Campbell* v. *Edinburgh & Glasgow Railway Company*, March 7, 1855, 17 D. 613, was not in point here. There the whole road was taken and no right-of-way was left to the original proprietor or his tenants.

Argued for the defenders—(1) The pursuer had no claim under sections 46 and 48 of the Railways Clauses Consolidation (Scotland) Act 1845. These sections did not apply here, because (1) they only applied to physical interference with the road — here there may have been some slight physical interference with the road, but that was not what the pursuer complained of or claimed damages for; (2) they did not apply to interference with a road which was the property of the Railway Company, as was the case here, the railway having bought and paid for the portion of the road which was crossed by the railway—*Campbell* v. *Edinburgh and Glasgow Railway Company*, March 7, 1855, 17 D. 613. (3) there was here no right-of-way within the meaning of section 48; there was here nothing more than a right of passage to fields, which was not a right-of-way within the meaning of that section; (4) there was here no road within the meaning of section 46, a cart track not being one of the kinds of road there enumerated; and (5) these sections only referred to interference during construction. This clearly appeared from the terms of section 49. If the road in question here were one to which the sections applied at all, which was not conceded, the respondents might be prepared to admit that the pursuer would be entitled to any special damage caused by interference with the road in the course of doubling the line, but that was not the nature of his claim. What the pursuer claimed here was damages, not for an interference with the road caused by the construction or the doubling of the railway, but for an interference caused by the use made of the railway after it was completed. No such claim was contemplated by the sections founded on by the pursuer. The company were under no obligation to restrict the use of their line. The pursuer was not entitled to damages because the defenders saw fit to increase the number or speed of their trains. If, owing to their doing so, the pursuer could not use the level-crossing, that was his misfortune. He had a right to cross the rails, but he had only a right to do so at his own risk. There was nothing to prevent his using the level-crossing if he chose. It was still there, and unaltered by anything which the Railway Company had done. The Railway Company had the right to double their line under the Act of 1878, and did not require the 1893 Act to enable them to do so—*Western District Committee of the County Council of Stirling* v. *North British Company*, July 2, 1896, 23 R. 929. Full compensation had been paid for all that was taken by the Railway Company, including the road at the level-crossing, and for all the consequences arising from the taking of what was taken, and no further claim could arise owing to the Railway Company using their railway in a way which was perfectly lawful, although it might be somewhat different from the way in which it had been used at first. (2) The pursuer had no claim under section 60. The remedies for failure to provide accommodation works under that section timeously were indicated in sections 61 to 66, and there was no provision as to damages in any of these sections. Resistance by the Railway Company to the demand for accommodation works was contemplated in sections 61 and 62. If it had been intended that the Railway Company should be liable in damages for delay caused by their litigating about such a demand, there would have been a clause imposing such a liability, just as liability in damages for failure to comply with the provisions of section 46 was provided for by section 48. Section 48 only applied in

the case of failure to comply with section 46. It had no connection with section 60, and could not be read into that section, which was what the pursuer practically proposed to do. The Railway Company were entitled to dispute the pursuer's demand. They were not liable in damages for doing so, but only for the expenses of process in the Sheriff Court. In the case of *Houldsworth, cit.*, the pursuer's claim was for violent profits and for damages for breach of contract, and that case had no bearing upon the present. There was no undue delay here in providing accommodation works. Any loss which the pursuer had suffered was due to his not taking proceedings sooner to compel the Railway Company to comply with his demand. If he had applied sooner, as he might quite well have done, there would have been ample time for the matter in dispute to be settled by the Sheriff, and for the works to be completed before the increased and accelerated service of trains began.

At advising—

LORD JUSTICE-CLERK—I am with the Lord Ordinary in thinking that the 46th and following clauses of the Railways Clauses Act do not apply to the present case. As I read these clauses they are intended to meet the case of the construction of the works interfering with a road, and are intended to make it compulsory on the Railway Company before they proceed to do any work which will interfere with the use of the road to provide an efficient substitute way, which shall be kept open till the works are finished, and when that time arrives shall be taken away, unless it shall turn out that the construction of the works has made restoration of the original way impossible. In this case the construction of the line had been completed for many years, and therefore if I am right in the view I take of these clauses, it is not under them that the pursuer can succeed in a demand for damages because of interference with a road to the use of which he has right. But when the Lord Ordinary, as a consequence of that reading of those clauses, holds that the pursuer is debarred from claiming damages for the injury he complains of in this case, and assoilzies the defenders from the conclusions of the action, I am unable to agree with him, as I think the pursuer may be entitled to compensation on a different ground.

The facts are these. When the line was originally constructed the defenders were required to leave, and did leave, a way across their line for the accommodation of the farm, of which the pursuer is now tenant, to enable access to be obtained from one part of the farm to another, where it had been severed by the construction of the works. It must be assumed that Parliament held such a passage to be necessary for the working of the farm, and sufficient for its reasonable working, according to what was then in contemplation.

Recently, however, the defenders have doubled this line, and brought it into direct communication with the main line. The result has been that the passage which formerly was a sufficient accommodation at that place for the working of the farm has ceased to be so. This is admitted by the defenders. The traffic on the line is now so frequent and so fast that a level-crossing cannot provide the tenant with a reasonably safe and convenient passage for the traffic which he requires to have passed from one side of the railway to the other.

It was accordingly a case in which under a different section of the statute (section 60) the tenant had a right to ask for accommodation works by which the safe and reasonable working of his farm might be ensured. The pursuer complains that the defenders disputed his claim for such works, contested the matter with him before the tribunal appointed by the statute to decide such disputes, and when ordered delayed to proceed to execute the works. Now, it appears to me that if the Railway Company should have given accommodation works when by their actings they rendered an existing work unfit to give the accommodation for which it had been originally provided under compulsion of the Legislature, and if and in so far as they failed to do so, the pursuer is entitled to complain of their failure as a wrong, and to receive compensation for such injury as he can substantiate by evidence.

I am of opinion that he has reasonably and fairly established loss and damage by being deprived of the use of his passage across the line, the company having practically made it impassable, and that he is entitled to reasonable compensation. In this case the loss consisted in the yield of milk from his farm, which is a dairy farm, caused by the necessity of driving his herd of cows a long distance round daily so as to obtain a safe crossing from the one part of the farm to the other on the opposite side of the line. I think he has sufficiently established the fact that such diminution of yield would take place from such a cause.

As regards the amount of the loss, I think it may fairly be taken on the evidence at £140. Upon his whole claim for compensation, I think the claim he makes is reasonable and moderate. Indeed, I think it possible that if his claim had been somewhat greater he might have been able to show ground for allowing it.

I would therefore move your Lordships to recal the interlocutor of the Lord Ordinary, to find the defenders liable in £200 to the pursuer in name of damages, and to find him entitled to expenses.

LORD YOUNG concurred.

LORD TRAYNER—The Lord Ordinary has dealt with this case on the footing that the pursuer's claim is one based on the 46th and 48th sections of the Railway Clauses Act. If that were so, and if the damage or inconvenience for which the pursuer seeks redress was merely occasioned by the use — the extended and increased use— to which the defenders were putting their line after its

completion (as the Lord Ordinary thinks it is) I should be disposed to concur in the decision reclaimed against. It appears to me that no claim of damage would arise against the defender from a use of their railway which the Legislature had authorised. But the case seems to me to be different from that which the Lord Ordinary has described. The pursuer concludes for a sum of money, which in his condescendence (art. 9) he explains he claims not merely on the provisions of the statute but also at common law. And without deciding positively whether the claim is well founded on the statute, I am of opinion that at common law the pursuer is entitled to succeed. The view I take of the case is this — The pursuer in June 1896 presented a petition to the Sheriff craving that the defenders should be ordained to execute and afford certain accommodation works as provided by the 60th section of the Railway Clauses Act. This application the defenders opposed and after a litigation for which the pursuer was not responsible the Sheriff-Substitute in July 1897 granted the prayer of the pursuer's application. The accommodation works which the defenders were thus ordered by a final judgment to afford were not completed until March 1898. The result is that the defenders failed to afford the pursuer the accommodation to which (*ex hypothesi* of the judgment by the Sheriff-Substitute) he was entitled when he presented his application, for a period of about one year and one month. It is for the damage ensuing in the year 1897 out of the defenders' failure to give the accommodation works that the pursuer now seeks decree. In this view of the case, the issue is a very simple one. Were the defenders in default during 1897, and did the pursuer suffer damage thereby? I think their default is clear. It has been decided, as I have said, that the pursuer's demand made in June 1896 was one with which the defenders were bound to comply. They did not fulfil their duty so judicially ascertained until March 1898. The defenders were entitled, it may be admitted, to a reasonable time to execute their works, and they did execute them in about eight months after the date of the final judgment. But if they had executed the works within eight months (assuming that that period was necessary) after the date of the pursuer's application to the Sheriff, the works would have been completed by February 1897, and the damage complained of would not have been incurred. I think the defenders are liable for any damage occasioned by their delay, that is, their default in providing the accommodation works timeously. On the amount of damage there is not much evidence, but there is I think sufficient evidence to support the claim which the pursuer has made.

LORD MONCRIEFF—I am of opinion that the pursuer is entitled to damages. The facts which are stated with great clearness by the Sheriff-Substitute in his interlocutor of 14th July 1897 (in the former proceedings) lead irresistibly to this result, unless there is anything in the Railway Statutes which excludes what appears to be a just claim.

It is a matter of express admission on record that when Yoker farm was bisected by the company, whom the defenders represent, under the powers conferred in their Act of 1878, the claims of the landlord and tenant were settled on the footing that the severed portions of the farm were to be connected by a level-crossing at the place in question for the accommodation of the pursuer's farm. The line proposed to be formed was a single line terminating at Clydebank, and the level-crossing was sufficient to enable the tenant to cross and recross in safety.

The effect of this settlement was the same as if the proprietor of Yoker farm had conveyed the land to the Railway Company under burden of a reserved servitude or right-of-way by the level-crossing, or as if the Railway Company, having bought the land out and out, had thereafter granted such a right to the proprietor of the farm.

The proprietor had thus a separate, and what was intended to be, a permanent right over the road, although the *solum* belonged to the company, and they also had a concurrent right to use the surface for the purposes of their traffic

The next point to be noted is that in 1893 the Railway Company obtained an Act of Parliament which empowered them to construct a double line of railway on the Yoker line; and by extending their railway to Dalmuir, to run a large through traffic including express trains by the Yoker line to Helensburgh. The result of this was that the level-crossing became useless for the purposes of the farm, because the interval between the trains came to be so short that cattle could not be driven across it with safety.

The proprietor and tenant of Yoker farm therefore called upon the Railway Company to supply them with a substitute road. This demand was strenuously resisted by the Railway Company, and in the end the proprietor and tenant were obliged to apply to the Sheriff for an order upon the Railway Company to provide a suitable accommodation bridge and approaches in lieu of the level-crossing. This application was opposed by the Railway Company, and it was only after a year's litigation that the Sheriff ordained the defenders to provide an accommodation bridge as prayed for. That bridge has now been formed, but before the present pursuer got the benefit of it he had been deprived of the use of the level-crossing for at least ten months, in consequence of which he was admittedly put to inconvenience and suffered loss.

It seems to me that the broad question is this—Was the Railway Company under a statutory obligation to supply a substitute road before using their line so as to make the level-crossing impassible and dangerous? If it was not, the pursuer cannot recover damages, because the use made of the line is authorised by the company's Statutes. But if the company were in breach of a statutory obligation in failing

to supply a substitute road, the pursuer is entitled to damages; and it is comparatively unimportant which group of sections in the Railway Clauses Act 1845 is held to apply to the case.

I think it is clear that the company were under a statutory obligation to provide additional accommodation at the place in question. Indeed, it may be said that this is *res judicata*, the Sheriff's judgment being final. That being so, the company were guilty of a wrong in not timeously performing their statutory duty; and for that wrong they are liable in damages at common law if the statute does not expressly provide for such a claim. This is very clearly stated in the Lord Chancellor's opinion in the case of the *Caledonian Railway Company* v. *Colt*, 3 Macq. 808 at pp. 838-839. His Lordship there says—"Upon the first question I have not been able to entertain any doubt. The Company were under statutable obligation to restore the branch railway within a given period. They neglected to do so, whereby the pursuer was clearly damnified. *Primâ facie*, therefore, he has a right of action against them. One answer attempted in the Court below, and countenanced to a certain degree by the Lord Ordinary, is that the pursuer was confined for a remedy to the statutory tribunal which the Legislature has provided where losses are sustained in the formation of railways. But it is well settled that this statutory tribunal is only established to give compensation for losses sustained in consequence of what the Railway Company may do lawfully under the powers which the Legislature has conferred upon them, and that for anything done in excess of these powers, or contrary to what the Legislature in conferring these powers has commanded, the proper remedy is a common law action in the Common Law Courts. The company were guilty of a wrong in disobeying the Act of Parliament which requires the restoration of the pursuers branch railway, and for this wrong they are liable to an action *ex delicto*. At your Lordships bar the answer to the action chiefly relied upon was that the pursuer is confined to the penalties given by the 50th section of the statute. But this seems to me to be only a cumulative remedy given with a view to hasten the performance of the duty which the Legislature has imposed.

If this view is sound, it is perhaps not necessary to examine in detail the subtle argument which was presented to us by Mr Ure on behalf of the company.

He maintained to us that the 46th and following sections of the Railway Clauses Act 1845 only apply to temporary interference with roads in the course of the construction of the line. I think it can be shown that these sections apply to permanent as well as temporary damage, and it has been so held under the corresponding sections of the English Railway Clauses Act of 1845 (section 53, *et seq.*) I do not understand that the Lord Ordinary takes a different view on this point, but he has decided against the pursuer, on the ground that the damage complained of was not the result of any physical interference with the level-crossing, but was caused by the use made by the company of the double line after it was formed. In point of fact there was physical interference with the level-crossing, because the second line of rails, without which the obstruction could not have occurred, was laid across it. But passing from this, I think the Lord Ordinary has taken a somewhat too narrow view of the statute. It may be that the kind of interference chiefly struck at in these sections is physical interference, but a road may be interfered with as effectually by the use that is made of it as by actual interference with its surface. If, for instance, the company had used the line at the level-crossing as a siding, or placed locked gates on it, I am disposed to think that this would have been a use of the road which in the sense of section 46 would render it "impassable for or dangerous to persons entitled to the use thereof."

No doubt the use made of the line by the company is authorised by their statute, but the provisions of section 46 expressly apply to interference with a road "in the exercise of the powers by this or the special Act granted."

It is said that section 48 of the Railway Clauses Act 1845, which provides for the recovery of special damages by any party entitled to "a right-of-way" over a road interfered with by the company applies only to public rights-of-way. I am not satisfied of this, and the opposite has been decided under the corresponding section (section 55) of the English statute. But even supposing that this section only makes special provision for members of the public recovering compensation on proof of special damage, the owner of a private road has higher or at least as high rights, and his common law right to damages is not taken away by the statute.

I have dwelt so far upon those sections, because it strikes me that they apply more appropriately to the case, the damage having been caused through interference with an existing private road. But if I am wrong in this—if they do not apply—the company were still bound to provide accommodation works under the 60th section. They were bound to do so "forthwith;" that was their statutory duty; they failed to do so, and wasted ten months in litigation, and in my opinion they are liable in damages at common law to the amount claimed.

The Court pronounced this interlocutor—

"The Lords having heard counsel for the parties on the reclaiming-note for the pursuer against the interlocutor of Lord Kyllachy dated 29th December 1899, Recal the said interlocutor reclaimed against: Ordain the defenders to make payment to the pursuer of the sum of £200 sterling, with interest thereon at the rate of £5 per centum per annum from the date of citation till payment, and decern: Find the pursuer entitled to expenses," &c.

Counsel for the Pursuer—Solicitor-General (Dickson, Q.C.)—G. Watt. Agent—Marcus J. Brown, S.S.C.

Counsel for the Defenders—Ure, Q.C.—Grierson. Agent—James Watson, S.S.C.

Saturday, July 7.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

CALLANDER *v.* SMITH.

Landlord and Tenant—Outgoing—Compensation for Improvements—Market Garden—Statute—Construction—Effect—Retrospective Effect—Presumption against Retrospective Effect—Market Gardeners Compensation (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 22), *sec.* 4.

Section 4 of the Market Gardeners Compensation (Scotland) Act 1897, does not entitle a tenant under a lease current at the commencement of the Act, to claim compensation in respect of market garden improvements executed prior to the commencement of the Act.

Landlord and Tenant—Outgoing—Compensation for Improvements—Market Garden—Market Gardeners Compensation (Scotland) Act 1897 (60 *and* 61 *Vict. cap.* 22), *sec.* 4—"*Has then executed thereon.*"

In the Market Gardeners Compensation Act 1897, sec. 4, the words "has then executed thereon . . . . improvements in respect of which a right of compensation or removal is given to a tenant by this Act," mean "has executed" such improvements "prior to the commencement of the Act."

Landlord and Tenant—Outgoing—Compensation for Improvements—Market Garden—Market Gardeners Compensation (Scotland) Act 1997 (60 *and* 61 *Vict. c.* 22)—"*Holding*"—"*Part of a Holding*"—*Agricultural Farm Partly Used as Market Garden.*

Held per Lord Kyllachy (Ordinary), and acquiesced in, that in the construction of the Market Gardeners Compensation (Scotland) Act 1897, the term "holding" includes "part of a holding," and that consequently section 4 of the Act applied where part of a farm, held under an ordinary agricultural lease, had been cultivated as a market garden prior to the commencement of the Act.

By section 1 of the Agricultural Holdings (Scotland) Act 1883 (46 and 47 Vict. cap. 62), it is provided that a tenant who has made on his holding any improvements specified in the schedule thereto shall be entitled on quitting his holding to obtain from the landlord as compensation such sum as fairly represents the value of the improvements to the incoming tenant. Part III of the schedule specifies certain improvements to which the consent of the landlord is not required in order to entitle the tenant to compensation.

By section 42 of the Act "holding" is defined as "any piece of land held by a tenant."

By section 3 of the Market Gardeners Compensation (Scotland) Act 1897 (60 and 61 Vict. cap. 22), which amends and extends the provisions of the Act of 1883 as to improvements executed in or upon market gardens, it is provided that where after the commencement of the Act (1st January 1898), it is agreed in writing that a holding shall be let or treated as a market garden, the following provision, *inter alia*, shall have effect:—"(3) The following improvements shall, as far as regards such holding, be deemed to be comprised in Part III of the said schedule—(i) the planting of standard or other fruit trees permanently set out; (ii) planting of fruit bushes permanently set out; (iii) planting of strawberry plants; (iv) planting of rhubarb and other vegetable crops which continue productive for two or more years; (v) erection or enlargement of buildings for the purpose of the trade or business of a market gardener."

Section 4 of the said Act enacts as follows—"Where under a lease current at the commencement of this Act a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this Act, then the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden."

By section 6 of the said Act it is provided that "for the purposes of the principal Act and of this Act the expression 'market garden' shall mean a holding or that part of a holding which is cultivated wholly or mainly for the purpose of the trade or business of market gardening."

By lease dated 19th April and 2nd May 1881 Henry Callendar of Prestonhall and Westertown let to David Whytt Ewart Smith the farm of North Elphinstone, which extends to 359 acres or thereby, for nineteen years from Martinmas 1880.

By the lease Mr Smith bound himself to cultivate and labour the lands let according to the rules of good husbandry, and not to run out the same by irregular or over-cropping, and in particular never to have more than one-half of the lands in white crop at any time during the running of the lease, and to have the other half always in grass, fallow, or green crop, and never less than one-sixth part thereof in grass, and to leave the lands so at his removal. The lease contained a clause binding the tenant to pay an additional rent of £5 per acre for each acre cropped contrary to its terms.

At the end of 1898 Mr Smith gave notice