[*March* 22, 1842.]

The EDINBURGH and DALKEITH RAILWAY COMPANY, and their CLERK, *Appellants.*

JOHN WAUCHOPE, Esq., of Edmonstone, *Respondent.*

Statute. — Construction of.

Id. — The efficacy of a private Act of Parliament is no way dependent on the circumstance of previous notice of the intention to apply for it having been given to the parties whose rights are affected by it.

Acquiescence. — Dealings between parties held not to alter their rights between each other.

IN 1826, the appellants were incorporated by the act 7th Geo. IV., cap. 98, for the purpose of forming a railway between the city of Edinburgh and the village of Dalkeith. The appellants, in obtaining this act, were opposed by the respondent, through whose grounds the projected railway was intended to run. This opposition was withdrawn upon a compromise between the parties, which will appear from some of the sections of the act about to be detailed. The 22d section enacted, "that in order "to compensate the said John Wauchope of Edmonstone, Esq., "for carrying the said railway through his property, the said "company shall, and they are hereby required, (in addition to "the value of the ground to be occupied by the said railway, to "be ascertained and paid in manner hereinafter mentioned,) to "pay to the said John Wauchope, within six months after the "passing of this act, the sum of L.670; and also to pay to the "said John Wauchope, and his heirs and successors in the lands "and estate of Edmonstone, so long as the said railway shall

" continue to be used through the said lands, grounds, or other " premises of the said John Wauchope, the sum of one half- " penny per ton, upon all goods and articles upon which a " tonnage-duty is chargeable or charged in virtue of this act, " which shall pass along any part of the said railway, situated " within the said lands, grounds, and other premises of the said " John Wauchope, excepting the coals and other minerals, corn " and other articles, the produce of the said lands and estate; " and manure, lime, or other articles belonging to, or for the " use of, the said John Wauchope, or his heirs and successors, " in the said lands and estate, or of their tenants or occupiers " residing on the same; and which sum of one halfpenny per " ton, shall be payable by the said company to the said John " Wauchope, and his said heirs and successors, half-yearly, at " the terms of Whitsunday and Martinmas, beginning the first " payment thereof at the first term of Whitsunday or Martin- " mas which shall happen after the collection of rates and duties " on the said railway shall have begun to be made."

" Sect. 85. And, in consideration of the great charge and " expense which the company of proprietors for executing this " act must incur and sustain in making and maintaining the said " railway, and branches thereof, and other works hereby autho- " rized to be made and maintained, be it farther enacted, That " it shall and may be lawful for the said company of proprietors, " from time to time, and at all times hereafter, to ask, demand, " take, recover, and receive, to and for the use and benefit of " the said company of proprietors, for the tonnage and convey- " ance of all minerals, goods, wares, merchandise, and other " things which shall be carried or conveyed upon the said rail- " way and branches, or upon any part thereof, the rates and " duties hereinafter mentioned, that is to say:

" For all stone for the repairs of any turnpike-roads or bridges, " except the turnpike-roads and bridges within the Dalkeith

" district of roads, of the county of Edinburgh, or other public " streets, roads, or highways, such sum as the said company of " proprietors shall, from time to time, direct and appoint, not " exceeding the sum of fourpence per ton per mile :

" For all coal, coke, culm, and for all stone, (excepting stone " for the building or repair of bridges on the turnpike-roads " within the Dalkeith district,) cinders, chalk, marl, sand, lime " clay, ashes, peat, limestone, pitching and paving stone, (not " being for the repair of any turnpike-roads, or other public " streets, roads, or highways,) ironstone or other ore, and other " minerals, and bricks, tiles, slates, and all gross and unmanufac- " tured articles and building materials, and for all sorts of " manure, and all sorts of grain, flour, meal, potatoes, hay, and " straw, which shall be borne or carried along the said railway, " such sum or sums of money respectively as the said company " of proprietors shall, from time to time, direct and appoint to " be taken for the tonnage of any or either of the said kind of " goods, not exceeding fourpence per ton per mile :

" For every carriage conveying passengers, or goods or parcels, " not exceeding five hundredweight, such sum and sums of " money respectively as the said company of proprietors shall, " from time to time, direct and appoint to be taken, not exceed- " ing sixpence per ton per mile :

" And for all other goods, commodities, wares, and merchan- " dise whatsoever, carried on the said railway, such sum or sums " as the said company of proprietors shall, from time to time, " direct or appoint, not exceeding sixpence per ton per mile :

" For all goods, commodities, wares, and merchandises, articles, " matters, and things whatsoever which shall pass the railway " bridge to be erected over the river North Esk, at Eskbank, in " addition to all other rates and duties, such sum as the said " company of proprietors shall, from time to time, direct and " appoint, not exceeding the sum of fourpence per ton, until the

" sums raised at such railway bridge shall exceed the original " cost of such bridge, and of the annual expense of maintaining " and repairing the same, and of interest at five pounds per " centum per annum upon such outlay; after which the said " company of proprietors shall be entitled only to levy at such " railway bridge such a sum as shall be necessary for the annual " maintenance and repair of such bridge:

" For all goods, commodities, wares, and merchandise, articles, " matters, and things whatsoever which shall pass the railway " bridge to be erected at or near Cowpits, over the river Esk, in " addition to all other rates and duties, such sum as the said " company of proprietors shall, from time to time, direct and " appoint, not exceeding the sum of fourpence per ton, until the " sums raised at such railway bridge shall exceed the original " cost of such bridge, and of the annual expense of maintaining " and repairing the same, and of interest at five pounds per " centum per annum upon such outlay; after which the said " company of proprietors shall be entitled only to levy at such " railway bridge such a sum as shall be necessary for the annual " maintenance and repair of such bridge:

" For all the articles, matters, and things which shall pass the " inclined planes upon the said railway by means of a stationary " steam-engine, or other machinery, in addition to all other " rates and duties, such sum, as the said company of proprietors " shall, from time to time, direct and appoint, not exceeding the " sum of one shilling per ton, for each such inclined plane, pro- " vided that not more than two inclined planes are erected and " used upon the said railways betwixt the city of Edinburgh and " the village of Hunter's Hall."

" Sect. 99. And be it farther enacted, That if any difference " shall arise between any collector of the said rates and the " owner or person having the charge of any waggon or other " carriage, or the owner of any goods or other things, it shall be

" lawful for any such collector to stop and detain any such " waggon or other carriage, and to weigh, measure, or gauge " such waggon or other carriage, and all such goods or other " things as shall be therein contained respectively; and in case " the same shall, upon such weighing, measuring, or gauging, " appear to be of greater weight or quantity than what is set " forth and contained in the account given thereof as aforesaid, " then the owner or person giving in such account shall pay the " costs and charges of such weighing, measuring, and gauging; " all which said costs and charges, upon refusal of payment " thereof upon demand, shall and may be recovered and levied " by such ways and means, and in such manner as the said rates " are hereby appointed to be recovered and levied; but if such " goods or other things shall appear to be of the same or less " weight or quantity than the same shall, by such account, " appear to be of, then the said collector shall pay the costs and " charges of such weighing, measuring, and gauging, and also to " pay to such owner or person, or to the owner or owners of " such goods or other things, such damages as shall appear to " have arisen from such detention; and, in default of immediate " payment thereof by the collector, the same shall be recovered " from the said company of proprietors by distress and sale of " the goods and effects of the said company or of their col- " lector."

The powers of the appellants were enlarged by the 4th and 5th Will. IV. cap. 98, which recited the 7th and 10th Geo. IV., and contained the following among other sections:—" 1. That " all the powers, authorities, provisoes, regulations, directions, " privileges, penalties, forfeitures, clauses, restrictions, matters, " and things whatsoever contained in the said recited acts, ex- " cept in so far as the same are altered, varied, or repealed, shall " extend, and be construed to extend to, and operate and be in " force for carrying this act into effect, as fully and effectually,

" to all intents and purposes, as if the same and every part " thereof were repeated and re-enacted in this act, and were " made part thereof; and the said recited acts, and this act, " shall, as to all matters and things whatsoever, except as afore- " said, be construed as one act."

" Sect. 16. And whereas by the said first-recited act, 7th " Geo. IV., certain way-leaves were granted to Andrew " Wauchope of Niddrie Mareschall, and John Wauchope of " Edmonstone, and their heirs and successors in their respective " estates, and their tenants or occupiers residing on the same, " and to Sir Robert Keith Dick of Prestonfield, Baronet, and " his heirs and successors in the estate of Prestonfield; Be it " farther enacted, That it shall and may be lawful for the said " company of proprietors, or their committee of management, if " they shall see fit, to uplift and collect the said way-leaves, or " any of them, separately from the rates and duties levied at the " time upon the said main line of railway or branches thereof, " provided that such rates so levied, and such way-leaves to- " gether, shall not exceed the rates and duties authorized to be " levied by the said two recited acts, and this act."

" Sect. 29. And be it farther enacted, That the rates and " duties by the said recited acts granted for, and in respect of, " carriages conveying passengers shall be, and the same are " hereby repealed."

" Sect. 30. And be it farther enacted, That it shall and may " be lawful to and for the said company of proprietors, in re- " gard to the main line and branches thereof, and to and for the " said proprietors of the Leith Branch Railway, in regard to " such branch and the extension thereof, to demand, receive, and " recover, to and for the use and benefit of the said company of " proprietors, and proprietors of the said Leith Branch Railway " respectively, for, and in respect of passengers, beasts, cattle, " and animals conveyed in carriages upon the said railway and

" branches, and for, or in respect of, the several matters and " things herein after mentioned, any tolls, rates, or fares, not " exceeding the following, (that is to say :)

" For every person conveyed in or upon any such carriage, " any sum not exceeding threepence per mile :

" For every person conveyed in or upon any such carriage, " for ascending or descending the Edinburgh inclined plane, an " additional sum not exceeding threepence :

" For every horse, mule, ass, or other beast of draught or " burden ; and for every ox, cow, bull, or neat cattle conveyed " in or upon any such carriage, any sum not exceeding sixpence " per mile ;

" For every calf or pig, sheep, lamb, or other small animal " conveyed in or upon any such carriages, any sum not exceed- " ing threepence per mile :

" For every carriage, of whatever description, not being a " carriage adapted and used for travelling on a railway, and not " weighing more than one ton, carried or conveyed on a truck " or platform, any sum not exceeding one shilling per mile :

" For the use of every machine, for the loading or unloading " of ships or vessels, any sum not exceeding twopence per ton.

" Sect. 31. Providing always, and be it farther enacted, That " in all cases where any passengers, cattle or animals, shall be " conveyed on the said railway or branches for a less distance " than two miles, the said company of proprietors, or proprietors " respectively, are hereby empowered to demand and receive the " afore-mentioned tolls, rates, or fares, as the case may be, for " two miles, how short soever such distance may be."

" Sect. 33. And be it farther enacted, That it shall be lawful " to and for the said company of proprietors, in regard to the " said main line and branches thereof, and to and for the said " proprietors of the said Leith Branch Railway, in regard to " such branch and the extension thereof, and they are respec-

" tively hereby authorized to provide and establish carriages,
" and to convey upon the said railway and branches all such
" passengers, cattle, and other animals, goods, wares, and mer-
" chandise, articles, matters and things as shall be offered to
" them for that purpose, and to make such reasonable charges
" for such conveyance as they may, from time to time, deter-
" mine upon, in addition to the several rates, tolls, or fares by
" the said recited act, and this act authorized to be taken."

" Sect. 37. And be it farther enacted, That it shall and may
" be lawful for the officers or collectors appointed by the said
" company of proprietors, and the said proprietors of the Leith
" Branch Railway within their respective limits, to weigh all
" waggons and carriages passing on the said railways and
" branches thereof, as often as may to them, the said officers
" or collectors, appear necessary for determining the weight of
" goods carried in such waggons or carriages; and no charge
" on account of delay or loss of time shall be payable to the
" owner of such waggons or carriages on account of such weigh-
" ing; and the person or persons in charge of all waggons and
" carriages shall place them upon any of the common weighing
" machines, and other machines of the branch proprietors, and
" assist in the weighing of the same when required to do so by
" any of the company's or proprietors' officers, under a penalty
" of forty shillings, to be paid by the party offending for each
" offence."

The railway came into use in October, 1831, and the first payment to the respondent, in respect of his right of compensation under the statute, was made at Martinmas, 1832, upon a letter from the manager for the appellants, to the agent of the respondent, saying, " I have to intimate to you, that the number
" of tons of goods which have passed through any part of the
" Edmonstone estate, chargeable with the Edmonstone way-
" leave, have, during the six months ending yesterday, been

" 12,981, which, at one halfpenny per ton, give L.27, 0s.
" 10½d.

Again, on the 16th May, 1833, the manager wrote to the agent of the respondent: — " The railway tonnage conveyed " through the Edmonstone estate, during the half year previous " to the 15th inst., has been 26,643, giving, at one halfpenny " per ton, L.55, 10s. 1½d." After deducting a sum due on another account, the letter continued, " After you have satisfied " yourself of the correctness of the above balance, pray let me " know, and I will send it." On 20th May, 1833, the agent gave a receipt for the balance, as the " balance of tonnage for " the Edinburgh Railway to John Wauchope, Esq."

On 11th November, 1833, the manager wrote the agent, " I " have to intimate to you, that the number of tons of all articles " carried along the Edinburgh and Dalkeith Railway, through " the property of Mr Wauchope, during the half year ending " with last Saturday, has been 25,874, giving, at one halfpenny, " L.53, 18s. 1d.;" and, after making certain deductions, the letter continued, " which balance I shall be ready to pay when " you have satisfied yourself of its accuracy." On the 16th November, 1833, the agent gave a receipt for " the balance of " the amount of tonnage due to J. Wauchope, Esq., for railway " leave through his estate."

On the 16th May, 1834, the manager wrote the agent, " I " have to intimate to you, that the tonnage conveyed along the " railway through the Edmonstone estate amounts to," &c. And on the 31st May the agent gave a receipt for the balance of the amount stated, as " the balance of the tonnage dues due by the " said company to J. Wauchope."

On the 12th November, 1834, the manager wrote the agent, " I have to intimate to you, that the way-leave due by the rail- " way company to Mr Wauchope, for the half year ending this " term, is, on 32,136 tons at one halfpenny, L.66, 19s." On

15th November the agent gave a receipt for the balance of this sum, as "the balance due to J. Wauchope for way-leave."

Similar settlements to those detailed were continued by the parties, down to Martinmas, 1835, when the respondent made a demand to be paid way-leave on the tonnage of carriages conveying passengers along the railway, which was refused by the appellants. The respondent, in consequence, brought an action against the appellants, setting forth the 20th section of 7th Geo. IV. 98, and that part of the 85th section which related to the rate leviable by the appellants in respect of carriages conveying passengers, and concluding to have it found, that the appellants were bound to pay to him a halfpenny a ton on all carriages conveying passengers, which had passed along any part of the railway situated within his lands, since its completion, and that they ought to give an account of the tonnage of such carriages, and to pay what should be due in respect thereof, or otherwise, that they should be decreed to pay to him L.500, as the amount of this tonnage up to Martinmas, 1835.

A record was made up on the summons, defences, condescendence and answers, in which the pleas stated for the appellants were, 1st. That the respondent's way-leave was, by the statute, limited to a rate on "goods and articles," and could not be construed to include a duty in respect of the conveyance of passengers. 2d. That if the construction of the statute in this respect were doubtful, the understanding of the parties, as to its import, was established by the mode of accounting which had been adopted, and had been homologated by the respondent. 3d. That as the powers contained in 7th Geo. IV., in regard to dues chargeable for the conveyance of passengers, were repealed, and the dues were, at all events, not levied by the amount of tonnage, the respondent's claim could not be made effectual. 4th. That the claim was barred as to any arrears by the discharges granted. 5th. That they were not bound to keep accounts to ascertain the

amount of way-leave, but this the respondent must do at his own expense.

The pleas stated for the respondent were, 1st. That by 7th Geo. IV. the appellants were authorized to levy a rate of tonnage on all carriages conveying passengers, and he was entitled to a halfpenny per ton on the amount of this tonnage. 2d. That he had never abandoned his right in any way. 3d. That the 4th and 5th Will. IV. was ineffectual to deprive him of a vested right, seeing that no notice was given to him of the intention to apply for such an act.

On the 16th June, 1837, the Lord Ordinary (Cockburn) pronounced the following interlocutor, and added the subjoined note:—"The Lord Ordinary having heard parties, and con-
"sidered the process, repels the defences, and decerns in terms
"of the two first conclusions of the libel, reserving consideration
"of the third or alternative conclusion, *hoc statu*, and until it
"be seen whether the defenders furnish the account demanded
"under the second conclusion: Finds the defenders liable in
"expenses; appoints an account thereof to be given in, and,
"when lodged, remits the same to the auditor to tax and to
"report."

"*Note.*—The pursuer only gave, or was compelled to give, way-
"leave to the defenders, on this condition, as enacted in the statute
"originally establishing the company, (7th Geo. IV. cap. 98, sec. 20,)
"namely, that he was to receive 'one halfpenny per ton upon all
"'goods and articles upon which a tonnage-duty is chargeable, or
"'charged, in virtue of this act, which shall pass along any part of
"'the railway situated within the lands of the said John Wauchope.'
"Now, the 85th section of this statute gives the defenders power to
"charge a tonnage-duty on 'every carriage conveying passengers.'
"It does not describe these carriages by applying to them the pre-
"cise terms 'goods and articles,' which occur in the 20th section,
"but uses the words, 'for the tonnage and conveyance of all

" minerals, goods, wares, merchandise, and other things, ' which shall " ' be carried or conveyed upon the said railway.' But this (almost " imperceptible) difference is immaterial; because, besides using " these general words, the 85th section imposes a tonnage-duty " expressly on carriages carrying passengers; and it does so on the " declaration that such carriages come within the description of " goods, wares, merchandise, ' and other things' conveyed along the " railway. If a carriage carrying passengers be a thing conveyed " along the railway, it is difficult to see how it can be held not to be " one of the ' articles upon which a tonnage-duty is chargeable, or " ' charged, in virtue of this act.'

" If, therefore, the matter had stood solely on this first statute, " it would be clear that the halfpenny for way-leave was due on " this carriage. Nor would the Lord Ordinary consider the past " periodical settlements, by which the defenders say that accounts " have been adjusted without including this, as any abandonment by " the pursuer, or as any evidence that both parties hold it not to be " due. The substance of what was done was merely that the " defenders, having presented statements to the pursuer of what they " thought was due, he, relying on their accuracy, took and gave a " discharge for what was offered. These statements never disclose " what the tonnage is upon, but merely say that they include the " whole tonnage conveyed along the railway; and the way-leave, thus " said by the defenders to be due, is discharged. But if their " accounts did not contain all that they ought, the defenders cannot " take the benefit of their own errors of omission.

" But they say that the last statute, 4th and 5th Will. IV. cap. 71, " sec. 29, repeals the tonnage-duties on the carriages, and substitutes " direct fares from the passengers; from which it is inferred, that the " tonnage-duty being abolished, the carriages cease to be articles on " which, under the first act, the halfpenny for way-leave was due.

" The Lord Ordinary is by no means satisfied that due parlia- " mentary notice was given to the pursuer previous to the introduc- " tion of this last act. Undoubtedly, no notice was given to him " personally, nor did the public notices announce any intention to " take away his existing rights. If, as the Lord Ordinary is disposed

" to think, these defects imply a failure to intimate the real design " in view, he would be strongly inclined to hold, in conformity with " the principles of Donald, 27th November, 1832, that rights previously established by statute could not be taken away by a private " act, of which due notice was not given to the party meant to be " injured. But it is not necessary to decide on this ground, because " the two statutes are not inconsistent. For, in the first place, the " first act lays the halfpenny for way-leave on all goods and articles " upon which a tonnage-duty is chargeable, 'in virtue of this act.' " Carriages for passengers was one of these; and the pursuer's interest was fixed by reference to the tonnage-duties existing at the " time he made his bargain. The company might afterwards get " their arrangements with the public changed, as, for example, by " giving up the tonnage-duty on several articles, or by conveying all " goods gratis; but this did not necessarily impair the rights of the " defender, who arranged in reference to the duties exigible at the " time he dealt. In the second place, his rights cannot be taken " away by implication. Now, the last act repeals the rates and " duties 'granted for, and in respect of, carriages conveying passengers,' that is, the rates exigible by the defenders from the " public; but it does not repeal the way-leave payable by the " defenders to the pursuer. These two things are quite different; " and the fact that no notice was given of any intention to subvert " the arrangement between the company and the pursuer, implies " that no such design existed, and that the only object was to change " the arrangement between the company and the public.

" If the debt be due under the first conclusion, the account called " for under the second must plainly be furnished by the defenders. " They were only entitled to pass the pursuer's lands on the condition that they were to pay him a halfpenny a ton for the way-" leave. The obligation to pay this implies the obligation to keep an " account of the tonnage. It may be difficult or impossible to furnish " such an account now, but this cannot affect the declaration of the " rule in the first instance, though it may ultimately lead to the " necessity of doing something under the third or alternative con-" clusion."

The appellants reclaimed against the foregoing interlocutor, but on the 14th December, 1837, the Court "adhered to the inter- "locutor reclaimed against."

Minutes and answers were then given in for the parties, and allowed to be seen and revised, but on 24th January, 1839, the Lord Ordinary, of consent, "recalled the interlocutors allowing "minute and answers to be seen, answered, and revised, and "appointed these papers to be withdrawn from the process; and "before answer ordained the defenders (appellants) to lodge an "account, in terms of the second conclusion of the libel."

Accordingly, the appellants gave in an account, stating the number of carriages which had been employed in the conveyance of passengers, the weight of each carriage, and the amount of rate payable to the respondent in respect of the aggregate amount of tonnage. The respondent objected to the account, that it did not include the weight of the passengers, as well as of the carriages which conveyed them.

On the 2d March, 1839, the Lord Ordinary pronounced the following interlocutor, adding the subjoined note:—"The Lord "Ordinary having heard the counsel for the parties, and con- "sidered the account lodged by the defenders, and the objections "thereto, finds, That in ascertaining what is due to the pursuer "for his way-leave on carriages conveying passengers, the ton- "nage-duty is to be taken as laid on the carriages, and not on "the passengers also; therefore, repels the objection to the said "account, and approves thereof, and decerns: Finds the pursuer "liable in this part of the discussion; appoints an account "thereof to be given in; and, when lodged, remits to the auditor "to tax the same, and to report."

"*Note.*— All that the former judgment did was to decide, that in "the words of the statute, the defenders were bound to pay for

" ' carriages conveying passengers,' but whether the duty was to be " laid on the carriages laden with the passengers, or empty, was not " decided, and in so far as the Lord Ordinary is concerned, was not " meant to be decided.

" This question has now arisen.

" The Lord Ordinary leaves the defenders' second statute (4th " and 5th William IV. chap. 7) entirely out of view, because the " pursuer's rights were fixed by the first act (7th Geo. IV. chap. 98,) " and were not taken away by the subsequent one. Now, the 85th " section of the first statute specifies all the articles or things on " which a tonnage-duty is chargeable in detail. It is always laid " upon the articles, and never on the carriages, with this single " exception, that when the case of passengers, and light goods or " parcels not exceeding five hundred weight, comes to be disposed " of, the phraseology is changed, and instead of being laid on these " contents of the carriages, it is laid on the carriages themselves, " that is, on the 'carriages conveying passengers," &c. The very " words do not admit of the pursuer's construction, which includes " the passengers as subjects of weight along with the carriage. The " carriage is the thing that the duty is laid on, and this construction " is fortified by the obvious difficulties and inconveniences of ascer- " taining the additional weight of passengers."

The respondent reclaimed against this interlocutor, and on the 4th July, 1839, the Court pronounced the following interlocutor: — " The Lords having resumed consideration of this " note and heard counsel, alter the interlocutor reclaimed " against, sustain the pursuer's objections to the account, No. " 43 of process, lodged by the defenders, and remit to the Lord " Ordinary to proceed accordingly, find the defenders liable in " the expenses of the discussion relative to the said account, and " remit to the auditor to tax the account, and to report."

The appellants then gave in the following account: —

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	T.	cwt.	qr.	lb.
The average weight of the carriages used in conveying passengers, as stated in the account previously lodged, is -	1	10	0	12⅓
Allowing twenty passengers on an average to each carriage, and assuming the average weight of each passenger to be 1 cwt. 2 qr. 9⅓lb., (or fifteen passengers to a ton,) the average weight of passengers in each carriage is - - -	1	6	2	18⅔
Gross weight of each carriage and passengers,	2	16	3	3

The number of passengers conveyed, as stated in the account previously lodged, is - 925,550

And at the rate of twenty passengers to each carriage, the number of laden carriages is 46,277½

Hence, 46,277½ carriages, at 2 t. 16 cwt. 3 qr. 3 lb., give - - - 132,574 Tons

At one halfpenny per ton = L.276, 3s. 11d.

On the 18th March, 1840, the Lord Ordinary pronounced the following interlocutor: — "The Lord Ordinary, of consent "of the pursuer, approves of the amended account, No. 51 of "process, decerns the defenders to make payment to the pur- "suer of the sum of L.276, 3s. 11d, as the amount of tonnage "on carriages conveying passengers which have passed along "the railway through the pursuer's lands, from the completion "of the said railway till the end of the year 1837, conform to "said amended account; and having heard parties' procurators "on the point of expenses, finds the defenders liable to the pur- "suer in the expenses incurred by him in this case, subsequent "to the decision of the Court, of date the 4th of July, 1839, "and decerns; appoints an account of said expenses to be

" given in, and remits the same to the auditor to tax and " report."

The appellants reclaimed against this interlocutor, but on the 21st May, 1840, the Court, " of consent, refused the desire of " the reclaiming note, and adhered to the interlocutor reclaimed " against."

The appeal was taken against the interlocutors of 16th June, and 14th December, 1837, 29th June, 1838, 4th July, 1839, 18th March, and 21st May, 1840. In the record below, it was admitted on both sides, that the conveyance of passengers was very little relied upon as a source of emolument to the appellants in the formation of the railway. But in the printed cases on the appeal, it was stated, that after the appellants had failed in inducing third parties to use the railway for the conveyance of passengers, they took this upon themselves, charging the passengers so much per head, even prior to the 4th and 5th W. IV. by which act they first obtained power to make this charge.

The Solicitor-General and Mr Wilmore for appellants. — I. The 85th section of the 7th George IV. gave the appellants power to levy a rate on carriages conveying passengers, at so much per ton per mile, but it did not give them any power to levy a rate in respect of the passengers themselves; the levying of a rate in that respect was not enjoyed by the appellants until the 4th and 5th W. IV. was passed. But this act, in its 16th section, expressly repealed the rates leviable under 7 G. IV. The respondent says he cannot be affected by the 4th and 5th W. IV. because he had no notice of the intention to apply for it.

[*Lord Brougham.* — That may be a good ground for repealing the act.

Lord Campbell. — It is not the first time that that doctrine

has been broached, what countenance it has received is another matter.

Mr Attorney-General for respondents. — My Lords, I do not mean to argue that point.

Lord Brougham. — That 's a pity.]

Mr Solicitor. -- Perhaps it had better be fully brought under your Lordships' notice, and be disposed of.

[*Mr Attorney.* — I certainly will not argue the point one way or another.]

Under the 7th Geo. IV. the appellants had no power to make a charge for passengers, by weight, or otherwise; all they could do was, under sect 85, to charge any body who might use the railway for the conveyance of passengers 6d per ton per mile on the carriages employed, but no tonnage was ever levied under this power while it remained in force; and by the 16th section of 4th and 5th W. IV. the power was taken away. Previous, therefore, to this last statute no tonnage was ever charged by the company in respect of passengers, and subsequent to that statute their charge has been not a tonnage-duty, but so much per head. The right of the respondent, however, under the 20th section of 7 Geo. IV., is to a rate upon "all goods or articles upon which "a tonnage-duty is chargeable" by the appellants. But no tonnage was leviable by the appellants under section 85, either upon passengers or small parcels; the 6d per ton allowed by that section applies to the carriages, not to passengers, or goods, or parcels; that this must be so is shewn by the 91st section, which declares that the rate upon small parcels shall not exceed 10d per ton. If the 85th section includes small parcels, the appellants would be entitled to levy a double rate, one under the 85th, and the other under the 91st, which plainly could never have been intended. If this be so, and the rate in the 85th section is on the carriage, exclusive of the small parcels upon the carriage, it must be equally exclusive of passengers, and then the rate is

confined to the carriage alone, and is not one to which the 20th section can have reference, so as to give the respondent any right of claim. The 85th section was not framed with a view to the right given to the respondent, but to the general rights of the appellants.

[*Lord Brougham.* — It would be framed with a view to sect. 20. If the company had no right to levy, Wauchope would not have any right to payment.]

By section 20th, Wauchope was entitled to a rate upon goods only, but not in respect of carriages. Throughout the act, carriages are never comprehended under the words "goods and "articles." Were it so, the company, under the rates in regard to the bridge over the Esk, and at Cowpits, and the inclined plane, would be entitled to levy two rates, one in respect of goods, and another in respect of carriages, which plainly never was intended.

II. But whatever may be the rights of the parties according to a strict literal interpretation of the statute, which it is very difficult to give to it, the settlements which have taken place between the parties, in which no claim has been made by the respondent for any rate, in respect either of carriages or passengers, conclusively ascertain their rights by their own understanding and agreement, and preclude the respondent from urging the claim upon which he insists, Bramston *v.* Robins, 4 *Bingh.* 11. No demand was ever made by the respondent until shortly before the commencement of this action, for a rate either upon carriages or passengers; the truth being that he, in common with the proprietors of railways generally, when the 7th Geo. IV. was passed, did not consider that passengers would yield any revenue; they did not, therefore, enter into the consideration either of the appellants or the respondent in the arrangements which were made for overcoming the opposition of the respondent to the passing of the act, and it never occurred to the respondent to

advance any charge in the settlements upon this subject, until, contrary to general expectation, experience shewed that the conveyance of passengers was the most lucrative branch of railway business.

[*Lord Cottenham.* — How have the appellants accounted since the act of William IV?]

In the same way as before.

[*Lord Cottenham.* — Because in that act you are not entitled to charge upon conveying passengers.]

Then if Wauchope was entitled under the 20th section of the first act, he is no longer so.

Mr Attorney-General and Mr Kelly for respondent. — I. The supposed unreasonableness of the respondent's claim cannot have any effect upon the question between the parties. The decision must rest upon the interpretation of the statute, which is neither more nor less than the agreement between the parties recorded by Parliament. By the 20th section the respondent was to have an allowance upon every thing for which the appellants could charge. By the 85th section the appellants were entitled to make a charge upon carriages conveying passengers; whatever charge, therefore, the appellants could make against the public under the 85th section, was subject to the respondent's allowance under the 20th section. That they, prior to the act of William IV., in truth made their charge by head, while they were yet only entitled to charge by tonnage, cannot have any effect upon the rights of the respondent. It is very true that the act of William IV. substituted the right to charge by head, but that was altogether applicable, as between the appellants and the public. This we say without at all arguing that the statute can-not have any effect upon the rights of the respondent, by reason of the want of notice, an argument we entirely disclaim. The act of William IV., though it altered the method of charge by

the appellants to the public, in no way, expressly or impliedly, dealt with the rights of the respondent under the former act As to them it was entirely silent.

[*Lord Brougham.* — By the first act your payment is to be out of sums leviable by the company, but if under the new act nothing was leviable, there was no fund of payment.]

Nothing but imperative necessity will induce the House to hold that the new act disturbed the rights of the respondent. Though the new act gave the appellants power to charge the public by a mode which under the first act they did not enjoy, still it did not take away their right to make a charge in respect of passengers, and therefore their liability on this account remains to the respondent, though the mode of ascertaining what is payable to him may be according to the original, and not the new mode of charge by the appellants.

[*Lord Campbell.* — What do you say would be the course of ascertaining what is payable to you ?]

By weighing; it may be inconvenient, but it is the contract of the parties. The rate payable to the respondent under the 20th section is upon all "goods and articles" on which the appellants may make a charge. By the 85th section, the appellants may charge upon carriages conveying passengers. Here carriages are mentioned in connection with passengers and goods, and this shews the reason why the term "articles" was used in the 20th section in addition to "goods," which would have been sufficient of itself, but for this, to embrace every thing upon which the company could make a charge.

By the 85th section, when the goods are heavy, the company are entitled to make a charge upon them alone; when they are light, they are not entitled to make a charge upon them, otherwise than by a charge upon the carriage conveying them. If the argument of the appellants were correct, they might carry many tons of small parcels, and make a charge upon them under this

section, and yet the respondent would not be entitled to any thing.

II. As to the understanding of the parties from the settlements which took place, there was nothing in the statements given by the appellants to raise any supposition in the mind of the respondent that carriages conveying passengers were not included. But even were it otherwise, the course of dealing was much too short to have the effect contended for.

Mr Solicitor-General in reply.

LORD BROUGHAM.—My Lords, undoubtedly we often feel considerable reason to hesitate in coming to a conclusion as to the construction of a private act of parliament, arising from the somewhat careless manner in which acts of this sort, as well as some other acts, are wont to be framed. Nevertheless, upon the whole, I think the construction is a sound one, which has been put upon this act of parliament by the Court below, namely, that one halfpenny per ton is to be taken upon all goods and articles upon which a tonnage duty is chargeable, or charged according to the act. Well then, in the 85th section we find, that every carriage conveying passengers is to be charged by, or to, or for the company, at a rate not exceeding sixpence per ton per mile; that therefore is a tonnage, and the question is, Is that tonnage to be taken upon the carriages, or is it to be taken upon the carriages conveying passengers? I apprehend that the sound construction, and the more natural construction is, that the tonnage is to be taken upon carriages conveying passengers, and that it will not be accurate to hold that the words "conveying passengers," are merely descriptive of the kind of carriage, but that it is indicative of the matters and things which are to be the subject of weighing, and to be in that respect subjected to a tonnage not exceeding sixpence a ton per mile. I therefore think that a sound con-

struction has been put upon the act, for it is also to be observed, that the passengers or the company who escape, pay Mr Wauchope so much per ton altogether, and in no other way can it be taken.

With respect to the other objection which has been taken, arising upon the 91st section, undoubtedly at first, till it came to be examined into, it did seem to raise very great difficulty, and to throw a great obstruction in the way of the interpretation, which has been fixed by the Court below to the 85th section; but when you come to look at it, it clearly appears that this is a rule which applies entirely to the conveyance of goods by carriers using the railway, and is intended to protect the customers of those carriers from a larger charge by them against their customers than twenty pence per ton; and it does not apply to the company themselves in carrying passengers, which they really do not appear to have had power to do at that period, nor until the act of the 4th and 5th of William the IVth gave them the power. It is a great mistake to suppose that they can as a company do, and that they are not prevented from doing, that which a company must be incorporated for the purpose of doing.

The last point appears now to be abandoned on both sides. It was repeated on the one side, and abandoned on the other. The principle seems to me to be clear, and I trust it will be so considered in the Courts below, that no notice or want of notice in a private act or a local act is any ground for holding that the act does not apply; and it seems to me that that was very properly entirely abandoned on the part of the respondents.

Lord Cottenham. — My Lords, upon the last point which has been adverted to, it is only necessary to say a few words, in order that we may not again have a similar question brought before this House. It has been most properly abandoned at the bar, but upon the papers and the opinions it does appear that an impression has existed, that an act of parliament is or is not to bind according as there may, or may not be, proof of the individual

to be affected by it, having had notice of the act of parliament whilst in progress.

Lord Brougham. — That the standing orders have not been complied with for protecting individuals, and not being complied with, that affects the act of parliament itself.

Lord Cottenham. — There is no foundation for such an idea; however, such an opinion appears to have existed in Scotland, but I hope it will cease to exist for the future.

With regard to the merits of the case, so far as they have been brought under our consideration, upon the first point that has been made by the appellant, I have already intimated an opinion that there is no doubt at all; whatever may be the rule by which the weight is to be found, that it falls under the 20th section, and if the words are attended to, I am surprised that any doubt should have existed, because the 85th section, (which imposes the duty upon the carriages,) describes the things to be charged as things which should be carried or conveyed upon the railway, upon which certain rates are fixed; and among the enumeration of those things upon which a rate is fixed, we find a carriage; and the 20th section gives Mr Wauchope the sum of a halfpenny per ton, upon all goods and articles upon which a tonnage duty is chargeable or charged, in virtue of this act, which shall pass along any part of the said railway; the sole argument must rest upon proving that that which in one section is called an article, is not such a thing as is described in the other. The doubt arises from the mode in which the weight is to be ascertained, and if the 91st section had imposed a toll upon the small parcels, as described in the 85th section, that would have furnished a very strong argument indeed in behalf of the appellant, but that section has, I think, no reference to the provision in the act which imposes tolls or duties to be paid as a remuneration to the company for the use of their railway.

Now passengers, if their weight is not to be included in the weight of the carriage, and these small parcels, of less than five hundred pounds weight, (for I assume that to be the proper construction,) escape without payment altogether, because there is no provision by which passengers are to be the subject of the rate, or by which small parcels are to be the subject of the rate, the 91st section clearly not applying to the present subject matter. That is a strong reason for supposing that it could not have been intended that passengers, and such small parcels, should have been altogether omitted, the argument on the one side being, in fact, that it was included by being weighed in the weight of the carriage, and, on the other side, it being contended that it was excluded by the 85th section, and that there was no other provision by which it was included. However imperfect the expression in the section is, it is much more consistent with the terms used to consider the weight of the carriage, as estimated by that which at the time was upon it, than by its being estimated without reference to what was upon it. It is the weight of the carriage conveying the passengers. So long as the carriage was conveying passengers there must be an additional weight to that which the carriage would have had if not conveying passengers, and the rate is to be according to the terms of the section, "for every carriage "conveying passengers." Now there is no doubt, that if, in the ordinary mode of expression, you were describing the weight of a carriage conveying passengers, you would consider that the carriage must be weighed with the passengers upon it, otherwise it would be the weight of the carriage not conveying passengers.

My Lords, the provisions of the act are exceedingly ambiguous, and no doubt extremely inaccurate, but, upon the whole, I am of opinion, that the Court of Session has come to a right conclusion upon the construction of the act, and that Mr Wauchope is entitled to his halfpenny per ton upon the weight

of the carriage, with the addition, as it existed, of passengers upon it; and if what is stated at the bar be founded in fact, (though nothing appears upon the subject that I am aware of,) namely, that the company have actually paid to him at that rate upon these small parcels under five hundred weight, for the parcels of goods so carried, and for the carriages so carrying them, then it is a construction they themselves have put upon one portion of the 85th section, and they cannot be very much surprised that we have made it applicable to the conveyance of passengers.

Lord Campbell. — My Lords, I am entirely of the same opinion. The question seems to me to turn exclusively upon the construction of the act of the 7th of George the Fourth; and under the 85th section of the Act of Parliament, I am of opinion, that the company are entitled to receive tonnage upon the carriage with its contents, including the passengers; that upon every carriage conveying passengers, or goods, or parcels not exceeding five hundred pounds weight, the company was entitled to demand such sum and sums of money respectively, as the company of proprietors should, from time to time, direct to be taken, not exceeding sixpence per mile. I think that the carriage must be weighed with its contents, consisting of passengers or parcels. Then that being so, the question is, whether, under the 20th section of that act, this clause relating to carriages and parcels does not apply, and whether a carriage is not to be considered an article upon which a tonnage duty is charged or chargeable; and I am clearly of opinion it is such an article, and, therefore, that one halfpenny a ton, upon the sum received upon these carriages by the company, is payable to Mr Wauchope.

With regard to the arrears, there seems to be no reason in the world why the arrears should not be payable, because there has not been any acquiescence, for we know not that Mr Wauchope was aware of the circumstances. He took the accounts as they

were rendered to him, and there are no facts at all that bring this case within the case that was referred to from Bingham's reports.

My Lords, I think it right to say a word or two before I sit down, upon the point that has been raised with regard to an act of Parliament being held inoperative by a court of justice because the forms, in respect of an act of Parliament, have not been complied with. There seems great reason to believe that notion has prevailed to a considerable extent in Scotland, for we have it here brought forward as a substantive ground upon which the act of the 4th and 5th William the Fourth could not apply: the language being, that the statute of the 4th and 5th William the Fourth being a private act, and no notice given to the pursuer of the intention to apply for an act of Parliament, and so on. It would appear that that defence was entered into, and the fact was examined into, and an inquiry, whether notice was given to him personally, or by advertisement in the newspapers, and the Lord Ordinary, in the note which he appends to his interlocutor, gives great weight to this. The Lord Ordinary says, "he is by "no means satisfied that due parliamentary notice was given to "the pursuer previous to the introduction of this last act. Un- "doubtedly no notice was given to him personally, nor did the "public notices announce any intention to take away his existing "rights. If, as the Lord Ordinary is disposed to think, these "defects imply a failure to intimate the real design in view, he "would be strongly inclined to hold in conformity with the "principles of Donald, 27th November, 1832, that rights previ- "ously established could not be taken away by a private act, of "which due notice was not given to the party meant to be in- "jured." Therefore, my Lord Ordinary seems to have been most distinctly of opinion, that if this act did receive that construction, it would clearly take away the right to this tonnage

from Mr Wauchope, and would have had that effect if notice had been given to him before the bill was introduced into the House of Commons; but that notice not having been given, it could have no such effect, and therefore the act is wholly inoperative. I must express some surprise that such a notion should have prevailed. It seems to me there is no foundation for it whatever; all that a court of justice can look to is the parliamentary roll; they see that an act has passed both Houses of Parliament, and that it has received the royal assent, and no court of justice can inquire into the manner in which it was introduced into parliament, what was done previously to its being introduced, or what passed in parliament during the various stages of its progress through both Houses of Parliament. I therefore trust that no such inquiry will hereafter be entered into in Scotland, and that due effect will be given to every act of Parliament, both private as well as public, upon the just construction which appears to arise upon it.

Lord Brougham. — It ought to be observed, that the Lord Ordinary is not quite correct in the view he takes of the principle in the case of Donald. I do not agree with what is said as to the case of Donald; it does not go by any means so far; it is only used as a topic, as it were, in the construction of the act of Parliament, and I think, improperly used.

Lord Cottenham. — I move your Lordships that the interlocutor be affirmed with costs.

Ordered and Adjudged, that the petition and appeal be dismissed this House, and that the interlocutors therein complained of be affirmed with costs.

ARCHD. GRAHAME — SPOTTISWOODE & ROBERTSON, Agents.