

Friday, January 21.

FIRST DIVISION.

[Lord Adam, Ordinary,

MONTGOMERY v. MONTGOMERY.

(*Ante*, p. 6).

Process—Expenses—Divorce—Expenses of Wife's Reclaiming-Note.

A wife who unsuccessfully reclaims against a decree of divorce will not be allowed the expenses of her reclaiming-note unless the Court is of opinion that she has a probable case.

In an action of divorce for adultery at the instance of James Montgomery against his wife, the Lord Ordinary (ADAM) granted decree, allowing the defender her expenses. In giving judgment his Lordship remarked that he did not believe the evidence of the witnesses for the defence.

Mrs Montgomery reclaimed, and the Court, after hearing a full argument and taking the case to *avizandum*, adhered.

Counsel for the defender then moved that she should be found entitled to the expenses of her reclaiming-note. He argued—She was justified in reclaiming, because the case involved the status of her child. She had also a probable case for success, as was shown by the fact that the Court had heard the argument fully out and made *avizandum*. In all the cases where such a motion had been refused the Court had been satisfied without calling on the respondent's counsel that the claimer's case was bad. But where a probable case for success was shown a wife was entitled to defend herself to the end at her husband's expense.

Replied for respondent—The wife had not shown a probable case. On the contrary, the Lord Ordinary was of opinion that her story was trumped up, and the Court after full consideration had affirmed that view. To allow the expenses in such a case would simply be to encourage vexatious litigation.

Authorities—2 Fraser, Husband and Wife, 1235; *Kirk v. Kirk*, Nov. 12, 1875, 3 R. 128; *Dalgleish v. Dalgleish*, Feb. 1, 1878, 5 R. 679.

At advising—

LORD PRESIDENT—The only special ground for Mr Asher's motion that his client should get her expenses for this reclaiming-note is that the case was fully heard out by the Court, and he says that the only cases in which a wife who has defended such an action and reclaimed has been found not entitled to her expenses have been where the Court adhered to the interlocutor under review without calling on the respondent's counsel. I should be sorry to lay it down as a rule that expenses are never to be refused except in that case, for I can conceive cases where the Court, though quite clearly of opinion against the claimer, might yet think fit to call on the respondent's counsel. Nay, I will go a step further, and say that that description applies to the present case. It was less in the interest of the parties than in that of the law that we heard the argument to the end; and I concur in a remark made by Lord Shand in giving judgment, to the

effect that he was clear against the claimer at the conclusion of her counsel's opening speech. That shows how inexpedient it would be to adopt such a rule as was suggested; it may be a consideration, but it is certainly not a conclusive one. I think no expenses should be awarded to the defender for this reclaiming-note; the case was a very bad one as regards her, and we were all of opinion that the whole story of the defence was trumped up and false.

LORD MURE—I am of the same opinion. I wished to hear the case out just to satisfy myself that the Lord Ordinary was right in his view that the defender's evidence was a trumped-up story. And I have come distinctly to that conclusion, and think we should award no expenses to this defender for her reclaiming-note.

LORD SHAND—It appears to me that the principle enunciated by the Second Division that a wife who reclaims in such an action as this is only entitled to her expenses if she had a probable case for overturning the judgment of the Court of first instance is a sound one to apply, and if we apply it to this case it appears to me that the claimer's motion must fail. The Lord Ordinary has said that he did not believe the evidence adduced for her, and our examination of it has certainly confirmed that view. I think she has shown no probable cause for disturbing the judgment, and that we should refuse her the expenses of this reclaiming-note.

LORD DEAS was absent.

The Court refused the claimer's motion for expenses from the date of the Lord Ordinary's interlocutor.

Counsel for Pursuer (Respondent)—Trayner—Young. Agent—Alexander Morison, S.S.C.

Counsel for Defender (Reclaimer)—Asher—Ure. Agent—Thomas Carmichael, S.S.C.

Friday, January 21.

SECOND DIVISION.

[Lord Curriehill, Ordinary.

GALBRAITH AND OTHERS (WALKER'S TRUSTEES) v. CALEDONIAN RAILWAY COMPANY.

(Sequel to case of *Playfair and Others (Walker's Trustees) v. Caledonian Railway*, Dec. 2, 1879, reported *ante*, vol. xvii, p. 192).

Property—Railway Compensation—Lands Clauses Consolidation (Scotland) Act 1845—Railway Clauses Consolidation Act 1845, sec. 6—Railway Works “Injurious Affecting Lands.”

A railway company under powers contained in a private Act executed alterations on certain public streets. The effect of these operations was to cut off level accesses to a great thoroughfare which a property situated not in immediate proximity to, but at a short distance from, the place where the operations were executed had enjoyed, and to substitute

for those accesses a new and much longer access with considerable gradients. *Held* that this property had been "injuriously affected" in the sense of the above mentioned statutes.

Compensatory Claims by the Railway Company.

Held that it was not a relevant ground for diminishing the compensation for damages thus sustained that benefit might arise to the property from the operations of the company.

The previous proceedings in this case are reported of date Dec. 2, 1879, 17 Scot. Law Rep. p. 192.

The Second Division having, as therein stated, reserved the question of the relevancy of the claim for damage to their property made by Walker's trustees, while holding the railway company bound to proceed with the arbitration under the letter of undertaking granted by them, the arbitration was proceeded with. The arbiters having differed in opinion, devolved the arbitration upon the oversman, Mr M'Jannet, writer, Glasgow. After sundry procedure, Mr M'Jannet on 3d June 1880 issued his final decret-arbitral, from which the facts of the case fully appear. The oversman found "*(First)* That the claimants' property consists of a plot of ground extending to 6153 square yards and $\frac{3}{4}$ parts of a square yard or thereby (with buildings as after mentioned), part of the lands of Tradeston, situated in the barony of Gorbals and shire of Lanark, bounded by Francis Street, 60 feet wide, on the east, by Canal Street, 60 feet wide, on the north; by Victoria Street, 60 feet wide, on the south; and by an unformed street, intended to be 60 feet wide, on the west. That the said three first-mentioned streets were in the year 1873, and continue to be, public streets, and that before the respondents' operations began said 6153 square yards and $\frac{3}{4}$ parts of a square yard were, as they continue to be, to the extent of 4681 square yards and $\frac{3}{4}$ parts of a square yard, covered by a spinning and weaving mill or factory, and to the remaining extent of 1472 square yards and $\frac{3}{4}$ parts of a square yard by dwelling-houses, stables, &c. *(Second)* That the rent of the mill portion was £1000 per annum, under a lease which terminated in 1874, but the occupancy has since been continued on tacit relocation at the same rent; and the rent of the remainder is £108, 10s. per annum. *(Third)* That the claimants have sustained no loss or damage in respect of diminution or reduction of rents since the time the respondents' operations began. *(Fourth)* That during the respondents' operations and since their completion the claimants' property has not by reason of these operations sustained any physical injury in its structure as buildings, or in respect of drainage, light, or air. *(Fifth)* That prior to the respondents' operations the claimants had direct, straight, and practically level access to and from their property from and to Eglinton Street on the east (first) by Canal Street and (second) by Victoria Street, Eglinton Street then forming (as it does still) a leading thoroughfare from the centre of Glasgow to the south. *(Sixth)* That since the respondents' works were executed, and by reason of their execution, the following results have happened:—(first) Canal Street has been shut up as a direct access to Eglinton Street, and in place of that direct access the respondents

have formed as a substitute therefor Salkeld Street, a public but a back street of 50 feet wide, running nearly parallel to, and to the west of, Eglinton Street: (second) Salkeld Street is not direct or straight, but slightly curved in its formation, and is steeper in its gradients than Eglinton Street, for the corresponding distance between Canal Street and Cook Street, the steepest gradient being 1 in 34 as compared with Eglinton Street, the steepest gradient in which within the same distance being 1 in 59: (third) for the purpose of traffic carried or going to or from the claimants' property to Glasgow or the north, the detour carried by this substituted street is immaterial; but taking the west end of Cumberland Street as a common point by Eglinton Street and by Salkeld Street from Canal Street, the detour or extra distance caused by the respondents' works extends to about 1485 feet, and now applies to all traffic from the claimants' property carried or going eastward along Cumberland Street: (fourth) that Victoria Street has not been shut up, but has been slightly diverted, with no appreciable detour, as an access to the claimants' property to or from Eglinton Street and the south, but with a detour or extra distance caused by the respondents' works of about 265 feet, which now applies to all traffic carried or going by Eglinton Street to the north; and the diversion of Victoria Street, and the building of a bridge over their railway by the respondents, have had the effect of altering the gradient of a street formerly almost level to 1 in 20 for a space of about 116 feet, and 1 in 34·7 for a space of about 197 feet. *(Seventh)* That the new substituted access by Salkeld Street forms, in conjunction with Canal Street, Cook Street, and Victoria Street, the principal access to Eglinton Street for the claimants' property and the other properties situated in the same locality, including the Joint Line Railway Station and the Canal basin. *(Eighth)* That in these circumstances, and having regard to the facts and circumstances proved, the claimants' property is in my opinion injuriously affected by the construction of the respondents' works; and, on the assumption that the claimants are legally entitled to be compensated by the respondents for the injury so caused, I fix and assess the pecuniary amount of this compensation at the sum of £1500 sterling, whereof I allocate the sum of £1200 as applicable to compensation for damage by detour, and the sum of £300 to compensation for damages by change of gradients: And accordingly, on said assumption, I find the claimants entitled to said sum of £1500 (made up as aforesaid), with interest thereon, at 5 per cent. per annum, from 13th April 1880 till payment." Walker's trustees then raised the present action, concluding for £1500, being the amount of the damage found by the oversman to have been suffered by them, and for £486, 16s. 11d., being the amount of their expenses in the arbitration.

Their action was founded on the terms of the following letter, granted by the railway company while the Act under the authority of which the operations for which compensation was now claimed were made was in dependence in Parliament:—

"*Caledonian Railway (Glasgow Central Station, &c.) Bill.*

Gentlemen,—In consideration of your withdrawing all further opposition to this bill, we,

the Caledonian Railway Company, do hereby undertake that if and so far as you or any of you are, in the judgment of the arbiters or oversman or jury to be appointed under the Lands Clauses Consolidation (Scotland) Act 1845, as after mentioned, injuriously affected by the construction of any of the works authorized by this bill, your claim for compensation shall not be barred by reason of our not taking any part of your respective lands; and the amount of such compensation, if any, if not agreed upon, shall be determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act 1845, for the determination of cases of disputed compensation, but without prejudice to all claims competent to you or any of you under and by virtue of the said Act and of any other Acts regulating the construction of railways, in all cases where the lands of you or any of you, or any part thereof, may be taken by us for the purposes of this Act."

On receipt of this letter the pursuers had withdrawn their opposition to the bill.

The pursuer also contended that, without reference to this letter, their property was injuriously affected by the operations of the company in the sense of the Special Act (Gordon Street, Glasgow, Station Act 1873) then obtained, and of the Lands and Railways Clauses Acts of 1845 incorporated with that Special Act by sec. 3 thereof.

They pleaded (1) that in respect of the letter of undertaking and the decree-arbitral following thereon, they were entitled to decree; and "(2) The pursuers' property being injuriously affected in the sense of the statutes by the construction of the defender's works, they are entitled to decree for the compensation assessed by the oversman in the statutory arbitration."

The railway company disputed liability on the terms of the letter and also on the construction of the Acts. On the latter point they disputed the pursuers' claim on the ground that the pursuers had no exclusive right of property otherwise in the streets parts of which had been taken by them, nor any special or exclusive use and enjoyment of the said streets, the streets being public and the pursuers having no right to use them other than as members of the public. They also held that in the arbitration effect ought to have been given to compensatory elements which, had they been allowed for by the oversman, would have led to his finding that no compensation was due to the pursuers, their property being as valuable after as before the execution of the works. They referred to the eighth proposed finding of the oversman issued several months before the final decret-arbitral, in which the oversman explained that in fixing the compensation he had not "given effect to any compensatory elements arising from the following two circumstances, which they contended ought to have been allowed for—(1) the respondents taking, and so withdrawing, feuing ground from the market, or (2) the fact of their having placed a passenger station in the immediate neighbourhood."

They therefore pleaded in defence to the action—" (1) The property of the pursuers not having sustained any permanent or peculiar physical injury, nor been injuriously affected in the sense of the Special Act, or any of the Acts

incorporated therewith, by the defenders' operations, the defenders are entitled to absolvitor. (2) The pursuers not being entitled to compensation either in respect of the undertaking of the defenders, or any of the Acts of Parliament before mentioned, the defenders are entitled to absolvitor. (3) In determining the question whether or not the pursuers' property was injuriously affected by the defenders' operations, the oversman ought to have considered the whole effect of these operations, and to have given effect to any compensatory elements arising therefrom benefitting the pursuers' property, as well as those injuriously affecting the same."

The Lord Ordinary on 10th November 1880 repelled the defenders' third plea-in-law, and decerned against them in terms of the conclusions of the summons, adding this note—"The defenders object to the oversman's award on the ground that he does not give any effect to compensatory claims arising (*first*) from the defenders withdrawing feuing-ground from public competition, and so rendering the complainers' ground more valuable for that purpose; (*second*) from the establishment of a passenger station in the neighbourhood. I am of opinion that the oversman would have erred had he taken these elements into consideration. The pursuers have suffered direct injury by the access to their property being rendered more steep and circuitous than before, and by the consequent increased cost of cartage, tear and wear of horses, &c. They were content with their property as it stood before the railway company interfered with it; they did not desire to feu their ground; and they had no wish to have a passenger station forced upon them. All these things I think must be assumed in their favour. The question, and the sole question for the oversman, was the amount of damage to the pursuers' accesses actually caused by the company's works, and it is not relevant in such an inquiry to discuss whether in other respects unconnected with access these works may be expected to benefit the pursuer. The case of *Senior v. The Metropolitan Railway Company*, 12 L.J. Exch. 225, and *Eagle v. The Charing Cross Railway Company*, L.J. 2 C.P. 638, seem to be authorities very much in point. I have therefore sustained the oversman's award, and decerned for the amount thereof with expenses."

The defenders reclaimed, and argued—The letter of undertaking was not a guarantee that in consideration of withdrawal of opposition to their bill the defenders would pay compensation to which the pursuers were not by law entitled. In order to their success on the terms of the letter the pursuers must show that they would have a good ground of claim if any of their land had been taken. But here they were not in that position. Their claim was not one that would arise if some of their land had been taken. On the general law, apart from the letter,—It was once a moot point whether there could be any good claim if none of the claimant's property had been taken by the operations of the company entitled to make the operations. But it had been decided that certain claims would be held to lie in such a case—*Chamberlain v. West End of London and Crystal Palace Railway Company*, 2d Feb. 1862, 2 Best and Smith, 617. There were, however, two classes of cases where the

claimant might have suffered damage—(1) Those in which the access injured was *ex adverso* of the property; (2) that in which the public street, some distance away from the claimant's property, was injured. The present case was of the second class, and in that class, inasmuch as the injury was only that the proprietor claiming compensation suffered oftener than others the same damage as the general public suffered, no compensation was given—*Caledonian Railway Co. v. Ogilvy*, 30th March 1856, 2 Macq. 229; *Ricket v. Metropolitan Railway Company*, 2 L.R. H. of L. 175; *Queen v. Metropolitan Board of Works*, 4 L.R. Q.B. 358. Such cases were distinguished from those like *Chamberlain*, *supra*, where there was special damage by reason of direct interference with the street immediately *ex adverso* of the claimant's property. The same was to be said of *Beckett v. Midland Railway Company*, 3 L.R. C.P. 88. Even the case of *Metropolitan Board of Works v. M'Caskey*, L.R., 7 E. and I. App. 243, founded on on the other side, bore out the doctrine that damage done to the public highway away from the immediate proximity of the property is not special damage, but damage suffered by the proprietor more often than the rest of the public, but *ejusdem generis* with theirs.

The pursuers answered—The letter of undertaking is conclusive against the defenders. It was given to purchase freedom from opposition founded on grounds the very same as were stated to form a claim in the arbitration. It must be read in the light of the circumstances in which it was given. As to the general question, the case of *Ogilvy* did not bear out the construction put on it by the other side, since it has been often said in the subsequent cases that it was decided on the ground that personal inconvenience or annoyance is not a ground for special damage—*Erle, C.J.*, in *Chamberlain's* case, *supra*. The nature of the injury is special damage, resulting from the cutting off of a convenient access and the substituting of inconvenient gradients. If a property, as distinguished from the personal inconvenience of the owner, is in fact damaged by works done to a public street, the proprietor is entitled to compensation notwithstanding that the operations also injure the public—*Duke of Buccleuch v. Metropolitan Board of Works*, 5 L.R. Ex. 221, and 5 L.R. H. of L. 418; *M'Caskey's* case, *supra*, opinion of Lord Penzance; *Hammersmith Railway Company v. Brand*, 4 L.R. E. and I. App. 211; *Queen v. Eastern Counties Railway*, 2 L.R. Q.B. 347.

At advising—

LORD JUSTICE-CLERK—Divested of details, the state of facts under which the claims of the respondents arise is the following:—They are proprietors in trust of a block of ground lying to the north of Eglinton Street, in Glasgow, which is one of the great thoroughfares of the city. This block of ground, which is used for a spinning-mill, and the relative buildings, extend to over 6000 square yards. It lies about 130 yards from Eglinton Street, and is flanked on the east and west sides by two streets of 60 feet in width, both of which are contiguous to the premises, and are parallel to each other, there being a distance of 100 yards, or rather less, between them. Before the operations of the railway these two streets afforded a straight and level access from

either side of the premises to Eglinton Street, which they both joined at right angles. The effect of the railway operations is substantially to destroy both these accesses as they stood. The railway works are so constructed as to interpose a new street called Salkeld Street, running parallel to Eglinton Street, between the premises and Eglinton Street, cutting off entirely the end of Canal Street, so that access can only be had to Eglinton Street from the works by a considerable detour on the east, and a less but still a considerable detour on the west. The gradients of Victoria Street have been altered from a level to 1 in 27, and the other gradients are materially altered for the worse.

Such being an outline of the alleged causes of damage, the respondents opposed the company's bill in Parliament on a narrative in their petition of the special grounds of damage which I have generally indicated. In the end they consented to withdraw their opposition on a formal undertaking by the company in the following terms—[reads].

On the bill passing, the respondents gave the usual notices to have the amount of their claim fixed by arbitration, nominated their arbiter, and called on the Company to nominate theirs. This the Company did, but at the same time presented a note of suspension and interdict praying to have the arbiters and parties interdicted from proceeding, on the ground that the claim of the respondents presented no case in law on which they could demand compensation. The Lord Ordinary refused the interdict on its merits, and added a long and very careful exposition of his views. We adhered to his judgment refusing the interdict, but reserved our opinion on the question of relevancy until the facts should be found by the arbiter. The oversman in the arbitration has now pronounced his award, and in a detailed decree-arbitral, explaining fully the grounds of his decision, he has found the respondents entitled to a sum of £1500 in name of compensation for injury to the premises, allocating £1200 in respect of detour in the accesses, and £300 in respect of gradients. The Company then challenged the award before the Lord Ordinary, who has sustained it, and the whole matter is now before us in this reclaiming-note.

If I were obliged to decide this case solely on the terms of the written agreement, the inclination of my opinion would be to construe those terms as an admission of liability, if the arbiters should find in point of fact that the premises were injuriously affected by the Company's operations. The agreement must be construed according to the subject-matter to which it related. Injury to the premises by reason of alteration of access was the thing complained of in the petition, and the agreement was the consideration given for its withdrawal. The assumption of the agreement seems to be that whatever question there might have been as to the facts alleged in the petition as the ground of a claim for compensation under the 26th section of the Railway Clauses Act, there could have been none under the 68th section of the Lands Clauses Act, had the operations of the Company been executed partly on land taken from the petitioners; and such was the law laid down in the cases of the *Duke of Buccleuch* and that of the *Hammersmith Company* by the House of Lords. The good faith and true import of the agreement was, that

as the injury to the accesses alleged would have formed a good element of damage if pleaded as an incident or accessory to a claim for land taken for the operations complained of, the present claim should be held to stand on the same footing; and therefore the agreement left no question over but the fact of injury and the amount of damage payable in respect of it. This has been decided by the arbiter, and there I think the dispute was intended to terminate.

I have, however, after the full argument which we heard, come to be very clearly of opinion that had there been no agreement between the parties, and had this claim stood exclusively on the 26th section of the Railway Clauses Act, the award of the oversman ought to be sustained.

I have said that the two contiguous accesses by which these premises communicated with Eglington Street are substantially destroyed by these operations. Whether sufficient substitutes have been provided is another question, but these special accesses no longer exist by reason of the works complained of. I think the only question of relevancy raised here is conclusively settled by the case of *The Metropolitan Board of Works v. M'Caskey*. In that case certain premises had two accesses—one by a road and another by water—both being public highways, and not in any degree private property. The railway works destroyed one of these accesses, and it was found that the Board of Works were bound to make compensation. Here both accesses are taken away, and unless the railway company can show that they have substituted accesses which are fully equivalent—which was a matter for the oversman—the right of compensation is clear.

Of course the theoretical difficulty which attends a claim for injury done to an access over a public road or street is, that as, according to the proverb, all roads lead to Rome, a claim might be preferred for damage done to a public road at a considerable distance. But the question must be solved reasonably, and the opinions of the noble and learned Lords in the case referred to indicate the true solution. The injury alleged must be such as attaches specially to the premises in question, not exclusively, but specially. In this case no difficulty can arise on that head, because these two accesses by Canal Street and Victoria Street specially subserved these particular premises, and, indeed, did so almost exclusively. They certainly were of much greater consequence to them than to any other premises.

It is said, no doubt, that other accesses were provided. But the oversman has found—and it was for him to decide that matter—that these accesses so provided are insufficient by reason of detour and gradients; and he has estimated the value of the insufficiency at the sum in the award. I have no doubt of his power to do so, and have no right to question the conclusion he came to.

This short view makes it unnecessary for me to canvass at length either the decisions or the opinions in the numerous and not very consistent cases by which this branch of the law is encumbered. If I may say so without presumption, I think there has been a tendency throughout the series to run these questions into subtle generalisations, or ingenious but hazardous definitions, when the application of ordinary practical rules of everyday life would suffice for their decision. I am not prepared to affirm, in its

generality, the proposition that the measure or test of such a claim as this is the right which the claimant would have had against anyone who had performed the same operations without Parliamentary authority. This is a claim founded on and given by statute, and it cannot be the same, I should have thought, as any common-law right, and the considerations which would have affected any proceeding at common law must be other than and different from those applicable to the statutory claim. Neither do I think it sound to lay it down as a general proposition that it is any answer to such a claim that to sustain it would leave the claimant in a better position than if the works complained of had never been executed. So far, in my opinion, is that from being at variance with the policy of these statutes, it is a result which lies at the foundation of them. The statutory powers are given in order that the community may profit by their execution. But those of the community who profit by them are of course a limited class, and of that limited class some profit more than others. But that consideration cannot enter into a question of compensation for injury done to property, which only implies an obligation on the railway company to place the party injured in the same position as that which he would have held if his property had not been injured.

I do not think it is sound to say, as has been argued on the authority of the case of *Ogilvy*, that an injury which is shared by the public cannot support a claim for compensation. It is more sound to say, that if the injury be specific and proved, it is of no moment how many other premises are also injured. "The public" is merely a generic term for persons who are entitled to use, and do use, the access; and in proportion to the use they make of it may be the injury suffered by their premises by the operations on it. When the use made by one or more of the public is so far special and peculiar, the injury becomes individual. When the injury is shared by many, it of course loses its individual character. It may be difficult to define the line in words; it is a question of degree, but practically presents little real perplexity in any given case.

The case of *Ogilvy* itself, although we may doubt whether, with the further elucidation these questions have received, all the *dicta* to be found in the judgments would have been delivered, illustrates what I have said. There was no evidence there of any damage other than would have been equally occasioned if the bad crossing had been an inch off, and the amount of injury to the premises was in itself hardly inappreciable.

LOED YOUNG—Three questions are presented, and were fully argued.

I. The first is, Whether upon the facts found by the arbiter, and which are not disputed, the respondents' property has been injuriously affected by the operations of the complainers (the railway company) so as to entitle them to compensation irrespective of the special undertaking in the complainers' letter, which forms the subject of the second question? On the one hand, it is clear that when a portion of any property is so taken that the residue is thereby injured (*i.e.*, depreciated in value), this is an injury for which compensation is due. This may perhaps in all cases be called severance damage, although that term

is usually applied, though it may not be confined, to the case where a property is divided, portions of it being left on either side of the part taken, which severs them from each other. But although such severance may not be occasioned, and is not when the extremity of a property is taken at any end or side, it is, I apprehend, not doubtful that if the effect of taking a part is to deprive the residue of a frontage or of a valuable entrance and egress which the whole had before, this is an injury for which compensation is due, and whether it be called severance or by another name is plainly immaterial. On the other hand, it is clear, at least in the sense of having been authoritatively decided, that where the only injury complained of is that a public road has been rendered less commodious to the public, as by a level-crossing, a proprietor of land in the neighbourhood is not distinguishable from the rest of the public and entitled to compensation because the road is frequently used by him as an access to his property, and so the inconvenience of the level-crossing frequently experienced by him. It was so decided in the case of the *Caledonian Railway Company v. Ogilvy*, the decision being put on the ground that the claim was truly for personal inconvenience suffered in common with the public at large, and that "all attempt at arguing that this is a damage to the estate is a mere play upon words." The question has since been a good deal considered, and been illustrated by several decisions. These decisions (subsequent to *Ogilvy*) are so fully and clearly noticed by the Lord Ordinary in his note of 16th June 1879 that I shall content myself with stating the result of them as I collect it. It is, that wherever property is in fact injuriously affected by the operations of a railway company, compensation is due to the proprietor, notwithstanding that the operations by which the property is injuriously affected are on public streets or roads occupied for the purpose, and may, and in fact do, cause inconvenience to the public at large. The first part of this proposition is just the enactment of the general Act, and the materiality and value of it is in the latter part, which is the correction of an erroneous conclusion which had for a short while been drawn, perhaps excusably, from the case of *Ogilvy*. In that case there were apparently plausible grounds for contending that the proprietor had represented, and the valuation jury approved, that his property was injuriously affected by the level-crossing within a few yards of the principal entrance gate; and on that assumption the only objection to the claim was, or might reasonably be represented to be, the fact that the crossing which damaged the claimant's property was also an inconvenience to the public. But the noble and learned Lords certainly negated this contention, and decided the case on the footing that the property was not injuriously affected, and it is very noticeable that the decision is so explained and accounted for in the subsequent cases. As thus explained, the decision is authority for no larger proposition than this—that a man cannot have compensation for the personal inconvenience of a level-crossing on a public road in the vicinity of his property, which is not in fact injuriously affected thereby. I do not suppose that it was intended to be decided as matter of law that no property whatever could be damaged, *i.e.*, the value of it substantially de-

teriorated, by any level-crossing on an adjoining public road, and I do not find this view of the judgment suggested in any of the subsequent cases.

But leaving aside level-crossings, which may perhaps in deference to the case of *Ogilvy* stand as a class apart, and reverting to the general question exclusive of that class, I am prepared to assent to the proposition that when property is in fact damaged in the sense of being deteriorated in value by the works of a railway company, the proprietor is entitled to compensation, and that it is immaterial that the works causing the damage are on a public road or street (or what was so) which has been taken or used therefor. When such damage is alleged on the one hand and denied on the other, I think the issue raised is *prima facie* one of fact only, and is to be tried as directed by the statute. It has been so tried between the parties before us, and decided in favour of the respondents. The decision is that the respondents' property is injuriously affected by the complainers' works to the amount of £1500, and I find no reason in law why this decision should not have been made, or why having been made it shall not have effect. It is said that the injury to property to be compensated for must be physical. This is obscure language. If it means that the injury must be caused by works or operations on the property, the proposition is condemned by all the recent cases, and I cannot therefore attach this meaning to it. That the injury alleged is too remote to be taken account of is another matter. If the arbiter or jury think so, they may act on that opinion; and there may be cases in which the remoteness of the damage is so apparent that the Court would interpose either to prevent an idle trial, or after trial to refuse effect to an award or verdict. I do not pursue this topic or illustrate it by fanciful suppositions—for I am of opinion that there is here no good objection to the claim or to the award on it on the ground of the remoteness of the damage.

II. The opinion which I entertain irrespective of the complainers undertaking that the respondents' claim, if affirmed by an arbiter or jury, should not be barred "by reason of our not taking part of your respective lands," renders it unnecessary that I should express any opinion on the effect of that undertaking, which was the second question argued before us.

III. The third question regards the contention of the complainers that they are entitled to set the benefits which they have conferred on the respondents' property against the damage which they have done to that property of a character entitling them to compensation under the statute. This contention is admittedly novel, and I content myself with saying that it is in my opinion inadmissible. There may be, and probably are, cases in which the damage done to a landed estate by the formation of a railway through it exceeds the benefit, but the common and familiar case is no doubt otherwise. There is usually, almost universally (in the case of estates in the country), a large balance of benefit. It has never, however, been doubted, so far as I know, that the railway company must pay compensation for the damage they do, and look to their traffic receipts for remuneration for the benefits they confer. This is according to the invariable practice of about

forty years, and I can give no countenance to the present attempt to invert it.

LORD CRAIGHILL not having been present at the debate gave no opinion.

The Court adhered.

Counsel for Pursuers — Asher — Lorimer. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders—Solicitor-General (Balfour, Q.C.)—R. Johnstone — Keir. Agents — Hope, Mann, & Kirk, W.S.

Friday, January 21.

FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.]

THE NORTH OF SCOTLAND BANKING COMPANY v. BEHN, MOELLER, & COMPANY.

Agent and Principal—Bill—Mandate to Sign per pro.—Liability.

B. & Co., merchants in Hamburg, opened a branch in Dundee in January 1869, to be managed by an agent, to whom they gave, *inter alia*, power to sign per pro. of their firm. On 1st September 1879 the agency terminated, they being dissatisfied with the conduct of their agent. A bank having discounted some bills of later date than 1st September 1879, drawn by D. & Co., a Dundee firm of which the said agent was a partner, on B. & Co., and accepted by the agent per pro. of them, sued B. & Co. for the amount. It was proved that the bank knew the agency was to terminate on 1st September 1879, though no general notice had been given of the fact in Dundee; and that they had inquired and been misinformed by D. & Co. that the bills were granted in connection with some unconcluded transactions of B. & Co. The bills turned out to have been for the accommodation of the agent, who subsequently absconded, and his partner in D. & Co. Held that the bank being in knowledge of the termination of the agency, could not succeed, and B. & Co. assolizied accordingly.

Question as to the limits of the duty of inquiry, and subsequent liability, of a party discounting bills accepted per pro.

Opinion per Lord Rutherford Clark (Ordinary) that the holder of a mandate to sign per pro. will bind his principal by his actings if within the sphere of that mandate, even though they are fraudulent.

Messrs Behn, Möller, & Co. were merchants in Hamburg. In January 1869 they established a branch house in Dundee. They conferred the management of this branch on Julius Heyde, under an agreement dated 7th January 1869, in which they "at the same time gave him procuration." Heyde was to be paid partly by salary, partly by commission, and was at no time a partner of their firm. By power of attorney of the same date they constituted him "true and lawful attorney for us, and in our name, place,

and stead, to act in all our affairs at Dundee, giving to our said attorney full power and authority (*procura*) to sign all letters, deeds, assignments, acts, indentures, and bills of exchange with our firm, adding to it the words '*per procura*' and his name to oblige our firm in that way, and in every wise to sell and to transfer real property, shares, and mortgages, and to extinguish the latter, to ask, demand, sue for, recover, and receive every sum and any object due to us, to compound with any person, to give good and sufficient releases and discharges, to appear and to plead before every inland or foreign judge and court of justice whatsoever, and to prosecute such actions and suits to judgment and execution, to seize, sequester, and arrest merchandises, claims, or other objects whatsoever, giving and hereby granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes as we might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that our said attorney or his substitutes shall lawfully do or cause to be done by virtue hereof." On 1st September 1879 Behn, Möller, & Co. being dissatisfied with Heyde's conduct, closed their Dundee branch, and his powers as their agent ceased as from that date.

The present action was raised against Behn, Möller, & Co. by the North of Scotland Banking Company, and concluded for payment of the sums contained in each of four bills for the amounts of £89, 4s. 5d., £164, 9s. 2d., £195, 16s. 5d., and £242, 13s. 4d. respectively, of dates 27th September, 30th September, 11th October, and 18th October 1879, drawn by William Dewar & Co., manufacturers, Lochee, upon the defenders, and bearing to be accepted by them *per procuracionem* of Julius Heyde, all payable three months after date.

The defenders pleaded—" (1) The defenders not being due and resting-owing to the pursuers the amounts of the said several bills, they are entitled to absolutor with expenses. (2) The said Julius Heyde having accepted the said several bills *per procuracionem* of the defenders without authority to do so, the defenders are not liable for the amounts of the said bills. (3) The said Julius Heyde having ceased to represent, and having ceased to have authority to bind, the defenders as their agent or otherwise prior to the dates of the said acceptances, the defenders are entitled to absolutor. (4) The said several bills being accommodation bills, of which the defenders had at the time no knowledge, and in which they had no interest, and this being well known to the pursuers, the defenders are not liable for the amounts of the said bills. (5) Neither the pursuers nor the said William Dewar & Co. having given value for the said several bills, the pursuers are not entitled to insist in this action against the defenders."

From the proof which was led in the case it appeared that between 7th January 1869 and 1st September 1879 Heyde carried on numerous transactions as manager of the Dundee firm. He ordered goods from manufacturers in Dundee and elsewhere, in the defenders' name, which