Thursday, December 20.

OUTER HOUSE.

[Lord Adam.

JOHNSTON *v.* SHAW.

Reparation — Master and Servant — Employers Liability Act 1880 (43 *and* 44 *Vict. c.* 42), *sec.* 4 —Non valens agere—*Period within which Action must be Commenced.*

The Employers Liability Act 1880 provides that an action for compensation under it "shall not be maintainable" unless commenced within six months from the occurrence of the accident causing the injury for which compensation is claimed. *Held* (by Lord Adam, Ordinary), in an action raised after the expiry of six months from the accident founded on, that an allegation by the pursuer that he had been rendered insane by the result of the accident, and did not recover until the six months had elapsed, did not elide a plea that the action was not maintainable under the Act.

The Employers Liability Act 1880 provides (sec. 4)—"An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action, if the Judge shall be of opinion that there was reasonable excuse for such want of notice."

This was an action raised in September 1883 before the Sheriff Court of Midlothian by Walter Johnston, mason, against James Shaw, bricklayer, Leith. The pursuer alleged that he had, through the fault of the defender or his servant for whom he was responsible, been injured on the head, back, and legs at a tenement which defender was erecting in Leith, at which he (pursuer) was working as a mason, the date of the injury being 16th January 1883. Notice of injury had, as required by the section above quoted, been sent to the defender within six weeks of 16th January. The pursuer concluded for "£250 [being the amount of three years' earnings] or such other sum as may be found to be due to the pursuer under the Employers Liability Act 1880, as compensation for the injuries received by him."

The defender pleaded, *inter alia*—"The action cannot be maintained in respect that it was not commenced within six months from the occurrence of the accident in question."

The action was removed in the manner provided by the Act to the Court of Session, and depended before Lord Adam.

The pursuer averred that shortly after the accident his mental faculties became impaired in consequence of it, and that he had been eventually confined in an asylum, where he remained from May to July. He argued that in these circumstances the provision as to the raising of the action within six months did not apply, as he was *non valens agere* during a portion at least of the time.

The Lord Ordinary dismissed the action.

"*Opinion.*—I have no difficulty in expressing an opinion upon the question whether the Sheriff Court action, which is based entirely on the statute—the Employers Liability Act—and proceeds upon the footing, and no other, that the pursuer and the person by whose acts he is alleged to have been injured were fellow servants, is maintainable. Section 4 of the statute enacts —[*His Lordship read the section above quoted*]. The facts in this case are these:—The injuries are said to have been inflicted on the 16th January 1883. Notice is said to have been given on the 19th February 1883, but the action was not raised in the Sheriff Court until September 1883. That being so, I think the case clearly falls within the 4th section of the Act as an action that cannot be maintained. It was suggested that the six months limit must be read with this limitation, that the person who is to bring the action must be *valens agere*, and that a period during which he is unable to act is not to be reckoned. But that principle has no application to a limitation of the kind indicated by the Act, which is meant for the protection of defenders, and simply says that beyond a certain time the action shall not be maintained. Upon that simple ground I am of opinion that this action cannot be maintained, and that I have no other duty than to dismiss it. It was said by Mr Campbell Smith that if this had been a case where (as in other cases that have been brought) there were, besides the statutory conclusions, common law conclusions, and it might turn out on investigation that there was no case under the statute but it would be competent to decern under the common law conclusions, such a case might proceed, and that therefore this case could competently go on. But I fail to see that that has any application to a case brought in the Sheriff Court with no other conclusions whatever except statutory conclusions. If an action were brought before the Sheriff containing not only conclusions under the statute but common law conclusions, and the six months had expired, I think the first interlocutor he would be compelled to pronounce would be, 'in so far as this action is founded on the statute, finds that it cannot be maintained.'"

Counsel for Pursuer — Campbell Smith — Ferguson. Agents—Miller & Murray, S.S.C.

Counsel for Defender—Pearson—Sym. Agent —Thomas Dowie, S.S.C.

Friday, December 21.

SECOND DIVISION.

[Lord Kinnear, Ordinary.

SIR ROBERT BURNETT, BART. *v.* THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

Superior and Vassal — Railway — Obligation in favour of Superior to stop all Passenger Trains at a certain Station — Specific Implement of such Contract.

A proprietor of land through which a railway was formed, feued to the railway company ground on which it was stipulated that

the company should erect "a station for passengers and goods travelling by the said . . . railway, at which all passenger trains shall regularly stop." There was an irritant clause providing that in the event of the company failing to use that station as a regular station their right should become null, and the land revert to the superior. The company erected the station, and all ordinary passenger trains were stopped at it. There were established subsequently to the date of the feu-contract (1) a service of trains subsidised in the public service by the Home Office and Post Office, of which, except in matter of working them, the company had no control, but in which ordinary passengers were usually allowed to travel, and (2) a series of Saturday excursion trains at low fares to the chief stations on the line. Neither of these classes of trains was in use to stop at the station in question, and the proprietor as superior raised an action for declarator that the company were bound to stop such trains at his station. *Held* (*dub.* Lord Rutherfurd Clark) that neither of these classes of trains fell within the meaning of the contract, and that the company was not bound to stop them at the station in question.

Opinion (*per* Lord M'Laren) that the proper mode of enforcing the obligation, if it had existed as a condition of the feu, was by a proceeding for the forfeiture of the feu as provided by the clause of irritancy.

Question, Whether if it appeared that the performance of such an obligation to stop all trains at a certain station on behalf of a private party was inconsistent with the obligation of the company to provide for the public safety and convenience, specific implement could be enforced?

In 1853 Sir Alexander Burnett, Bart., of Leys, residing at Crathes Castle, entered into an agreement with the Deeside Railway Company, by which the company, who had been authorised by their Act to construct their railway through the estate of Leys, agreed, besides making certain payments and preparing certain other works, to construct a siding "for the accommodation of the proprietor and tenants of the estate of Leys," at which any of the passenger trains might be stopped, by signal, "so as to take up or set down any passengers proceeding from or to Crathes." In 1863 it was resolved that a station should be erected there, and the then proprietor of Leys, Sir James Burnett, granted a feu-charter to the railway company by which, on the narrative that the company had agreed on his granting the charter to erect a station for passengers and goods, which would be of advantage to him and his tenants in Leys and Crathes, as well as to the public, he conveyed to them certain pieces of ground for a nominal feu-duty, but "declaring that the several pieces of grouud above described are disponed, but without prejudice to the deed of agreement" of 1853 "for the purposes, and subject to the conditions, restrictions, and clauses herein contained, which are hereby declared to be real liens and burdens affecting the said pieces of ground, namely, the said railway company shall be bound within twelve months from the date of these presents to erect at their own expense on the said piece of ground first above mentioned, on the west side of the bridge over the road leading to the said bridge across the Dee in course of erection at Durris, a station for passengers and goods travelling by the said Deeside Railway, at which all passenger trains shall regularly stop, to be called the "Crathes" Station, containing a suitable waiting-room, covered passenger shed, platform, and all proper accommodation for first-class and other passengers, and to maintain such station in all time coming.'" . . "It being hereby expressly provided and declared that in the event of the said railway company not erecting said station within the time above mentioned . . . or at any time hereafter discontinuing the use thereof as a regular goods and passenger station of the said railway, then, and in that case, these presents and the rights to follow hereon shall *ipso facto* become null and void without declarator, and the said piece of ground, and all buildings and works constructed thereon, shall revert and belong to me and my foresaids, free and disencumbered of all burdens whatsoever, alike as if these presents had never been granted, and this without prejudice to our legal rights and remedies against the said railway company for obtaining implement of the prestations incumbent on them as above expressed."

After obtaining the feu-charter the railway company erected a station at Crathes, which is between Aberdeen and Banchory. By the Great North of Scotland Act 1876 (39 and 40 Vict. c. 124) the Deeside Railway Company was amalgamated with the Great North of Scotland Railway.

In 1883 this action was raised against the Great North of Scotland Railway Co. by Sir Robert Burnett, son and heir-at-law of Sir James (to whom he had succeeded in the estates), as superior of the subjects feued to the defenders, to have it found and declared, but without prejudice to the agreement of 1853, "that the defenders are bound regularly to stop at the station called 'Crathes,' on the line of railway belonging to the defenders between Aberdeen and Ballater, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station and carrying passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and without prejudice to the foresaid generality, that the defenders are bound, while and so long as they run the trains after mentioned for the conveyance of passengers, regularly to stop at said station for the foresaid purposes" (1) A train leaving (in summer) Aberdeen for Banchory, Aboyne, and Ballater on Saturdays at one o'clock; (2) a train leaving Ballater in summer at eight p.m. on Saturdays for Aboyne, Banchory and Aberdeen; (3) a train leaving (during the Queen's stay at Balmoral) Aberdeen for Banchory, Aboyne, and Ballater at 3·30 each day of the week except Monday; (4) a train leaving (during the Queen's stay at Balmoral) Aberdeen for Banchory, Aboyne, and Ballater at one p.m. on Sunday; (5) a train leaving (during the Queen's stay at Balmoral) Ballater for Aberdeen and intermediate stations at 3·5 p.m. on week days; (6) a train leaving (during the Queen's stay) Ballater for Banchory and Aberdeen at 10·45 on Sundays. Then followed a

conclusion that the defenders should be "ordained, by decree foresaid, regularly to stop at the said station called Crathes, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station, and carrying passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and without prejudice to the foresaid generality, the trains particularly above specified, or any similar or corresponding trains which may be substituted by the defenders for the said trains: And the defenders ought and should be interdicted, prohibited, and discharged by decree foresaid from running through or past the station called Crathes any train or trains carrying passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, without stopping, for the purpose as well of taking up as of setting down passengers."

The pursuer set forth that he was in course of feuing ground at Crathes, and that with regard to that circumstance, and not merely for the convenience of his family and tenants, it was of great importance to him that all passenger trains should be regularly stopped at Crathes, but that the defenders were not doing so, but had recently commenced to run the trains specified in the summons without causing them to stop regularly at Crathes, and had disputed his right to have them stopped.

The defenders made the following explanation of their running of the trains to which the summons referred—"Admitted that the defenders have been running the trains mentioned in the summons since they were commenced to be run without causing them to stop regularly at Crathes station." . . . . "With regard to the trains run during Her Majesty's stay at Balmoral, it is explained that these trains are called the Queen's Messenger trains, and are run for the sole purpose of accommodating Her Majesty's couriers, and the defenders receive a special subsidy for these trains, and are bound to run them within a limited time between Ballater and Aberdeen. Further, it is explained that of these trains, the train fourth mentioned in the conclusion of the summons is run as a special express mail-train under an agreement with Her Majesty's Postmaster-General, dated 20th and 26th October 1881, and particularly section 14 thereof. The said agreement and correspondence relative thereto are referred to. This train the defenders are bound to run within such time as may be required by the Post Office authorities. The defenders receive a subsidy from the Post-Office in respect of this train. These trains form no part of the ordinary service of trains on the Deeside line, and, as already explained, it was not till 1877 that the pursuer or his authors claimed any right to have these trains stopped at Crathes Station. With regard to the Saturday excursion trains mentioned in the summons, it is explained that these also form no part of the regular service of trains on the line. They are special cheap excursion trains to Banchory, Aboyne, and Ballater, and the defenders do not book, and never have booked, passengers for them at or to Crathes Station. In a similar way other cheap excursion trains are run from and to these three principal stations on different holidays, fast days and other special occasions, and these trains the pursuer claims should also stop at Crathes. There is very little traffic to or from Crathes Station, and it would be a cause of serious inconvenience to the public, as well as of material delay and expense to the defenders, to stop all these said trains at an insignificant road-side station such as Crathes, where there is a very limited amount of traffic, and a small and sparse population. Further, such trains are not the trains contemplated in the said feu-charter."

They also set forth that since the feu-contract the circumstances had greatly changed, the line, which had at that date stopped at Aboyne, having been extended 11 miles further to Ballater, and a great development of the traffic having taken place, resulting in the necessity, in the interest of public convenience, of running express trains to the principal stations (Banchory, Aboyne, and Ballater).

The pursuer explained, with regard to this answer, that the "trains styled by the defenders Queen's Messenger trains, were merely fast passenger trains, open to all members of the public, though the defenders may be subsidised to run them. The defenders' failure to stop them at Crathes was and is a violation of the feu-charter referred to, and was never sanctioned or acquiesced in by the pursuer or his predecessor. The other trains referred to are also open to all members of the public, though the defenders have within the last few years ceased to book passengers for them at Crathes Station.

The pursuer pleaded—"(1) On a sound construction of the feu-charter and Amalgamation Act libelled, the pursuer is entitled to decree of declarator as concluded for. (2) The pursuer, as superior of the subjects referred to, is entitled to enforce the obligation in question against the defenders as his vassals therein."

The defenders pleaded—"(1) On a sound construction of the said feu-charter, the defenders sufficiently comply with the obligations therein imposed on them by causing to be stopped at Crathes Station all ordinary passenger trains, such as were in use to be run at the date of the said feu-charter, and were then *in intuitu* of the parties thereto. (2) The Queen's Messenger trains referred to in the summons being express trains run under special arrangement with and paid for by Her Majesty, the pursuer is not entitled to insist that the said trains shall be stopped at Crathes Station. (3) The excursion trains mentioned in the summons not being part of the ordinary passenger service of trains, but express trains run for traffic between special places and on special occasions, the pursuer is not entitled to have the same stopped at Crathes Station. (4) In view of the changed and changing circumstances of the Deeside line, the pursuer is not entitled to decree as concluded for, and in no view ought decree to be pronounced in terms of the general declaratory conclusions of the summons."

A proof was led, the import of which appears from the opinion of the Lord Ordinary.

The Lord Ordinary (Kinnear) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*—The defenders do not dispute that under this obligation they are bound to cause all passenger trains running upon their line for the ordinary service and traffic of the district to be stopped at Crathes; and upon the other hand, it is not disputed that if this be a correct con-

struction of their obligation, it has been well performed. Crathes is not a very populous place; it cannot have a very large traffic; there are sixteen passenger trains (eight each way) calling there daily during the summer season; and upon the evidence which has been led there cannot be the least doubt that the accommodation thus afforded for railway travellers is amply sufficient for the requirements of the place.

"But besides these regular trains there are certain occasional trains carrying passengers between Aberdeen and Banchory or Ballater, which do not stop at Crathes; and the question is, whether these trains also are or are not within the true intent and meaning of the contract?

"These are of three kinds—

"1. There are certain trains called Queen's Messenger trains, which are run only during Her Majesty's stay at Balmoral for the conveyance of the Queen's Messengers from Aberdeen to Ballater, and from Ballater to Aberdeen. These trains were not running at the date of the feu-contract, but since 1865 they have run regularly for the purpose I have mentioned during the various periods when the Court has been at Balmoral. This has been done under an arrangement with the Home Office, which appears to have been first proposed in 1864 by letter from the secretary of the company to General Gray on 2d June 1864, in which he offers on behalf of the company, 'in consideration of a specified subsidy, to run a special train daily during Her Majesty's residence at Balmoral from the south, due at Aberdeen at 3 p.m., and to the train leaving Aberdeen at 4·15,' and also to convey the passengers betwixt Aboyne, beyond which place the railway was not at that time carried, and Ballater by carriage and pair in connection therewith. The arrangement thus proposed was, with some immaterial modifications, accepted, and has been carried out ever since; and it appears that during the last ten years the special subsidies which the company has received from the Home Office for these trains has amounted to £9278, being on an average, £927 a-year. By their primary purpose, therefore, these are special trains for Her Majesty's service, paid for by special subsidy from the Home Office. They do, however, at least occasionally, carry other passengers. Members of the Queen's household, other than the Queen's Messengers, may travel by them, paying the ordinary fare; and ordinary passengers by the south train to Aberdeen are allowed to travel by them, and for their convenience the trains may be stopped at any station on the line on notice being given to the guard. It would appear that travellers going south have also been allowed to travel by them. But still they are not trains for the accommodation of the public, but special trains for the service of Her Majesty. The manager says that he looks upon them as being under the control of the Home Office, except in matters of working, and it is obvious that this must be so, because if the special purpose for which they are hired by the Home Office is the conveyance of Queen's Messengers to and from Ballater, their hours of starting and places of stoppage must be regulated, as far as possible, according to the exigencies of Her Majesty's service, and not according to the general convenience of ordinary travellers. It may happen that the special purposes of the trains may be quite consistent with their stopping at Crathes, but it may happen otherwise, and accordingly the defenders maintain that they are not bound to stop these trains at Crathes regularly for the purpose of taking up or setting down any passengers who may desire to travel to or from that station.

"2. The train described in the fourth conclusion of the summons as the train in use to be run during Her Majesty's stay at Balmoral, leaving Aberdeen for Banchory, Aboyne, and Ballater at one o'clock p.m. on Sundays, is in much the same position. By a series of contracts between the company and the Postmaster-General, for the conveyance of Her Majesty's mails, it has been stipulated, *inter alia*, that in addition to certain specified mail-trains the Postmaster-General may at any time, and at any station, require the company to provide and run any other express or special train for mails, guards, and post-officers when and as he shall think fit, and in that case the company shall provide such express or special trains accordingly for a compensation to be fixed at certain rates. Under these stipulations, and in compliance with a special requisition from the Post Office, the train in question has been in use to be run since 1871 for the conveyance of mails to Balmoral during Her Majesty's stay. The contention of the defenders is, that passengers may be carried by this train so long as the Post Office does not object, and in fact they have been in the habit of booking passengers by it to Crathes when desired to do so, as well as to Banchory and Ballater, but they do not stop regularly at any intermediate station, and by the contract they maintain that the train is subject to the control of the Postmaster-General, who may regulate as he thinks fit the stations at which it shall stop.

"3. The remaining trains are Saturday excursion trains, which are run during the summer months chiefly for the accommodation of the working-classes, who have a half-holiday on Saturday afternoon. They run between Aberdeen and Ballater, stopping at Banchory and Aboyne. No luggage may be carried by this train, and the passengers who travel by it must have special excursion tickets, issued only at Aberdeen, and at very cheap rates. On the journey to Ballater passengers may be set down at Banchory and Aboyne, but no passengers are taken up; and on the return journey the excursionists who were set down at Banchory and Aboyne in going out may be taken up again, but no passengers are set down. The train was advertised as an express train in the company's time-tables for June and September 1882, but in future the company do not propose that it shall be run regularly every Saturday during any specified period, but only on those Saturdays upon which a sufficient number of passengers present themselves to make it worth while, and according to the evidence of the manager it is impossible that it should be run at the present rates, or so as to serve the particular purpose in view if it were necessary that it should run regularly, or that it should regularly call at an intermediate station such as Crathes.

"As regards the special trains for Her Majesty's service under arrangements with the Home Office and the Post Office, I think it very clear that these are not within the true intent and meaning of the contract. They were not running at the date of the contract so as to be specially excepted, but they are not trains of the character which

must be supposed to have been within the contemplation of the parties. Any difficulty which might otherwise have arisen from the very comprehensive terms of the contract appears to me to be removed by a concession which the pursuer makes, not merely in argument, but by the conclusions of his summons. For the summons necessarily involves a concession that the general words, 'the contract,' cannot be applied without some limitation. If the words are to be construed according to their primary and literal meaning, passenger trains must mean trains carrying passengers as distinguished from trains carrying goods. But the pursuer admits that special trains, hired by individuals for their own use, are not included. Now, there is nothing in the terms of the context upon which that limitation can be supported, unless it be the stipulation that the trains should be regularly stopped, which the defenders maintain points at ordinary and regular trains as contra-distinguished from trains that are merely occasional. But the pursuer rejects that interpretation of the words, and the limitation, which he admits must therefore be taken as a concession that the general words, if they are to be construed reasonably, must be limited in their application by reference to the subject-matter. It is accordingly admitted to be clear, from the nature of things, that the contract could not have been intended to apply to what are commonly called special trains, although they are certainly passenger trains as contra-distinguished from goods trains. This is an excellent illustration of the rule that 'words, if they be general and not precise, shall be restrained unto the fitness of the matter.' But the same reasoning applies just as forcibly to special trains hired by a department of Government for Her Majesty's service as to special trains hired by individuals for their own use. And if these trains, whether private or Government trains, may be run without stopping at Crathes so long as they carry only the hirer and his friends in the one case, or the particular persons for whose accommodation they are subsidised in the other, it can make no difference that the hirer—whether an individual or a department of Government—is content that other persons travelling that way should be permitted to take advantage of any surplus accommodation the special train may afford, so long as such incidental uses do not interfere with the primary purpose for which it is hired. The pursuer says that by letting people who are not going to or coming from Crathes travel by these trains the company is giving an advantage to other stations on the line which they deny to Crathes Station. But there is nothing in the contract to prevent such an incidental convenience being afforded to travellers elsewhere than to Crathes. If all the passenger trains within the true intent of the contract are stopped by the company in terms of their obligation, the pursuer has no ground of complaint, because passengers are allowed to travel by other trains which, not being within the true intent of the contract, he cannot require to be stopped at Crathes.

"The question as to the Saturday excursion trains is in some respects a different one, because these are entirely under the control of the railway company, but I think it is to be solved by the same considerations. These are not ordinary trains for the general traffic of the district, but occasional trains for a special purpose, which does not admit of their being stopped at intermediate stations. It is manifest, from the evidence of the manager, that these are not such trains as, in a reasonable administration of the railway, would or could have been run for the accommodation of such a station as Crathes, and that is enough to show that they are not of the character contemplated by the contract. It is in accordance with rules that are constantly acted on, that in construing such a contract, regard should be had rather to the clear intention of the parties than to the literal meaning of particular words. But the clear intention of the contract was to secure for Crathes a certain advantage which the parties must be supposed to have had distinctly in view. It appears to me that, both from the terms and the subject-matter, it may be reasonably inferred that the advantage contemplated was not the prohibition of occasional excursion trains to other stations, but the regular stoppage of regular trains at Crathes; and if the superior and his feuars have received, as I think they have, all the benefit which according to the clear intention of the contract it was calculated to secure for them, they cannot be allowed to press its terms unduly so as to obstruct the general management of the line for the public accommodation."

The pursuer reclaimed, and argued—On a sound construction of the clause contained in the feu-charter he was entitled to insist on the defenders stopping at Crathes all passenger trains. The Queen's Messenger trains and excursion trains undoubtedly came under this category. The former were really merely fast passenger trains open to all members of the public, although the defenders were subsidised to run them, and the latter were also purely passenger trains. The pursuer was not insisting in a right of which he could not legally demand specific performance. Such a right was a perfectly well recognised one in the law of England.—*Rigby and Another* v. *Great Western Railway Company*, December 1, 1845, 15 L.J., C.L. 60; *Greene* v. *West Cheshire Railway Company*, November 1871, 13 L.R., Equity 44; *Hood* v. *North-Eastern Railway Company*, March 1870, L.R., 5 Ch. App. 525. The right must be construed strictly against the company—*Turner* v. *London & South-Western Railway Company*, January 1874, L.R. 17, Equity 561; and the defenders were not entitled to set up the inconvenience to the public as a reason for not performing the agreement—*Raphael* v. *Thames Valley Railway Company*, December 1866 L.R. 2, Ch. App. 147.

The defenders replied—It was clear, on a consideration of the proof, that the trains in question were not in any sense ordinary passenger trains. They did not come, then, under the agreement. They were not in contemplation of parties at the date of the feu-charter. The arrangements for pursuer's accommodation were thoroughly satisfactory, eight trains stopping daily at Crathes, which number was amply sufficient for so small a place as Crathes—*Turner* v. *London & South-Western Railway Company*, January 1874, L. R. 17, Equity 561.

At advising—

Lord M'Laren—In the view I take of this case it is not necessary to consider whether an unqualified obligation to stop all passenger trains at

a particular station is one which the Court would enforce without reference to the circumstances in which specific performance was demanded.

In the case of a breach of a contract of service an action for implement will not in general be sustained, and the party aggrieved will only have a remedy by action of damages. I do not mean that the considerations which influence the two classes of cases are the same. But in the case of the contract of carriage there are considerations of public utility and convenience which point with some degree of force to a limitation of the remedy for the breach of such a contract as is supposed. If such a case should arise, and the defendant company were to come into Court with a statement that performance of a contract to stop all trains, including express trains, was not within their power, or could not be given consistently with their obligation to provide the public with convenient and expeditious passenger trains, the company at the same time offering compensation to the private party, such a statement would no doubt be entitled to very great consideration. I think, however, that the present case may be dealt with as a case raising no other question than the construction of the obligation on which the action is laid.

The first observation which occurs to me is that the form of the clause is not such as suggests that the parties contemplated an obligation of an unusual or very stringent character. In strictness, the obligation imposed on the railway company is to construct a station "at which," it is added parenthetically, "all passenger trains shall regularly stop." Here the stoppage of trains at the station is prescribed, rather as one of the incidents or consequences of the establishment of a station than as an independent obligation. The language is not such as would probably have been chosen if the parties had meant the thing which the pursuer represents as the true reading of the clause.

I do not understand that the pursuer is suing in the character of the personal representative of Sir James Burnett (who would be the proper creditor upon an obligatory undertaking by the railway company), and apparently the pursuer's true legal position is that of a superior who is claiming the fulfilment of something which is declared to be a condition of the grant of the feu. Now, the proper mode of enforcing a condition of a feudal contract is by a proceeding for the forfeiture of the feu in case of non-fulfilment. The deed accordingly contains a clause of irritancy, but the terms of that clause do not support the construction put on the obligation by the pursuer. The irritancy is conditioned to take effect in the event of the company "discontinuing the use thereof (of the station) as a regular goods and passenger station of the said railway." This appears to me to be the measure of the power of Sir James Burnett's feudal successor to enforce the running of trains to and from his station at Crathes, and it is not easy to account for the difference of language in the obligatory and irritant clauses except on the supposition that it is a mere difference of expression, that in both clauses the parties were really stipulating as to one and the same undertaking, and that this undertaking was that the company should furnish in all time coming a regular service of passenger trains to and from the projected station.

Independently of the light thrown upon the obligation by the clause of irritancy, I should be disposed to come to the same conclusion. I think it must be admitted that an obligation to stop all passenger trains is one which requires construction with reference to the actual traffic arrangements of the obligant company. I think that the parties must be taken to have had in view a definite description of trains, which they describe shortly as passenger trains, and the description of trains referred to can be no other, in my apprehension, than such trains as the company, in the ordinary course of its business as a carrier of passengers, should provide for the accommodation of the public. Every contract in general terms with a mercantile company is to be construed with reference to the usage and practice of the business in which the company engages, and is not to be extended to transactions of a class or description demonstrably not in the contemplation of the parties at the time the contract was made. With this limitation—I think it a necessary limitation on the words used—I think the parties may be taken to have contemplated all trains provided by the company in the conduct of their business as public carriers of passengers, but not trains the cost of which is provided by a public subsidy, and the conditions of which as to expedition and the number of stopping places must be determined by the nature of the public employment. Neither the Queen's Messenger trains nor the special Saturday train were in existence in March 1863, when the feu-contract was executed. They could not have been in Sir James Burnett's contemplation, and they are not passenger trains in the ordinary sense. I do not think they become such because under an arrangement for lessening their cost to the public through-passengers are allowed to travel by them. They are, I think, public service trains, and the carrying of passengers is an incident, and not a characteristic, such as would bring them within the description of passenger trains.

With regard to excursion trains, I will only say that in my opinion they are not passenger trains in the ordinary and known acceptation of the term. It is as if a postmaster had contracted regularly to take up and set down a passenger by his stage-coaches at his place of residence, and that person should insist on getting a place in a post-chaise or omnibus which the postmaster had hired out to members of the public for a special occasion. In short, excursion trains are not part of the regular train service to which the obligation applies.

On all the points, therefore, I am of opinion that the action fails, and agreeing with the judgment of the Lord Ordinary that the conclusions of declarator are ill-founded, I think that his Lordship's interlocutor should be adhered to.

Lord Young—My opinion coincides with that of the Lord Ordinary, and in many respects, though I cannot say in all, with that of Lord M'Laren. If we had to determine on the validity of the obligation contained in the clause in question, and to define its extent, I think questions of a very difficult character would arise. I should have some difficulty in giving a name to the obligation, or in stating the special category to which it belongs. It occurs in a feu-charter, and at the

same time it is certainly not a proper feudal incident. It is not an ordinary contract. One of the parties to the contract is a railway company, but the deed does not specify in whose favour the obligation is created. If it were a proper feudal incident it would be in favour of the superior, but it is just a general obligation in a feu-charter by a vassal to do certain things which are not properly feudal. Therefore it is difficult to determine the character of the obligation, or who is the creditor in it. Is it such as runs with the lands? Suppose it is, with what lands? with the superiority? —because that may become detached from the property. With the Castle of Crathes?—it would be difficult to say that, because it is not of the nature of a servitude.

It is not an obligation "to me and my general representatives for ever." There would be, to my mind, great difficulty attending the obligation if the general question as regards its validity and extent were to arise. The action before us is so *ex facie* nimious and unreasonable as to excite prejudice against it, so that one has to be on his guard, and see that the exact legal rights of the pursuer, however unreasonable his demands, are satisfied. The pursuer claims that all trains whatever carrying passengers shall stop at Crathes, whether such stoppage be necessary or not. His declarator would be equally good in law, according to his view of his legal right, to have all trains stop there even though no passengers were to get in or out there. When the feu-charter was taken there were five trains apparently running each way daily. Now there are eight passenger trains each way stopping at Crathes. It is a very small place, and it is not suggested that that number is not sufficient for its requirements, and indeed it is manifestly greatly in excess of them, but the pursuer says the number is within his legal rights, and, as it were, his pound of flesh, contained in writing in his bond. I asked why he insisted on the right, and the answer I got was that some of the family coming from London might like to stop the train at Crathes, and therefore it is for that purpose that the pursuer desires the train should stop every night, both ways, at Crathes. Then there is a Sunday train during the Sovereign's residence at Balmoral to carry letters from the seat of Government. The pursuer says it is to stop at Crathes, because it is so nominated in his bond. Then the railway company sends excursion trains in summer to certain places where excursionists like to go, Crathes not being one of them. It is, the pursuer says, nominated in his bond that these trains shall stop there though no excursionists are going there. Indeed, I repeat the action is so nimious and unreasonable—I might almost say scandalous —as to stir up prejudice against the pursuer of it and put the Judge on his guard; and I have mentioned these considerations in order that I may say that I have done my best to guard against that prejudice, and to give the pursuer his legal rights if they are so nominated in his bond, and the law entitles him to them. Without entering, then, into the question of the validity or the extent of the obligation, I am very clearly of opinion, and without any doubt or hesitation at all, that the particular trains sought to be stopped are not within the contract. I cannot commend the conveyancing in this deed, and I am surprised that the men of business passed such a parenthesis as referred to by Lord M'Laren. It is very bad conveyancing. The clause is a parenthesis no doubt, but the men of business ought to have had in view that this construction might be impressed on it as a means of exacting toll on all trains passing Crathes without stopping, contrary to the true nature of the obligation. I construe the clause as a parenthetical one, and I was impressed with what Lord M'Laren said on that view. It is not the language which would be employed to impose an obligation of the character the pursuer represents it to be—"at which all passenger trains shall regularly stop." What does "regularly" mean? There may be exceptions, but the rule is that the trains shall stop. I should have thought that the rule would be the character of the station and the requirements of the place. But short of that it suggests the question, Are these normal passenger trains? Are the Queen's Messenger and summer excursion trains to be classed as normal trains? I am clearly of opinion, and without any doubt whatever, that they are not. Therefore, on the limited view taken by the Lord Ordinary, I agree with him, and further, I think it not amiss to say that I have great doubts as to the validity and extent of the obligation.

Lord Rutherfurd Clark—I am rather inclined to regard the trains in question as passenger trains, and to hold that the obligation extended to them, but I cannot say that I am sorry your Lordships have adopted another view.

The Lord Justice-Clerk and Lord Craighill were absent.

The Court adhered.

Counsel for Pursuer — Sol.-Gen. Asher, Q.C. — Mackintosh — Begg. -Agents — Baxter & Burnett, W.S.

Counsel for Defenders — J. P. B. Robertson — Jameson — Ferguson. Agents — Gordon, Pringle, Dallas, & Co., W.S.

Friday, December 21.

FIRST DIVISION.

[Sheriff of Lanarkshire.

WALKER, DONALD, & COMPANY *v.* BIRRELL, STENHOUSE, AND COMPANY.

Shipping Law—Ship—Shipbroker—Commission—Custom of Trade.

A broker sued a shipbuilder for 2½ per cent. commission on the price of a ship built by the defender, on the ground that the order having been the result of the introduction of the purchaser by the pursuer, he was entitled to such commission by the custom of trade on the Clyde. *Held*, on a proof, that by the custom of trade the broker was entitled, in the absence of special arrangement, to commission at the rate of 1 per cent., and that the defender had failed to prove that this right had been waived by the pursuer.

This action was raised in the Sheriff Court at Glas-