

the evidence they are to give before the Lord Ordinary.

LORD KINNEAR—I agree with your Lordships. I think, upon Mr Johnston's own statement, it is perfectly clear that the specification as presented to the Lord Ordinary was a great deal too wide. The Lord Ordinary decided nothing except that it is too wide, because he has reserved to the pursuer the right to make any more limited call upon which different questions may arise.

The Court refused the reclaiming-note, with expenses.

Counsel for the Defenders and Reclaimers—H. Johnston—M'Clure. Agents—Drummond & Reid, W.S.

Counsel for the Compeareers the Glasgow and South-Western Railway Company—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Counsel for the Compeareers the Caledonian Railway Company and Charles Tennant & Company and Others—Clyde. Agents—Hope, Mann, & Kirk, W.S.

On 24th February 1893 the Lord Ordinary (KYLACHY) granted diligence at the instance of the defenders in terms of the following restricted specification—"1. The invoice-books, day-books, ledgers, cash-books, or other books kept by the Caledonian Railway Company and the Glasgow and South-Western Railway Company, that excerpts may be taken therefrom of all entries relative to the rates charged by the said companies respectively against the traders mentioned in statements 6, 7, 8, and 9 for the defenders for the carriage between the stations mentioned in said statements, and relative accounts of the following articles, viz.—(1) Sulphuric acid, hydrochloric acid, and nitric acid in loads of (a) 1 ton and under, (b) over 1 ton and under 2 tons, (c) over 2 tons and under 4 tons, and (d) 4½ tons and upwards respectively; (2) Sulphate of soda, caustic soda, and soda ash in loads of (a) from 3 cwt. up to 2 tons, and (b) from 2 tons upwards respectively; (3) Iron ore and pyrites in loads of (a) from 4 to 10 tons, (b) from 20 to 30 tons, and (c) from 50 to 100 tons respectively, during the period from 1st January 1885 to 31st January 1890, said excerpts being limited always to what is necessary to show the dates, the class of goods carried, the class of load as above specified, and the rate charged. 2. All invoices, accounts, and other written statements rendered by said railway companies, or either of them, to said traders, that excerpts may be taken therefrom of all entries relating to the rates charged by the said companies respectively to said traders for the traffic specified in the last article, or relating to the drawbacks, rebates, or allowances from said rates given by said companies respectively to said traders, or any of them, said excerpts being limited always to what is necessary to show the date, the class of goods carried, the class of load as above specified, and the rate charged for the weights, and, if any given, the drawbacks, rebates, and allowances."

Friday, February 24.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.]

GILMOUR v. NORTH BRITISH RAILWAY COMPANY.

Railway—Question whether Statutory Obligation to Stop all Ordinary Trains at a Certain Station was Temporary or Permanent—Title to Sue.

A railway company were taken bound by a clause in their Act in 1855 to "erect and maintain a temporary goods and passenger station" at a point to be agreed on on an estate which was to be intersected by their line of railway, on the narrative that the then proprietors of the estate had laid out a portion of it for feuing. The clause proceeded thus—"At the said station all ordinary trains shall stop for the purpose of traffic;" then came a proviso that if on the expiry of five years the traffic proved unremunerative the company should no longer be bound to maintain the said station, and that the question of the maintenance or abandonment of the station should be determined by arbitration.

A station was erected in accordance with the above enactment, and no proposal to abandon it was ever made.

In 1858 the same parties arrived at an agreement, which proceeded on a recital of the above clause, and provided that in consideration of certain prestations in favour of the railway company they should complete the station as a permanent station, and should thereafter maintain it in all time coming at their own expense.

Subsequently the estate was sold. In 1892 the then proprietor brought an action against the railway company to have it declared that they were bound to stop all ordinary trains, and in particular certain specified trains, at the said station on his estate.

The Lord Ordinary (Stormonth Darling) repelled the defence of no title to sue, and allowed a proof.

Held (rev. the Lord Ordinary) that the above clause did not contain a permanent and subsisting obligation to stop all ordinary trains at the station in question.

The estate of Lundin, in the parish of Largo, and county of Fife, is intersected by a line of railway which was constructed by the Leven and East of Fife Railway Company in virtue of the Leven and East of Fife Railway Act 1855 (18 and 19 Vict. cap. 45).

Section 36 of the Act provides as follows—"And whereas the Standard Life Assurance Company, the owners of the estate of Lundin, in the parish of Largo, have laid out a portion of the said estate on the proposed line of railway to be let in lots or

feus for building: Be it enacted that the company shall erect and maintain a temporary goods and passenger station at or near to Sunnybraes, or at any other point on the said estate which may be agreed upon by and between the company and the owners of the said estate for the time; and at the said station all ordinary trains shall stop for the purpose of traffic; but providing always, that if upon the expiration of five years from the opening of the line of railway the traffic done at such station shall not be of sufficient extent to remunerate the company for the maintenance of the said station, the obligation to maintain the said station shall be no longer binding on the company: And it is further provided that for determining whether such station shall be maintained, or shall be abandoned as aforesaid, the decision of James Horne, land valuator in Edinburgh, whom failing, of John Dickson, farmer, of Saughton Mains, as sole arbiters in succession, shall be final and binding on the company and the owners of the said estate for the time being."

In accordance with this enactment a railway station, known as Lundin Links Station, was erected near Sunnybraes on the estate of Lundin. No proposal to abandon it seems ever to have been made.

On the contrary the following agreement, dated 29th September and 29th October 1858, was entered into between the Standard Life Assurance Company as owners of Lundin estate, and the Leven and East of Fife Railway Company—"Whereas by Act of Parliament (18 and 19 Vict. cap. 45), it was by section 36 thereof enacted [*recites the section above quoted*]: And whereas it has now been agreed, in consideration of the advantages to be acquired by the railway company as after provided, that the said station should be completed, not as a temporary station, but as a permanent station, in consideration of the obligations underwritten: Therefore it is hereby agreed—... *First*, The said railway company shall within eight months from the last date hereof complete the said railway station at or near to Sunnybraes as a permanent goods and passenger station, according to a plan and estimates to be subscribed as relative hereto, and shall thereafter uphold and maintain it at their own expense in all time coming. . . . *Third*, The said assurance company shall contribute the sum of £445 towards the expense of completing the said station and approach thereto from the turnpike road, being a difference between the estimated cost of £680, and the sum of £235 to be contributed by the said railway company; said sum of £445 being payable by the said assurance company on the completion of the work, and on the final report of the said engineers or oversman, or during the progress of the work, in partial payments, on their report that an equivalent expenditure has been properly made. *Fourth*, The said assurance company shall, within eighteen months from the last date hereof, cause four villas to be erected on the said farm of Sunnybraes. *Fifth*, The said

assurance company shall not insist on the erection for five years from the last date hereof of the bridge at the east end of their property, which the said railway company agreed to construct in terms of agreement between the said two companies dated 9th June and 3rd July 1856. *Sixth*, The said assurance company shall, within eight months from the last date hereof, put the private road leading northwards through the estate of Lundin, until it joins the statute labour road at Thomsford, into a sufficient state of repair for a statute labour road."

The agreement contained no obligation to stop trains at Lundin Links Station. The said station was duly completed in terms of the agreement as a permanent goods and passenger station.

The North British Railway Company acquired the whole undertaking of the Leven and East of Fife Railway Company, including the line which intersects Lundin estate, in 1877.

Mr Allan Gilmour acquired the estate of Lundin by purchase from the Standard Assurance Company in 1872, and he was succeeded by his son Mr John Gilmour in 1884.

On 22nd October 1892 Mr John Gilmour raised an action of declarator against the North British Railway Company to have it declared (1) "that the defenders are bound to cause all ordinary trains now and hereafter passing Lundin Links Station, on their line of railway between Thornton Junction and Anstruther, for the purpose of traffic, to stop, for the purpose of traffic, at the station called Lundin Links Station" in terms of the enactment and relative agreement between the pursuer's authors and the defenders' authors above quoted; and (2) that the trains leaving Thornton Junction daily for Anstruther at 11'38 a.m., 3 p.m., and 5'34 p.m. respectively, and the trains leaving Anstruther daily for Thornton Junction at 7'45 a.m., 9'40 a.m., and 4 p.m. respectively, "are ordinary trains within the meaning of the said section of the said Act of Parliament, and that the defenders, while and so long as they run the said trains above specified, are bound to cause the said trains to stop for the purpose of traffic at the said Lundin Links Station."

The pursuer stated (Cond. 2) that his authors, the Standard Assurance Company, opposed the Bill for the construction of the railway in question before Parliament, but withdrew their opposition after certain negotiations. "Among the stipulations in favour of the said assurance company as owners foresaid, and their successors in the said estate, in virtue of which their opposition to the Bill was withdrawn, was an obligation on the part of the Leven and East of Fife Railway Company to erect a station near Sunnybraes, on the Lundin estate, and to stop all ordinary trains at the said station."

The defenders answered—" (Ans. 1) The pursuer has no title to enforce the provisions of the statute or agreement on which he founds. (Ans. 3) Any obligation to stop trains at Lundin Links Station, referred

only to the temporary station and not to the permanent station, and only to ordinary trains as distinguished from fast or express trains."

The pursuer averred that until the Forth Bridge was opened in 1890, all passenger trains between Thornton Junction and Anstruther stopped for traffic at Lundin Links Station, but that since that date several ordinary passenger trains daily passed the station without stopping, particularly those libelled in the summons. He averred that the want of railway facilities was a bar to the successful carrying out of a feuing plan which he proposed, and which would greatly enhance the value of his estate.

The defenders admitted that the trains referred to did not stop at Lundin Links Station, but explained that four of them were express trains which did not commence running on this branch line till the opening of the Forth Bridge. They contended that express or fast trains were not in contemplation of the parties in 1855, and that the statutory obligation to stop trains, even if applicable to the permanent station, did not apply to these trains. They also averred that ordinary trains had all along, since the opening of the present station, passed Lundin Links Station without stopping there, and that it was only three-quarters of a mile distant from the next station, Largo, and that the traffic at it was very trifling.

The pursuer pleaded—“(1) In terms of the provisions embodied in the Act of Parliament and the relative agreement libelled in the summons, the defenders are bound, when called upon by the pursuer, to cause all ordinary trains on the line between Anstruther and Thornton to stop for the purpose of traffic at Lundin Links Station. (2) The trains mentioned in the summons are ordinary trains within the meaning of the said Act of Parliament, and the defenders are therefore bound to cause the same to stop at Lundin Links Station. (3) The defenders having failed or refused, when called upon, to carry out the provisions of the said Act of Parliament and the said agreement, the pursuer is entitled to decree of declarator and for implement, as concluded for.”

The defenders pleaded—“(1) No title to sue. (4) The defenders should be assozied in respect that they are under no obligation to the pursuer.”

On 3rd February 1893 the Lord Ordinary (STORMONTH DARLING) repelled the first plea-in-law for the defenders, and allowed the parties a proof of their averments.”

“*Opinion.*—This is an action at the instance of the present proprietor of the estate of Lundin in Fife, and the purpose of it is to compel the defenders to stop all ordinary trains, and in particular certain specified trains, on their line of railway between Thornton Junction and Anstruther, at Lundin Links Station. The sole question which I have to decide at present is whether the pursuer has a title to sue. I am of opinion that he has.

“It appears that the line of railway

which intersects the pursuer's lands was constructed by the Leven and East of Fife Railway Company, under the ‘East of Fife Railway Act 1855.’ The estate of Lundin then belonged to the Standard Life Assurance Company, but it was sold in 1872 to the pursuer's father, who was succeeded by the pursuer in 1884. The whole undertaking of the Leven and East of Fife Railway Company was acquired by the defenders in 1877.

“The defenders say, that whatever the rights of the Standard Life Company may have been, the pursuer has no title to enforce these rights. Now, it would obviously be a very odd thing if a landowner, in stipulating with a railway company for the benefit of his estate, whether before a Private Bill Committee or by direct contract, should so word his clause or his contract that if he sold the estate next day all benefit to the estate would be lost. I say it would be a very odd thing to do, and not what one would naturally expect. But, of course, the case must be decided, not on probabilities, but on the actual words used, and it is therefore necessary to examine the statute and the agreement on which the case depends.

[*After narrating their substance*—“It is clear that in framing the clause in the Act the Standard Company were not unmindful of the interests of their successors in the estate. The stipulations, both as to fixing the site of the station, and as to making the decision of the arbiters final, expressly refer to the owners of the estate for the time being. That being so, I think the whole clause must be read as giving singular successors in the estate a right to enforce the obligations thereby imposed on the railway company. But then it is said that the clause requires merely the erection and maintenance of a temporary station. Perhaps it is a sufficient answer to say that the word ‘temporary’ is not defined, and that so long as the station is, in point of fact, maintained (there being no proposal even now to abandon it) the obligation to stop trains subsists. But I think that the agreement of 1858, reciting as it does the clause in the Act, must be read as relative thereto. It is true that the agreement does not refer, in its operative clauses, to succeeding owners of the estate, except in so far as it describes the station as ‘permanent,’ and requires the railway company to maintain it ‘in all time coming.’ But it would be a strange result if the agreement were construed so as to give the railway company all the benefits of the pecuniary and other prestations performed by the assurance company, and at the same time to absolve them from the obligation to maintain the station and to stop trains the moment there was a change in the ownership of the estate. The very silence of the agreement as to the stopping of trains is, I think, significant of the view that the agreement was truly ancillary to the Act. Surely it could not be maintained that the assurance company, in stipulating for the conversion of the station from a temporary into a

permanent station, lost the right to have ordinary trains stopped there. Yet that would be the result of holding, as the defenders maintain, that the agreement was intended to supersede the 36th clause of the Act. On the other hand, if the assurance company preserved their right to have trains stopped notwithstanding the silence of the agreement on that point, how is it possible to limit the subsistence of the 36th clause to the period of their ownership, in the face of its express provisions as to the owners of the estate for the time being? It seems to me that the true view of the agreement is that it was simply intended to take the place of the arbitration contemplated by the Act as to the continued maintenance of the station, leaving all questions as to the effect of its continued maintenance to be determined by the Act.

"The parties are at issue as to whether the trains mentioned in the summons are 'ordinary' trains within the meaning of the statute, and I shall therefore repel the plea of no title to sue, and allow a proof."

The defenders reclaimed, and argued—The inductive clause of section 36 of the Act meant that the railway company gave the proprietors five years to develop their feuing-plan; if after such a fair trial there was sufficient traffic, the station would be maintained, but not otherwise. Under the statute there was no obligation to maintain a permanent station at all, or if there was such an obligation, that was all that was left to the arbiters; they had no power to decide what trains were to stop. The matter never went to arbitration owing to the agreement of 1858, which came in place of the obligations about stopping the trains, &c., contained in the statute. No doubt the statutory obligation was not expressly discharged, just because it was only meant to last for five years, but it was superseded by the agreement. Maintenance of the station was incumbent on the railway company under the agreement; stopping of the trains was not. The object of the clause as to stopping of the trains was to show whether there was a remunerative traffic. The pursuer required to show that the temporary agreement as to stoppage of trains was carried forward into the new agreement, and he had failed in that.

Argued for the pursuer and respondent—Section 36 of the Act was not a provision for gauging whether the traffic was remunerative enough to pay for the upkeep of a station; it was a general condition in the permanent interest of the proprietor. If the former construction were right, it should have been expressed. Besides, it would have been unreasonable to insert a clause which introduced an unremunerative element during the five experimental years if in future the traffic so gauged was to be conducted on a different principle, and only some trains were to stop. The words "the said station" and "as aforesaid" in the latter part of the section must be read in connection with the first part as meaning a station at which all trains stop. The sub-

sequent agreement did not discharge the obligation; it was merely ancillary; the railway company waived its right to have an arbitration at the close of the probationary period in return for certain prestations by the proprietors of the estate.

At advising—

LORD PRESIDENT—The right of the pursuer to prevail in this action depends on the construction of the 36th section of the East of Fife Railway Act 1855, and I shall consider the question just as if he, and not the sellers to his ancestor, had been proprietor of Lundin at the passing of that Act. The section certainly contained an obligation on the railway company to stop all their ordinary trains at a station on the estate of Lundin, but the question is, whether that is a subsisting obligation applicable to the present and future time.

Now, the section first deals with a temporary or experimental state of matters, the duration of which was to be five years. The company are to erect and maintain a temporary station at a particular place, and all ordinary trains are to stop at that station. Up to this point nothing has been spoken of except the temporary station. The obligation about stopping the trains is expressed as relating to the temporary station, and the question therefore comes to be, is it extended expressly or by implication to a more permanent arrangement. The next part of the section says that after five years the company, if the traffic at the station has proved unremunerative, shall no longer be bound to maintain the station, the question whether the station is to be maintained or abandoned (or, in other words, the question whether the traffic has or has not been remunerative) being determined by arbitration. Now, the point really is, whether in the event of the experimental station having proved remunerative, there can be found an obligation to stop all the trains. It is certainly not expressed, and where the alternative event of the traffic having proved unremunerative is contemplated, the obligation which is spoken of as continuing is the obligation to maintain the station. The word "maintain" of itself does not seem to me to comprehend the duty of stopping all the trains, and where the word "maintained" is said to be amplified by "as aforesaid," it is doubtful whether the words "as aforesaid" apply to the word "maintained," and are not confined to "abandoned." But assuming these to be applicable, I do not think that the words "as aforesaid" can be held to infuse into the word "maintained" the idea of stopping all the trains. In the structure of the original clause thus referred to the stopping of the trains is not put or described as a quality or equipment of the station, but is made a substantive and, I think, a separate obligation.

On the ordinary construction, then, of this section, I find that it contains a temporary and does not contain a permanent obligation to stop all the trains at this station. Nor do I think that there is any constraining consideration in the opposite

direction to be found in the good sense of the thing. It seems natural enough that in stipulating that an experiment shall be made whether a station will pay, the proprietor should go on to say, "and during the experiment you shall stop all the trains, although the station is not one of your permanent stations;" while, on the other hand, once it took its place as a permanent station, the interests of the traffic might be left to protect themselves.

It remains to be considered how far the agreement of 1858 affects the matter. Now, so far as the present question is concerned, that agreement seems to do no more than determine that there was to be a permanent station, or, in other words, it is equivalent to a finding by arbiters that the temporary station had proved remunerative. It says nothing about the number of trains. If therefore the proprietor had a right under the statute to have all trains stopped once the station was made permanent, he has it now; if he had this right, as I think, only during the temporary period, he certainly has not acquired anything more by the agreement.

It is perhaps superfluous to say that it would be a fraud on the statute if the company were to stop no trains at all at the station, for a station is a place for the stopping of trains; but on the view which I take, the station being an ordinary station, its requirements are to be met in the usual way, and the service regulated according to the ordinary discretion. No suggestion was made to the contrary.

My opinion is that the interlocutor should be recalled and the defenders assoilzied.

LORD ADAM concurred.

LORD M'LAREN—My original impression was in favour of the pursuer, because the obligation to stop trains was unlimited in time, and might therefore be held to subsist as long as there was a station at Lundin Links. That was the Lord Ordinary's judgment; but after considering the views which your Lordships have expressed, I do not feel sufficient confidence in my first impression to dissent from the judgment proposed.

LORD KINNEAR concurred.

The Court recalled the interlocutor reclaimed against and assoilzied the defenders from the conclusions of the summons.

Counsel for the Defenders and Reclaimers—Rankine—C. S. Dickson. Agent—James Watson, S.S.C.

Counsel for the Pursuer and Respondent—H. Johnston—C. N. Johnston. Agents—Macpherson & Mackay, W.S.

Tuesday, February 28.

FIRST DIVISION.

[Lord Wellwood, Ordinary.]

THE LORD ADVOCATE v. BOGIE AND OTHERS (METHVEN'S TRUSTEES).

(*Ante*, *Scott's Trustees v. Methven's Trustees*, Jan. 30, 1890, vol. xxvii. 314, 17 R. 389).

Revenue—Inventory Duty—Legacy Duty—Legacy to Executors and Representatives Whomsoever of a Predeceasing Legatee.

A testatrix bequeathed the residue of her moveable estate to R. M. and other two persons "equally, share and share alike, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do hereby appoint to be my residuary legatees."

R. M. predeceased the testatrix leaving a will by which he nominated executors and directed them to invest the residue of his estate for the liferent use of his brother, and thereafter to divide the fee among certain charities.

On the death of the testatrix her executors offered to pay inventory and legacy duty on R. M.'s share of residue, on the footing that it was a direct bequest from her to his executors, but the Crown claimed that double duty was payable as on the death of R. M., on the ground that his will was an effectual exercise of a power of disposal conferred on him by the testatrix.

Held (1) that R. M.'s executors took as conditional institutes under the will of the testatrix; and (2) that the one-third share of residue was not chargeable with a second duty as a legacy under R. M.'s will, in respect that he was not empowered by the will of the testatrix to dispose of her estate.

Miss Jessie Scott of Ferniebank, Newton of Panbride, Forfarshire, died on 20th July 1888. She left a trust-disposition and settlement dated 2nd September 1882, by which she appointed Robert Methven, of Hilton, Robert Russell, and James Russell, to be executors and intromitters with her whole moveable means and estate. After providing for payment of debts and legacies she disposed of the residue as follows—"With regard to the free residue of my whole moveable means and estate of every description, which may remain at the period of my death, after fulfilment of all my obligations and payment of all my debts and the foresaid legacy, I leave and bequeath the same to the said Robert Methven, Robert Russell, and James Russell, equally between and amongst them, share and share alike, for their own use and behoof, and failing all or any of them by their predeceasing me, to their several and respective executors and representatives whomsoever, whom I do