

sumed, it afforded no means of ascertaining the amount of such allowance.

The LORD ORDINARY (JERVISWOODS) repelled the reasons of reduction, resting his judgment mainly on the ground that the oversman had not failed to exhaust the claims of parties.

The pursuer reclaimed.

YOUNG and ADAM for him, maintained that the award was ambiguous, and, moreover, was disconform to the submission.

COOK, in answer.

The Court—LORD COWAN delivering the leading opinion—held that although there were words used in the award that might on a very rigorous construction be held to raise questions of difficulty, it was upon the whole pretty evident what the oversman intended to do, and the general principle of construction being that where the common sense interpretation of terms led to a reasonable view within the scope of the submission, the Court were not to go in search or pursuit of difficulties. The oversman found the defender entitled to a slump sum as allowance for the land taken away from him, and that was precisely what he had to do under the submission.

The other Judges concurred.

The Lord Ordinary's interlocutor was formally recalled; but the defender was assolizied.

Agents for Pursuer—Adam, Kirk, & Robertson, W.S.

Agent for Defender—William Kennedy, W.S.

Wednesday, May 15.

## FIRST DIVISION.

### BELL'S TRUSTEES v. EDINBURGH AND GLASGOW RAILWAY COMPANY.

*Railway — Siding — Level Crossing — Agreement.*

Circumstances in which held that a Railway Company having, by agreement, given a level crossing, along with a sum of money, to a proprietor whose lands were intersected by a branch line, were entitled to make a siding near the level crossing, it being held proved, on the evidence, and after a remit to a man of skill, that the siding did not render the level crossing either unsafe or materially inconvenient.

This was an action of declarator, interdict, and damages at the instance of the trustees of the late Alexander Bell, of North Newton, against the Edinburgh and Glasgow Railway Company, the main conclusion being that the defenders had no right to make a siding on that portion of the Stirlingshire Midland Junction Railway where it passes through the pursuers' lands of Bellmount, lying within, or in the immediate neighbourhood of, the town of Falkirk, so as to obstruct, interrupt, or impair the rights and privileges connected with the crossings possessed by the pursuers and their tenants over the railway, in terms of a minute of agreement dated 16th September and 8th October 1861.

A variety of questions had been raised relating to claims on the part of the pursuers for accommodation works; but the most of these had been settled by the said agreement, whereby the pursuers discharged these claims, and the railway company agreed to pay a certain sum in lieu of

building a bridge required by the pursuers. By the said agreement the railway company also undertook to allow the pursuers two foot crossings over the surface of the railway at certain points in the pursuers' lands. These crossings were made at parts where the line ran through a cutting, and the pursuers at each crossing placed, on each side of the cutting, wooden stairs leading down to and up from the line. Thereafter the railway company laid down a siding at these crossings in such a way as, according to the pursuers, to interfere with their right of crossing. The railway company removed the wooden steps and substituted therefor stone steps at a considerable distance further back. The pursuers alleged that this siding increased the danger involved in the crossing, and violated the agreement come to between the parties; and the question now in dispute was, whether this was the fact. After various steps of procedure in the case, some of the conclusions of this action being departed from, and judgment being given for the defenders to a partial extent, a remit was made to Mr Wylie, C.E., to examine and report whether the crossing had been rendered unsafe or materially inconvenient. Mr Wylie reported that the crossing had not been rendered unsafe or materially inconvenient by the formation of the siding, or by the manner in which it was used by the defenders. The pursuers objected to this report on the ground—(1) That the danger caused by the siding was considerable; (2) That the reporter was bound to suggest remedies therefor.

GLOAG (A. MONCRIEFF with him) supported the objections.

YOUNG and BLACKBURN, for the defenders, were not called on.

The Court unanimously (LORD DEAS declining) repelled the objections, and dismissed the action.

LORD CURRIEHILL said—that the case had undergone a full discussion formerly, and that then the Court had had no doubt that the pursuers' case had not been made out. He was not in the least shaken in his opinion by the present minute repetition of the argument. When the pursuers' land was taken for the purposes of the railway, he received ample compensation. The Sheriff, in conformity with the Act of Parliament, provided the proper accommodation for the severance of the pursuers' property, and that was a bridge. The pursuers, by contract, dispensed with that bridge, on getting a sum of money and a level crossing. The right to that level crossing remained intact. The railway company, on ground of their own, found it advisable to make a siding. They were legally entitled to make a siding. There was no agreement by convention to prevent that, and indeed the argument was not put that length. But it was said that they must make their siding so as not to interfere with the level crossing. He did not think it did interfere. Both the proof and the remit showed that. All level crossings were to some extent dangerous, and the person who used them took the right with the accompanying risks. It was established that if the ordinary care incumbent on persons to whom level crossings belonged were exercised, there was no injury to the right. What the pursuers wanted was immunity from practising that ordinary care. The objections ought therefore to be repelled, and the action dismissed.

LORD ARDMILLAN concurred.

The LORD PRESIDENT remarked that there was no foundation in Mr Wylie's report for the contention that any danger had been produced by the siding

with which a party having a level crossing must not lay his account. It would be inexpedient to take any other view. To hold that the granting of a level crossing was to tie up the hands of the railway company, so as to prevent them from using their own ground most advantageously, would lead to serious consequences. The granting of such a privilege must not prevent a railway company from increasing their traffic, though that might have a direct bearing on the party in right of a level crossing. On the other hand, a railway company, having given such a level crossing, could not be allowed capriciously to do things not necessary for their own advantage, to the injury of the proprietor. In the present case, looking to the situation of this siding, a few hundred feet from an important station, there was no wonder that this locality had been chosen. Plainly this was just where a siding was most required. Ample siding accommodation was of very great importance for public safety at railway stations.

Agent for Pursuers—Wilson, Burn, & Gloag, W.S.

Agents for Defendants—Hill, Reid, & Drummond, W.S.

Wednesday, May 15.

LYELL v. GARDYNE.

(*Ante*, vol. iii, p. 299; and ii, p. 251.)

*Jury Trial—New Trial.* On report of a Lord Ordinary in a case where a new trial had been granted, motion to fix a day for trial during session refused.

A new trial having been granted in this case, to-day the Lord Ordinary (Barcaple) was moved to fix a day for trial during session. His Lordship reported the case, stating that the trial had before occupied three days, and that there was no reason to suppose it would be shorter on the next occasion; that this would be very inconvenient during session, and indeed it would be July before he could try the case. His Lordship suggested that it was for the Court to say whether it would not be better to try the case at the sittings, and also before another Lord Ordinary.

The LORD PRESIDENT thought that if the trial were to be during session, it must take place before Lord Barcaple; but considering that it would be July in any view before the case could be tried, the Court held that it should stand over till the sittings. Lord Barcaple would therefore refuse the motion, leaving the parties to give notice of trial for the sittings.

Friday, May 17.

COLDINGHAM RIGHT OF WAY.

SCOTT v. HOME-DRUMMOND AND HERIOT.

(*Ante*, vol. ii, p. 79.)

*Road—Right of Way—Public Place—Sea-Shore—Harbour—New Trial.* Motion for new trial, on the ground that the verdict was contrary to evidence—refused.

This was a motion by the defenders for a rule on the pursuers to show cause why a new trial should not be granted, on the ground that the verdict was contrary to evidence. The pursuers are William and John Scott, fishermen at Coldingham and Eye-

mouth, in Berwickshire. The defender, Mr Home-Drummond, is proprietor of the estate of Northfield, in Coldingham parish. The other defender is tenant of Northfield farm. The question between the parties was as to certain alleged rights of way through the defender's property. The case was tried before Lord Barcaple and a jury in December last, on the three following issues;—

- "1. Whether, for forty years and upwards prior to 1864, or from time immemorial, there existed a public road or right of way from the town of Coldingham on the south to the sea-shore at Petticur-Wick or Pettico-Wick, and to the harbour or inlet called Pettico-Wick Harbour on the north, passing through the estate of Northfield, or part thereof, in or near the direction indicated by a line coloured red on the plan No. 9 of process, and which line is marked by the letters A, B, C?
- "2. Whether, for forty years and upwards prior to 1864, or from time immemorial, there existed a public right of way for foot-passengers from the village of Coldingham Shore to St Abb's Head, and onwards to the sea-shore at Petticur-Wick or Pettico-Wick, and to the harbour there, in or near the direction indicated by a line coloured blue on the plan No. 9 of process, which line is marked by the letters D, E, F, C?
- "3. Whether, for forty years and upwards prior to 1864, or from time immemorial, there existed a public right of way for foot-passengers from the village of Coldingham Shore to the sea-shore at the point called Burnmouth Harbour, and on to St Abb's Head and to the sea-shore at Petticur-Wick or Pettico-Wick, and to the harbour there, in or near the direction indicated by a line coloured yellow on the plan No. 9 of process, which line is marked by the letters H, E, G, C?

The jury returned a verdict for the pursuers on the first and third issues, and for the defenders on the second.

DUNCAN, for the defenders, now moved for a rule on the pursuers to show cause why a new trial should not be granted, contending—(1) That the evidence did not prove that Pettico-Wick was a public place in the proper sense of a terminus to a right of way, but, on the contrary, disproved that; (2) that the only use of the road proved was a use by fishermen, and not by the public; and (3) that the possession proved was not an uninterrupted use, but only an interrupted use, as was shown by the fact that the fields across which the alleged right of way led were occasionally in crop.

The LORD PRESIDENT—I am of opinion that the defender has not made out his case. There were three issues sent to trial, each raising a question of the exercise of a certain right of way. The jury, by their verdict, have negatived the claim under the second issue, finding on that issue for the defenders; and no attempt is made to dispute the verdict under that. The defenders, however, move for a new trial as regards the first and third issues, on the ground that the verdict was contrary to evidence. The road claimed under the first issue is described as a public road or right of way from the town of Coldingham, on the south [reads from first issue]. And the road claimed under the second issue is a footpath [reads from second issue]. Now when these issues were adjusted, the question was raised whether the place at which both these roads are said to terminate, at Pettico-Wick, is in the proper sense a public place; and, to avoid difficulty,