defenders. As things stand, that case rests not alone on their having satisfied production, but on this as the result of their whole course of conduct as deduced by Mr Murray. They first submitted to the decision of the judge defences which do not contain a challenge of the jurisdiction, and then, when these were disposed of in a certain way, and the defenders in the ordinary course had to meet the call in the summons to satisfy production, they met that call by production of the writ without objection, and so enabled the judge to proceed to deal with the defences which they had stated. The fact that after this they added to their record a plea against the jurisdiction of the Court did not, in my judgment, retrieve the position which they had lost.

As regards the second point, I think the reclaimers exaggerate the importance of the conclusion against the trustee, for he is brought into the action only as trustee to see something being done with the trust-estate. It is for him, as the Lord Ordinary says, to consider whether he will appear to defend or not, but to say that it was in any way incompetent for the pursuers to call him appears to me to be out of the question.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—Graham Murray, Q.C. — Salvesen. Agent — J. Smith Clark, S.S.C.

Counsel for the Defenders—C. S. Dickson —Cullen. Agent—J. Murray Lawson, S.S.C.

Wednesday, December 12.

FIRST DIVISION.

[Lord Low, Ordinary.

PLACE *v.* WEST HIGHLAND RAILWAY COMPANY.

Railway — Company — Deposited Plans— "Delineated"—Powers to Take Land Compulsorily.

A railway Act empowered the company to take compulsorily the lands delineated upon the deposited plans. A triangular plot of ground was delineated as bounded on one side by the railway of a different company, on another by a road, and on the third or west side by a dotted line. The lines which showed the limits of deviation terminated towards the west in this dotted line, and west of it nothing was shown on the plan except the road and the railway of the other company, which were continued, the road for a short, and the railway for a longer distance.

Held that the company were not entitled under their compulsory powers to take any land to the west of the dotted line.

The West Highland Railway Company obtained power under their Act of 1889 to take compulsorily, for the purposes of their undertaking, the lands delineated upon the deposited parliamentary plans, and described in the books of reference.

A portion of these lands was numbered "61" on the parliamentary plan, No. 32 of process. It was triangular in shape, having the Callander and Oban Railway line on its north side, a public road on its south side, and as a base (to the west) a dotted line (termed by the Lord Ordinary "the limit of deviation line"). To the north and south of this triangular plot dotted lines showing the limits of deviation were marked on the plan. These dotted lines terminated towards the west in the dotted line, part of which formed the base of the triangular plot. To the west of this dotted line nothing was shown on the plan except the public road and the Callander and Oban Railway, which were continued respectively 100 feet and 2500 feet. In the book of reference No. 61 was described as "pasture land."

It had been intended to form a junction between the two railways at or east of the triangle, but a dispute having arisen between the companies the arbiter appointed by the Board of Trade decided that the junction should be made further to the west. Accordingly, it became necessary for the West Highland Railway Company to acquire ground to the west of the dotted line which formed the base of the triangle. This they endeavoured to do under their compulsory powers by serving a notice upon Edward Gordon Place, Esq. of Loch Dochart, the proprietor of the whole land in question, with a relative plan showing, as the ground proposed to be taken under No. 61, not only the triangle shown on the parliamentary plan, but two strips of ground extending along the south side of the Callander and Oban Railway for a distance of 1200 feet to the west of the dotted line forming the base of the triangle. The land so proposed to be taken was pasture land.

In May 1894 Mr Place brought an action against the West Highland Railway Company to have them interdicted from entering upon the land shown in the notice, so far as it lay to the west of the dotted line on the parliamentary plan, as not being included in the lands which they were empowered by their Act to take.

The respondents pleaded—"(1) The respondents being entitled under their Act to acquire, and having acquired, the said land No. 61, by virtue and in terms of their notice to treat and plan relative thereto and the Acts mentioned in said notice, and being now in the lawful and permanent possession of said lands, the present action is incompetent. (3) The said land No. 61 being delineated upon the deposited plans, and being necessary for the construction of said junction with the Callander and Oban Railway and works connected therewith, and the acquisition thereof

being specially authorised by the respondents' Act of Parliament, the respondents were entitled to acquire and use the said land No. 61 under their compulsory powers."

Upon 22nd November 1894 the Lord Ordinary (LOW) pronounced the following interlocutor—"Finds, 1st, that such portions of the land marked No. 61 on the plan relative to the notice to treat served by the respondents upon the complainer on 4th April 1894, as are outside of the limit of deviation shown on the parliamentary plan, were not included in the lands which the respondents were authorised by their Act of Parliament to take compulsorily: . . . Appoints the cause to be put to the roll for further procedure: Reserves the question of expenses, and grants leave to reclaim.

"*Opinion.*—The question in this case is, whether the respondents have power to take compulsorily a certain part of the lands described in the notice to treat and relative plan, which they served upon the complainer in April 1894.

"The power to take lands compulsorily is given to the respondents by their Act in the usual terms, namely, 'to enter upon, take, and use such of the lands delineated on said plans, and described in the deposited books of reference as may be required.'

"One of the parcels of land delineated in the Parliamentary Plans is No. 61. The number is placed upon the plan upon a small triangular piece of ground, the boundary upon one side of which is the Callander and Oban line of railway, and upon another side a road. The base of the triangle is formed by the limit of deviation line. Beyond the limit of deviation the road which forms one side of the triangle is carried on for the distance of 100 feet, and then stops short, while the Callander and Oban line, which forms the other side of the triangle, is carried on for a distance of some 2500 feet. There is no number outside the limit of deviation, and nothing whatever is delineated on the plan outside that limit except the small piece of the road, and the Callander and Oban line to which I have referred. In the book of reference No. 61 is simply described as 'pasture land.'

"The notice to treat includes two narrow strips of ground running alongside the Callander and Oban line for a distance of some 1200 or 1300 feet beyond the limit of deviation. In the notice and relative plan these strips are included under the number 61.

"The complainer contends that the strips of land in question are not delineated upon the Parliamentary plan in so far as they are outside the limit of deviation, and that to that extent the respondents have no power to take them compulsorily.

"The respondents, on the other hand, maintain that the plans sufficiently indicate the lands in question to bring them within the word 'delineated.'

"The authority chiefly relied upon by the respondents is the case of *Dowling* v. *The Caerleon and Pontypool Railway Company*, L.R., 18 Eq. 714, in which Vice-Chancellor Hall held that the word 'delineated' could not be limited to mean surrounded on all sides by lines, but that it meant sketched or represented or so shown that the landowners would have notice that the land might be taken. Even assuming that that is a sound rule for the construction of the word 'delineated,' I do not think that it aids the respondents in this case. The pieces of land in question are in no way sketched or represented or shown on the plan, because where they are situated the plan is altogether blank and shows nothing. In the case of *Dowling* the piece of land (No. 35) in regard to which the question arose was shown (if I read the report and the plans aright) as having boundaries on every side, but at one corner the boundaries stopped short before they met. It was proved that these unfinished boundary lines represented actual boundaries, which in fact did meet, and the Vice-Chancellor, as I understand, held that the land which would have been closed by these boundaries if they had been prolonged upon the plan until they met, was 'delineated' in the sense in which he read that word. The facts therefore in *Dowling's* case were very different from these of the present case, because here, if the deviation line is once passed, it is impossible to find any limits within which the respondents' compulsory powers can be restricted.

"Another authority to which I was referred is *Protheroe* v. *Tottenham and Forest Gate Railway Company*, L.R., 1891, 3 Ch. Div. 278. That case appears to me to be directly in favour of the complainer. On the parliamentary plan a part of a nursery garden was shown, across which it was proposed to take the line of railway. The boundaries of the garden ground were shown upon all sides except on the north, where no boundaries were shown beyond the limit of deviation. The number by which the nursery land was denoted was inside the limit of deviation. Beyond the limit of deviation, however, the plan was not blank, because the eastern and western boundaries were prolonged for a considerable distance, and also dotted lines showing the paths by which the garden was intersected. It was held by the Court of Appeal (reversing the judgment of Kekewich, J., who thought that the case was ruled by *Dowling*) that the railway company had no power to take compulsorily any land to the north beyond the limit of deviation. Lord Justice Lindley summed up the ground of judgment in a single sentence—'There is no indication at all upon the deposited plan of the limit of what the company want north of the line of deviation.' These words are directly applicable to the present case, and the facts of the two cases cannot, in my opinion, be distinguished in any material respect. If there is any distinction, it is that the case of *Protheroe* was more favourable to the railway company than the present case.

"I am therefore of opinion that as regards No. 61 on the plan, the compulsory

powers of the respondents did not extend beyond the limit of deviation.

"There is, however, an argument of the respondents which I must notice before leaving this point. They said that they were compelled to take the land in question by the terms of a decree-arbitral pronounced by Sir Douglas Galton as arbiter appointed by the Board of Trade under the 40th section of their special Act of Parliament.

"That section provides 'for the protection of the Callander and Oban Railway Company,' that the junction between the line of that company and the respondents' line should, failing agreement, be made according to plans and specifications to be approved by an engineer to be appointed by the Board of Trade.

"I do not doubt that the method of forming the junction approved by Sir Douglas Galton does necessitate the acquisition of the lands in question, but I do not see how that can possibly enlarge the compulsory powers conferred upon the respondents by their Act." . . .

The railway company reclaimed, and argued—(1) They were not acting oppressively; it was necessary to have this ground in order to satisfy the Board of Trade requirements. (2) Due and full notice had been given to the proprietor. The land proposed to be taken was sufficiently delineated in the parliamentary plans. The ground was pasture land, and it would have made no difference in the proprietor's attitude towards the company's bill if it had been indubitably set forth on the parliamentary plan. In *Protheroe's* case the ground was a nursery garden. This case was ruled by that of *Dowling*, L.R., 18 Eq. 714. (3) They were not confined to the land within the limits of deviation. These limits applied to the railway line itself. For collateral purposes land beyond these limits could be compulsorily taken—*Pain* v. *Bristol Railway*, 2 Railway Cases 75; *Finck* v. *London & North-Western Railway Company*, L.R., 44 Ch. Div. 330.

Argued for the proprietor—(1) The Lord Ordinary was right, and the grounds of his decision were sound. This case was ruled by that of *Protheroe*, L.R., 1891, 3 Ch. Div. 278, the circumstances of which were more favourable to the railway company. (2) The nature of the ground proposed to be taken was immaterial. (3) There might be reasonable lateral extension, but here unlimited longitudinal extension was pleaded for. On the same principle land might be taken all the way to Oban.

At advising—

LORD PRESIDENT—It seems to me that the question to be determined is, what is the fair reading of the plan, No. 32 of process? It is by the plan and notice that a landowner is certified what portion of his estate is proposed to be taken from him in the event of the undertakers' bill becoming an Act of Parliament. Now, looking at this plan, I own my complete inability to think that any landowner or any man of ordinary understanding would consider that this portion of land, numbered 61, comprehends the ground which is the subject of dispute. It seems to me that the number 61 refers to and denotes that portion of ground which is within the triangle formed by the road, the embankment of the Callander and Oban Railway and—as a base—the dotted line upon which the figures 61 stand. I cannot think that anyone would suppose that the portion of ground referred to by 61 straggles down by the Callander and Oban line to the whole length of that railway as shown on the plan, and indeed, if No. 61 is so comprehensive as to include what is now in dispute it must be something the boundaries of which are not marked or suggested and which is therefore in no sense delineated. On the other hand, you have, in my opinion, a delineation supplied by this dotted line taken in combination with the lines to either side of the figures. Even if that dotted line had its own separate function on the plan as a limit of deviation, I should say that the true reading of the plan was that No. 61 was intended to be contained wholly within that line, and that the line performed the double duty of marking the limits of deviation and at the same time of delineating No. 61. But I do not think that this dotted line is a limit of deviation in the proper and statutory sense of the term, for it is not said to represent a limit either for lateral or vertical deviation, or indeed to be a limit of deviation from any line or level, but only from a point—to wit, the termination of the railway. I say this, because I think it better that we should vary the phraseology of the Lord Ordinary's interlocutor in the passage in which he calls this line a limit of deviation.

It is of course implied in what I have said that I do not proceed upon the view that the compulsory powers cannot go beyond the limits of deviation. I see nothing to warrant such a restriction.

LORD ADAM—I am of the same opinion. As I understand, the proposition is, "What would a landed proprietor, being a person of ordinary intelligence, understand from the plan?" My opinion is that he would require a great deal of imagination to reach the conclusion, that according to the plan anything was intended to be taken, except the portion of land which is delineated between the lines marked limits of deviation and the transverse line uniting the ends of these limits of deviation.

LORD M'LAREN—I think this case is clearly to be distinguished from the cases which raise a question as to the amount of lateral extension which a company may claim in carrying out the purposes of their undertaking. It is certain that the limit of lateral deviation of the line of the railway is not to be necessarily taken as the limit of the land which may be purchased. It is recognised in the two cases which were cited that where an enclosure

is exactly delineated on the parliamentary plan, and is distinguished by a number corresponding to the appropriate entry in the book of reference, and the limit of deviation is indicated as running through that numbered enclosure, the company are not restricted to the ground within the limits of deviation of the railway, but may take the whole enclosure if required for the purposes of their undertaking. On the other hand, when the plan shows nothing whatever outside the limits of deviation, it is difficult for a company to establish a right to go beyond these limits, and to claim land which lies outside and is not delineated. Here the case is even clearer, for it seems to be an attempt to extend the power of the purchaser not by way of lateral deviation, but by lineal extension. Now, if there were no transverse line indicated on the plan, I should still have thought that no proprietor could consider that he had received notice that the company might claim to take land for the purpose of the longitudinal extension of their railway beyond the termination of the loop line. But as if to prevent any misapprehension on this point a dotted line has been marked off to show the limit beyond which the company did not propose to exercise powers of compulsory purchase.

I agree, therefore, that, as the whole of the land which is now proposed to be taken is outside the limits of deviation, and as there is no delineation of any kind to indicate its extent or precise position, the Lord Ordinary's findings are right.

LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

"The Lords having considered the reclaiming-note for the respondents, the West Highland Railway Company, against the interlocutor of Lord Low dated 22nd November 1894, and heard counsel for the parties, Adhere to said interlocutor with this variation, that in place of the word 'limit' there be inserted the words 'the dotted transverse line connecting the terminations of the limits:' *Quoad ultra* refuse the reclaiming-note, and decern: Find the complainer entitled to expenses since the date of the interlocutor reclaimed against: Remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, and remit to his Lordship to proceed, with power to decern for the taxed amount of said expenses," &c.

Counsel for the Complainer—Graham Murray, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.

Counsel for the Respondents—D.-F. Sir Charles Pearson, Q.C.—N. J. Kennedy. Agents—Macrae, Flett, & Rennie, W.S.

Thursday, December 13.

FIRST DIVISION.

[Lord Wellwood, Ordinary.

A B *v.* C D.

(*Ante*, vol. xxxi. p. 848.)

Expenses — Fees to Skilled Witnesses — Special Expense Caused by Conduct of Party.

A wife brought an action of declarator of nullity of marriage against her husband which she was allowed to abandon two days before the diet fixed for proof upon payment of expenses. She had submitted to a medical examination by professional men employed by her husband, but had declined to come to Scotland, and had stipulated that the examination should be in London, and conducted by medical men of standing in their profession. Accordingly, with the view of their subsequently giving evidence at the trial, two eminent medical men had been sent from Scotland to London, to whom fees of £315 and £323, 8s. respectively were paid. These fees the Auditor taxed at £15, 15s. and £10, 10s. Objection having been taken to the Auditor's report, the Lord Ordinary fixed £131, 5s. and £105 as the fees chargeable against the pursuer.

Held that in the special circumstances of the case these fees were reasonable, and such as the pursuer was bound to pay as part of the expenses of the action.

A B brought an action of declarator of nullity of marriage against her husband C D, which she was afterwards allowed to abandon two days before the diet fixed for the proof upon payment of expenses.

In the course of the proceedings preparatory to proof the defender had agreed to submit to medical examination, but had stipulated that it should be in London and conducted by gentlemen of standing in their profession. She declined to accede to the suggestion that she should come to Scotland, and accordingly Dr Heron Watson, Edinburgh, and Dr Renton, Glasgow, were sent to London so that they might be able to give evidence in Edinburgh subsequently if required. These medical men charged £315 and £323, 8s. respectively for their professional services.

The Auditor taxed the fees payable by the pursuer at £15, 15s. and £10, 10s. respectively. Objection having been taken to the Auditor's report, the Lord Ordinary (WELLWOOD) fixed the fees chargeable against the pursuer at £131, 5s. and £105 respectively.

"*Opinion.*—At the previous hearing on 14th July I heard a full argument, not only on the competency, but also on the merits of the objections. The competency of the objections having now been sustained, I am of opinion, on the merits, that the Auditor has not allowed sufficiently large