Saturday, July 8.

GREENOCK AND WEMYSS BAY RAILWAY COMPANY *v.* CALEDONIAN RAILWAY COMPANY, *et e contra.*

Railway — Administration — Tolls — Rates — Joint Committee. The Wemyss Bay line commences at a point on the Caledonian line near Port-Glasgow, and terminates at Wemyss Bay, and is worked by the Caledonian Co. *Held*, on a sound construction of the Greenock and Wemyss Bay Railway Act 1862, and agreement between the Wemyss Bay Co. and the Caledonian Co., confirmed by the Act, that the powers of a joint committee of the two companies therein provided do not extend to the regulation of the tolls and rates to be charged on through traffic from Glasgow to stations on the Wemyss Bay line, but only to those to be charged on the Wemyss Bay Railway.

The Greenock and Wemyss Bay Railway Company were incorporated by the "Greenock and Wemyss Bay Railway Act, 1862." By that Act they were authorised to make a railway from a point on the Greenock section of the Caledonian line, about half a mile west of the Port-Glasgow station to Wemyss Bay, and a pier and roads in connection therewith. By the Act the Caledonian Railway Co. were authorised to contribute to the undertaking to the extent of one-fourth part of the whole capital of the Greenock and Wemyss Bay Railway Co. The preamble sets out that the said "railway and other works may be beneficially worked in connection with the railways of the Caledonian Railway Co., and that company are willing to work the same; and it is expedient that provision should be made for that purpose, and also with regard to the interchange of traffic on the said respective lines of railway." Prior to the passing of the Act, an agreement was entered into between the promoters and the Caledonian Railway Co. in relation to the construction and maintenance of the railway and works, the working and management of the traffic thereon, the fixing and apportionment between the companies of tolls, rates and charges, and other matters in connection therewith. This agreement was sanctioned and confirmed by the Act, and is printed in a schedule attached thereto. By this agreement it was provided that as soon as the railway pier, road, and other works had been completed by the complainers to the satisfaction of the Caledonian Railway Co., approved of by the Government Inspector, and opened to the public for traffic, the Caledonian Railway Co. should take possession of the said railway, pier, and roads for the purpose of working the same in perpetuity, and should provide the necessary rolling stock and plant of every kind for the purpose of effectually working the traffic on the same. Article 11 of the agreement provides, "that the traffic on the Greenock and Wemyss Bay Railway and pier, including the fixing of the tolls, duties, rates, and charges to be levied or taken in respect of the said traffic, shall be managed and fixed by a joint committee consisting of six persons, three of whom shall be named by the board of directors of the Caledonian Railway Co., and three by the directors of the Greenock and Wemyss Bay Railway Co.; the Caledonian Railway Co. having the appointment of the chairman of said company, but who shall have no casting vote, and all differences of opinion where the committee shall be equally divided, shall be referred to arbitration; declaring that, during the first year of the subsistence of the said agreement, three passenger trains and one goods train each way per diem between Glasgow and Wemyss Bay, at least, shall be placed upon the said railway, and should it afterwards be found by the joint working committee that the traffic warranted and required it, an additional number of trains should thereafter be placed upon the line, but the Caledonian Railway Co. should be the sole judges of the proper times for starting the said trains." It is farther, by article 18, provided that all differences which might arise between the parties respecting the true meaning or effect of the agreement, or the mode of carrying the same into operation, should be referred to arbitration in terms of "the Railway Clauses Consolidation (Scotland) Act, 1845."

A joint committee was appointed in 1865 in terms of the Act. The Caledonian Railway Co. have, since the opening of the Wemyss Bay Railway in 1865, worked the traffic on that line under the agreement, charging from their line between Glasgow and Port-Glasgow to the stations of the Wemyss Bay Railway certain through rates and charges. The Caledonian Co. informed the joint committee on 14th April, and the Wemyss Bay Co. on 19th April 1871, that they had resolved to terminate the existing through rates and division thereof as to passengers from 1st May 1871, and that it would therefore be for the joint committee to enter into new arrangements with the Caledonian Co. for these purposes, and particularly to fix what rates are to be applicable to the Wemyss Bay line, which, being added to the Caledonian rates, may enable that company to fix through rates, in case other through rates are not agreed to between the two companies. At a meeting of the joint committee, held on 26th April 1871, the Wemyss Bay Co.'s representative denied the right of the Caledonian Co. to alter the through rates without the consent of the joint committee. It was thereupon moved by two of the Caledonian Co.'s representatives that it was proper for the joint committee 'to fix the amount of new rates or fares to be exacted as on and from 1st May in respect of the Wemyss Bay Railway,' and that certain rates stated should be fixed for that month, and should continue until altered. For the Wemyss Bay Co. it was stated that the Caledonian Co. had no right to alter the existing through rates between their railway and the Wemyss Bay Railway and the division thereof, and it was moved as an amendment 'that the present through rates and division thereof shall continue until altered by the joint committee.' The representatives of the Caledonian Co. on the committee protested that this amendment raised a question not within the jurisdiction of the joint committee, and that it was incompetent. On a vote being taken, the joint committee, which consists of an equal number of directors of each company, was equally divided. Thereupon arbitration was claimed, on the motion for the Caledonian Railway Co., in terms of the 11th article of the agreement.

Each company proceeded to nominate an arbiter on their own construction of the agreement, and to call upon the other company to appoint an arbiter on their part. The Caledonian Railway Co. maintained that the joint committee had only

power to regulate the rates charged on the Wemyss Bay Railway and Pier. The Wemyss Bay Co. maintained that the joint committee had the sole power of fixing the rates to be charged for through traffic, not only along the Wemyss Bay Railway, but along the Caledonian Railway between Glasgow and its junction with the Wemyss Bay Railway. The respective references embodied these views.

Each company presented a note of suspension and interdict against the reference initiated by the other being proceeded with.

The two applications were heard together.

The Lord Ordinary on the Bills (MACKENZIE) granted the interdict craved by the Caledonian Railway Co., and refused that craved by the Wemyss Bay Co.

In a Note to the latter interlocutor his Lordship, after a narrative of the facts, proceeds:—"The Lord Ordinary is of opinion that the construction which the Wemyss Bay Company attempt to put upon the 11th article of the agreement confirmed by their Act of 1862 is untenable. Neither that or any other part of the agreement confers any power upon the joint committee to manage the traffic on the Caledonian Railway, or on any part of it, or to fix the tolls, duties, rates, and charges to be levied in respect of that traffic. By 'The Caledonian and Scottish Central Amalgamation Act 1865' the power to levy tolls and rates, not exceeding the maximum therein fixed, was conferred upon the Caledonian Railway Company, and there is no prevision either in the Greenock and Wemyss Bay Railway Act 1862, or in the agreement thereby confirmed, which takes away that power from the Caledonian Railway Co. and confers it upon the joint committee. On the contrary, it is expressly provided by section 64 of the complainers' Act of 1862 that 'Nothing in this Act contained shall alter, prejudice, or diminish any of the rights, powers, privileges, or authorities vested in the Caledonian Railway Co., in virtue of the Acts relating to such company, or to the Glasgow, Paisley and Greenock Railway, except in so far as expressly provided and declared by this Act.' And it is provided by article 2d of the agreement that 'the tolls, rates, and charges to be levied under the said Act shall be fixed and regulated by the joint committee to be named under the said Act.'

"The matters in dispute in both applications for interdict depend upon the true meaning and construction of the 11th article of the agreement, and that article is, the Lord Ordinary thinks, free from ambiguity. It is thereby provided that '*the traffic on the said railway and pier*,'—that is, the traffic on the Wemyss Bay Railway and Pier, including the tolls and rates to be levied '*in respect of the said traffic*,'—shall be managed and fixed by the joint committee, and all differences of opinion where the joint committee shall be equally divided in regard to that traffic, are to be referred to arbitration. Had the Wemyss Bay Co. followed the usual course of working their own undertaking, they would have had the sole right to manage the traffic, and to fix the tolls and rates to be exacted for traffic upon their railway. But that railway was to be worked by the Caledonian Co. under the agreement confirmed by the statute, and accordingly that agreement provides for the management of the traffic on the Wemyss Bay Railway, and the fixing of the tolls and rates, both through and local, to be levied in respect of that traffic by a joint committee of six persons, three of whom are to be named by each company. The rights of that joint committee under the agreement are, as regards tolls and rates and management of traffic, precisely the same as those which the directors of the Wemyss Bay Co. would have had if they had worked their own line, and there had been no agreement with the Caledonian Co.; and the powers of the arbiters appointed to settle a difference of opinion in the joint committee do not extend beyond the rights conferred upon the joint committee by article 11 of the agreement. These rights and powers do not extend to the fixing of the tolls and rates to be levied, or the management of the traffic on the Caledonian Railway, as regards through traffic passing over both the Caledonian Railway and the Wemyss Bay Railway, but are limited to the management of that traffic, and the fixing of the tolls and rates to be levied for that traffic, in so far as it passes over the Wemyss Bay Railway, and the Caledonian Co. have the sole right of managing the traffic, and fixing the tolls and rates to be levied in respect of that traffic in so far as it passes over their own line. As regards their own railway, the Caledonian Co. was, the Lord Ordinary considers, entitled to alter the tolls and rates on which the joint traffic had been carried up to the end of April 1871, and to terminate the table of tolls and rates then existing. It is not pleaded that they did not give reasonable notice of their intention. Upon receiving notice of that company's resolution, the joint committee should have decided the tolls and rates to be levied on the Wemyss Bay Railway for through traffic, or gone to arbitration upon that matter. The two charges for the various distances which the through traffic might pass over each railway would, when added together, be the rate which the Caledonian Co., as conductors of the traffic, could charge. The complainers (the Wemyss Bay Co.) stated that they only maintained that the joint committee had right to manage the through traffic, and to fix the rates to be levied in respect thereof, in so far as it passed over any part of the Caledonian Railway between Glasgow and the Wemyss Bay Railway, which join near Upper Greenock. But if the argument of the complainers were sound, the right of the joint committee would extend to through traffic passing over the Wemyss Bay Railway from any station on the Caledonian Railway.

"The complainers founded upon that part of the 11th article of the agreement which follows the the word 'declaring' as supporting their construction of the preceding part of the article which deals with the management of the traffic and the tolls and rates on the Wemyss Bay Railway and Pier. The Lord Ordinary considers that it has not that effect, and that it relates to a separate and distinct matter, namely, the number of the trains daily between Glasgow and Wemyss Bay, any increase of which it was reasonable and proper to commit after the first year to the joint committee, seeing that the greater part of the traffic to Wemyss Bay, a sea-bathing village on the Clyde, was expected to come from Glasgow.'

"If any argument is to be derived from the concluding part of article 11 of the agreement it is unfavourable to the complainers, because the words of the article are free from ambiguity—the number of trains from Glasgow to Wemyss Bay were within the view of the parties—and if it had been their intention that the management of the traffic,

including the fixing of the tolls and rates on the whole lines of railway between Glasgow and Wemyss Bay, should be committed to the joint committee, that would have been distinctly stated, whereas it is only the traffic on the Wemyss Bay Railway and Pier, including the tolls rates to be levied in respect of that traffic, which is, according to the agreement, to be managed and fixed by that committee.

"The complainers also founded upon the 60th section of their Act of 1862, which provides that 'while and so long as the Wemyss Bay Co. shall be worked by the Caledonian Co. under the said agreement, only one short distance charge shall be made in respect of the traffic conveyed partly on the lines of the Caledonian Railway Co., and partly on the Wemyss Bay Railway.' But the Lord Ordinary considers that this clause does not affect the construction of the 11th article of the agreement.

"For these reasons the Lord Ordinary is of opinion that the reference inaugurated by the Caledonian Railway Co. is in accordance with the complainers' statute and the agreement confirmed thereby, and that by the reference inaugurated by the complainers, which is the subject of complaint in the process of interdict at the instance of the Caledonian Railway Co., the complainers propose to submit a question to the arbiters which neither they nor the joint committee, in respect of whose difference of opinion the arbiters are called upon to act, are entitled to consider and determine."

The Wemyss Bay Co. reclaimed.

The SOLICITOR-GENERAL and BALFOUR for them.

WATSON and JOHNSTONE for the Caledonian Co.

The Court adhered to both interlocutors.

Agents for Wemyss Bay Co.—M'Ewen & Carment, W.S.

Agents for Caledonian Railway Co.—Hope & Mackay, W.S.

Saturday, July 8.

SECOND DIVISION.

CALDER *v.* STEVENS.

Pactum Illicitum—Sponsio Ludicra. The prize at a racing meeting having been admittedly gained by a certain horse, the owner of the horse raised an action against the stake-holder for the amount of the stakes in his hands—Action sustained, *repelling* the plea that its purpose was to give effect to a *sponsio ludicra*.

This was an action in the Sheriff-court of Haddington by Robert Calder, farmer, Kelloemains, against G. H. Stevens, innkeeper, Gullane. The Sheriff-Substitute (SHIRREFF), after some procedure, repelled preliminary pleas stated by the defender, and the facts and pleas are fully stated in the following Note, appended to his interlocutor:—"This is an action at the instance of the owner of horses that ran in two of the races at what was called 'The Gullane Spring Race Meeting,' held early in the year 1868. The defender consigned the stakes lodged with him by the pursuer which are sued for, and of consent of the defender, warrant was granted by interlocutor of 28th January 1869 for payment of the money to the pursuer. The conclusions of the action still insisted in are therefore only for the stakes lodged by the owners of the four horses that ran along with the pursuer's mare 'Jungle Queen,' in the race called the 'Gullane Hurdle Handicap,' and for the £20 of added money, which the pursuer maintains he is entitled to as the owner of 'Jungle Queen,' the winner of that race.

"The defender admits that he collected funds for the races, that he acted as clerk of the course, and did the duty falling on him in that capacity; he also admits that the pursuer's horse won the 'Gullane Hurdle Handicap.'

"The dilatory pleas are,—*First*, That the action being for a game or gambling debt or claim, it is incompetent, the claim being illegal and not actionable; and *Second*, That under the rules in the programme of the meeting (No. 8 of process), the claim sued for ought to have come before the stewards of the races, and the pursuer is barred from bringing it in 'a civil court.'

"As to the first of these pleas, there are two grounds on which actions to enforce claims arising out of races are incompetent—where it is sought to settle a question of *sponsio ludicra*, or where an action is brought to recover what has been wagered or betted on the result of a race.

"To ask a court of justice to settle which horse has won a race is clearly incompetent, and no action will be sustained where to its disposal it is necessary to settle such a question, or to make any other inquiry into the conduct of games or sports, —*O'Connell* v. *Russell*, 25th November 1864, (3 Macph., p. 94); *Paterson* v. *M'Queen and Kilgour*, 17th March 1866 (4 Macph., p. 602). But there is no question of *sponsio ludicra* to be disposed of here; there is no dispute that the pursuer's horse, 'Jungle Queen,' won the race in question.

"The defender pleads that the action *is for 'a game or gambling debt.'* It is undoubted that no action can be sustained for such a debt; or for any claim founded on a wager or bet (Bell's Prin., sec. 36; 1 Bell's Comm., p. 300, 5th edit.). 'It is a fixed rule in the law of Scotland that no action will lie for enforcing a wager' (2 More's Lectures, p. 282). But, as was remarked by Lord Ardmillan at advising *O'Connell* v. *Russell*, 25th November 1864 (3 Macph., p. 94), 'it is not the racing that is illegal; but the gambling attendant on racing is illegal, and no court of justice will give decree for recovery of money so won.' Wagering or betting on the result of the races is just the gambling which is illegal, and courts will not enforce payment of debts thereby incurred, *Wordsworth* v. *Pettigrew*, 1779 (Mor., p. 9524). But the claim here is not grounded on a wager or bet, to which it is essential that there is something staked to be lost or won (Webster's Dictionary). In this case there was nothing staked to be lost or won by the defender; nothing was ventured to be lost or won, either by him or by the parties who had subscribed money for the race. There was no risk of loss incurred by any of the parties who competed in the race. This is an action for payment of a prize offered to the horse of greatest speed of those which should compete for it, to be ascertained by a race, the money to pay which is averred to have been collected by the defender from the public for the express purpose of providing such prizes, and is in the defender's hands (at this stage these averments must be assumed to be true). There is an opinion by Lord Mackenzie, in delivering judgment in the case of *Graham* v. *Pollock*, 5th February 1848 (X. D. P. 648), that the Court will interfere to compel the holder of such a prize to deliver it to the competitor adjudged to be the winner. The other judges, forming the majority