making a declaration of right and producing certain evidence of title. This is a great privilege or facility given, and it is, I think, only giving to section 65 a reasonable meaning to read it as referring back to these provisions, and giving a remedy to a person interested in such cases. The provision of the section is as follows [*quotes ut supra*]; and I think that in cases in which shares of a ship have become vested in another by the death or bankruptcy of the owner, or by the marriage of a female owner, there may often be persons interested in the shares who may have valid objections to the new owner dealing with them. A person having such an interest is, in my opinion, in the situation contemplated by section 65.

But the operation of section 65 is not, I think, limited to these cases, for there is an important section (sec. 43) which may often make it necessary for persons having an interest to ask the Court to prohibit dealings with the shares of a ship—"No notice of any trust, express, implied, or constructive, shall be entered in the register book or receivable by the registrar; and, subject to any rights and powers appearing by the register book to be vested in any other party, the registered owner of any other ship or share therein shall have power absolutely to dispose in manner hereinafter mentioned of any such ship or share." Thus third parties are not affected by any trust, for persons who have been regularly placed on the register have absolute power to dispose in a specific manner of the ship or share. An *ex facie* owner may however, in fact, be a trustee, and it may at times be the right of the beneficiary to prevent dealings with the ship to his prejudice. In this view the section of the Act of 1862 (Merchant Shipping Act Amendment Act) to which Mr M'Laren referred, is not without force. That Act, in section 3, gives an interpretation of "beneficial interest." "Beneficial interest whenever used in the second part of the principal Act includes interests arising under contract and other equitable interests." The effect is to recognize the existence of such equities as controlling *ex facie* owners, and the effect of the 65th section of the principal Act is I think to give a short means of bringing these equities, as well as interests arising under contract, into play against *ex facie* owners. The words "for a time to be named in such order" occurring in section 65, create no difficulty. The order is to be preventative merely. The right in dispute is to be settled in the process appropriate for the purpose.

My opinion is that *Roy* v. *Hamilton* does not apply here; that section 65 applies to a large class of cases in which persons can qualify a direct interest in a ship; and that the petitioner is an interested person within the meaning of the Act.

The Court therefore pronounced an interlocutor refusing the petition as incompetent.

Counsel for Petitioner—M'Laren—Pearson. Agent—R. Ainslie Brown, L.A.

Counsel for Respondent—Maclean. Agents—Hamilton, Kinnear, & Beatson, W.S.

*Friday, July 5.**

FIRST DIVISION.

[Lord Young, Ordinary.

CALEDONIAN RAILWAY COMPANY *v.* GREENOCK AND WEMYSS BAY RAILWAY COMPANY.

Jurisdiction—Court of Session—Railway Commissioners—Regulation of Railways Act 1873 (36 *and* 37 *Vict. c.* 48).

Held (1) that the "Regulation of Railways Act 1873," under which the Railway Commissioners were appointed and their powers defined, does not exclude the common law jurisdiction of the Court of Session in a case where it is sought to set aside an order pronounced by them on the ground of excess of jurisdiction; and (2) that such a proceeding is not a process of review, and need not be raised in the form of a case stated by the Railway Commissioners under the 26th section of that Act.

Railway—Regulation of Railways Act 1873—*Railway Commissioners—Through Rates—Parties Entitled to Apply to Railway Commissioners to fix Through Rates.*

Two railway companies entered into an agreement whereby, *inter alia*, the one, W, was to construct a railway, which when completed the other, C, was to work. C was to appoint the servants to work the traffic, W the office-bearers to superintend the financial department. Three directors of each were to form a joint-committee to regulate the traffic, the cost of working which was to be paid by C, who in return was to receive 50 per cent. of the gross earnings. The remainder was to belong to W, to be applied, in the first place, in maintenance of the railway, payment of burdens, and general charges in conducting the business. Thereafter one-fourth of the balance was to be paid to C in respect of a money contribution by them to W, and the other three-fourths to W.

Held that W, holding a right of property in their line, and being interested in its profits, was a "forwarding" company in the sense of the 11th section of the "Regulation of Railways Act 1873," and as such entitled to apply to the Railway Commissioners to adjust their through traffic rates with C.

Opinion (*per* Lord Young) that the Regulation of Railways Act 1873 confers the power of enforcing the right of railways to appeal on through traffic questions to the Railway Commissioners upon the companies who own or work these railways, and takes no account of the bodies, such, *e.g.*, as the joint-committee mentioned above, who may have the management of the traffic and the fixing of rates or suchlike.

Opinion (*per* Lord Shand) that the joint-committee in question would have been entitled to make the application to the Commissioners.

The Greenock and Wemyss Bay Railway Company were the owners of a line of railway con-

* Decided June 28, 1878.

nected at a junction near Port-Glasgow with the Caledonian Railway Company. They had been incorporated by an Act of Parliament in 1862, and by an agreement scheduled to and confirmed by that Act it was provided that the line when completed should be worked by the Caledonian Railway Company. The traffic on the railway and piers in connection with it at Wemyss Bay, including the fixing of tolls, &c., was to be managed by a joint-committee of six persons, three to be named by the Board of Caledonian Railway directors, and three by the Greenock and Wemyss Bay directors, the chairman, who was to be appointed by the Caledonian, to have no casting vote. All differences were to be referred to arbitration. In return for the working of the line the Caledonian Company were to receive 50 per cent. of the gross receipts. Out of the other half of the receipts they were also to receive one-fourth of the balance left after payment of maintenance, public burdens, &c. This was in consideration of a sum of £30,000 advanced by them for the construction of the line. The remaining three-fourths were to be divided among the other shareholders of the Wemyss Bay Company.

On 9th June 1875, in terms of the 11th section of the Regulation of Railways Act 1873, the Wemyss Bay Company served a notice upon the Caledonian Company requiring the passenger traffic passing along the Glasgow, Paisley, and Greenock Railway and the railway of the Wemyss Bay Company to and from the various stations on both those lines of railway, to be forwarded by the Caledonian Company at the various rates specified in the table thereto annexed. The Caledonian Company thereafter, by notice dated 17th June, acknowledged receipt of the Wemyss Bay Company's notice, and informed them that they objected to the rates and apportionment proposed therein. The Wemyss Bay Company subsequently, in terms of the 26th section of the abovementioned Act, filed an application in the office of the Railway Commissioners, dated 1st July 1875, to which the Caledonian Company were made the sole respondents, in which, after setting out the notices of the 9th and 17th June respectively, they applied to the Railway Commissioners to pronounce an order allowing the several through rates and apportionment thereof proposed in the notice of 9th June and table appended thereto.

After hearing parties the Railway Commissioners, on 27th October 1875, gave a deliverance upon the question of through fares, but sent down, *inter alia*, the following question for the opinion of the Court of Session :—"(1) Whether or not the fact that the Wemyss Bay line of railway is worked by the Caledonian Company under the provisions of the said agreement of 1862 prevents the Wemyss Bay Company from applying under section 11 of the Regulation of Railways Act 1873 for the said through traffic to be forwarded at through rates?"

The Court after hearing parties pronounced an interlocutor by which they superseded consideration of the case, to enable the parties to apply to the Railway Commissioners to amend it so as to remove a difficulty they had in answering the question quoted (Jan. 16, 1877, 14 Scot. Law Rep. 235).

Application was thereafter made with that view to the Commissioners, who pronounced another deliverance, but the Court of Session on resuming consideration of the case still found themselves obliged to leave the question unanswered.

The Caledonian Railway Company then raised an action to have it declared that the deliverance of the Railway Commissioners as to the through fares was *ultra vires* of them.

They pleaded *inter alia*—"(1) The order of the Railway Commissioners foresaid was *ultra vires* and illegal in respect—1. The defenders had no title to make the application upon which it proceeded. 2. The Railway Commissioners were not entitled, in respect of the Greenock and Wemyss Bay Act and agreement therewith scheduled and incorporated, to grant the through rates referred to in said order, and to apportion the same, &c.

The Wemyss Bay Company pleaded *inter alia*—"(1) No jurisdiction. (2) The action is incompetent in respect that under section 26 of the Regulation of Railways Act 1873 an order of the Railway Commissioners can only be challenged or brought under review by appeal on a case stated, and on matters which in the opinion of the Commissioners are questions of law, and that the order complained of by the pursuers is now final and unchallengeable in terms of the said Act. (4) The proceedings and order of the Commissioners having been in all respects regular and within their statutory powers, the defenders should be assoilzied."

The terms of the agreement of 1862 sufficiently appear from the Lord Ordinary's note and from the judgment of the Lord President, *infra*.

Section 11 of the Regulation of Railways Act 1873 provided—"Subject as hereinafter mentioned, the said facilities to be so afforded" (that is, the facilities provided by the Railway and Canal Traffic Act 1854) "are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates): Provided as follows—(1) The company requiring the traffic to be forwarded shall give written notice of the proposed through rates to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded. (2) Each forwarding company shall, within the prescribed period after the receipt of such notice, by written notice inform the company requiring the traffic to be forwarded whether they agree to the rate and route, and if they object to either, the grounds of the objection. (3) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration. (4) If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the Commissioners for their decision. (5) If an objection be made to the granting of the rate or to the route, the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accord-

ingly," &c. [*Other provisions followed, which it is unnecessary to quote here.*]

Section 26 of the Act provided—"26. Any decision or any order made by the Commissioners for the purpose of carrying into effect any of the provisions of this Act may be made a rule or order of any Superior Court, and shall be enforced either in the manner directed by section 3 of the Railway and Canal Traffic Act 1854 as to the writs and orders therein mentioned or in like manner as any rule or order of such Court. . . . The Commissioners shall . . . at the instance of any party to the proceedings before them, and upon such security being given by the appellant as the Commissioners may direct, state a case in writing for the opinion of any Superior Court determined by the Commissioners upon any question which in the opinion of the Commissioners is a question of law." . . . . . .

The Lord Ordinary (Young) assoilzied the defenders, adding this note:—

"*Note.*—The pursuers allege that in making a certain order the Railway Commissioners exceeded their jurisdiction, and conclude for declarator substantially to that effect. The defenders object to the jurisdiction of this Court, and, assuming that jurisdiction, maintain that in making the order referred to the Railway Commissioners did not exceed theirs.

"I am of opinion that this Court has jurisdiction. The jurisdiction of the Railway Commissioners is defined and limited by the statute under which they act, and should they exceed it the party aggrieved must necessarily have a remedy in a court of law. It was not suggested that any other Court than this ought to have been, or indeed could have been, resorted to in this instance. The orders of the Commissioners acting within their jurisdiction are final, subject only to such review as may be had upon a case stated under the Act; but orders outwith their jurisdiction may, consistently with the finality, be set aside on application to the proper Court in England, Scotland, or Ireland, as the case may be. Had the statute made provision on the subject, it must have been followed, but, as it makes none, the matter is tacitly but necessarily left to the rules and procedure of the common law applicable to unauthorised orders or decrees. The question whether that which is alleged in any case as excess of jurisdiction is really of that character may be more or less difficult according to circumstances, but difficult or not must be determined by the Court to which it is submitted as a question on the merits of the action or proceeding brought to set aside the order. It is perhaps superfluous to remark that in general (and cases of an exceptional character need not now be considered) an error whether in law or in fact committed by the Commissioners within their jurisdiction would be no ground for setting aside their order as *ultra vires*.

"Assuming the jurisdiction of this Court, the question on the merits of the case is, Was the order referred to pronounced by the Railway Commissioners acting within their jurisdiction or not? The objection alleged is that the order was made on the application of a party having no authority or right to make it, and depends on the effect of the defenders' Act 1862 and agreement incorporated therein, which the pursuers contend places the defenders in an exceptional position with respect to the right conferred by the Regulation of Railways Act 1873 on railway companies generally to require the traffic over their lines to be duly forwarded, and on a reasonable arrangement for through rates, over adjoining lines of railway, and if necessary to refer the matter to the decision of the Railway Commissioners.

"The defenders are the owners of the railway, which for brevity I shall refer to as the Wemyss Bay Railway, and their position with respect to it is exceptional in this respect only, that it is not worked by themselves, but by the Caledonian Company, under the statutory agreement effected by the Act and agreement of 1862. The substance of the agreement (which is perpetual) so far as material to this case is, that the defenders shall provide and maintain the railway; that the pursuers (the Caledonian Company) shall have possession thereof, and work the same, providing the rolling stock and plant; that the traffic shall be managed and the rates of carriage fixed by a joint-committee of six—three appointed by each company; and that the gross receipts shall be divided equally or nearly so, as it happens, although the proportion is immaterial. It is, in short, a common working agreement confirmed by statute, and without any peculiarity that I can see; for there is nothing peculiar or unusual in the provision for a joint-committee to manage the traffic and fix the rates.

"The Wemyss Bay Railway admittedly forms part of a continuous line of railway communication, the Caledonian Railway being that which immediately adjoins and connects with it, and as traffic does pass from the one to the other of these railways, it is obviously desirable that there should be a fair arrangement between the proper parties (whoever they may be) regarding it, and comprehending through rates and the apportionment of them among those having interest. Prior to the Regulation of Railways Act 1873 there was no legal provision for compelling an agreement on the subject of the amount and apportionment of through rates, but voluntary agreements on the subject were common, and it appears from a litigation between the present parties in 1871 that such an agreement subsisted with respect to the Wemyss Bay and Caledonian Railway which was terminated in that year by the Caledonian Company. I need make no other remark on the decision of the dispute then presented to the Court than this, that it was necessarily to the effect that, failing voluntary agreement, the power of each company was limited to fixing the rates for their own line—that through rates could only be made by adding the local rates together, and apportionment effected by separating them again. It was not disputed that the rates for the Wemyss Bay Railway were to be fixed by the joint-committee as representing and charged with the interest in that matter of the two companies who owned and worked it respectively according to their rights under the working agreement. I notice this to qualify the expression 'each company' as I have used it in the above remarks regarding the decision of 1871.

"Had the law remained as it stood in 1871, the defenders could have taken no proceedings to force on the pursuers an arrangement respecting the amount and apportionment of through rates, and neither of course could the joint-committee under the Act and agreement of 1862, which con-

tain no provisions on the subject. The law on the subject was changed, or a new law made, by the Regulation of Railways Act 1873, and whether or not this avails the defenders is the question now raised between the parties. In the view that the new law is available to them, the defenders in 1875 submitted to the pursuers a proposal under section 11 of the Act 1873 respecting the amount and apportionment of through rates, and this not being assented to, referred the matter to the Railway Commissioners for their decision. The Commissioners sustained the validity of the proceeding against the objections urged by the pursuers, and made the order now complained of.

"The pursuers' objections, so far as necessary to be noticed at present, are alternative, and as follows:—

"*First.*—The primary objection is that the defenders being by the Act and agreement of 1862 deprived of all power over the traffic and rates of carriage on the railway of which they are the owners, and having only a pecuniary interest in the receipts drawn from traffic conducted by the pursuers under the management of the joint-committee at rates fixed by them, are not a company which does or can require traffic to be forwarded within the meaning of section 11 of the Act 1873; that the provisions of the Act are only applicable when the traffic of at least two companies, each properly describable as a 'forwarding company,' is concerned; and that here the defenders have no traffic, that on their railway being truly the traffic of the Caledonian Company, with nothing to distinguish it from the traffic of the Caledonian Railway itself except the management conferred on the joint-committee with a view to protect the common interest in the receipts therefrom. The result of this objection, as it was argued to me, and presumably to the Railway Commissioners, is that the provisions of the Act are altogether inapplicable to the case. To make sure of the scope and comprehension of it as urged I put the question to the pursuers' counsel whether it excluded proceedings under the Act, not only by the defenders, but also by the pursuers and the joint-committee, and was answered quite decidedly that it did. I may observe in passing that the legal question raised by this objection is apparently that which the Railway Commissioners intended to express in the first question of the case which they directed to be submitted to this Court.

"*Second.*—The alternative objection is that, assuming the applicability of the Act of 1873, it is not for either company as interested in the traffic of the Wemyss Bay Railway, but for the joint-committee, as charged with the interest of both in that traffic, to put it in force. Upon this question the Railway Commissioners saw fit in the exercise of their discretion to refuse to state a question for the opinion of this Court.

"These objections are now urged as going to the jurisdiction of the Railway Commissioners to make the order complained of. I am of opinion that they are both bad.

"1st, I think the defenders are a railway company within the meaning of the Act of 1873, looking both to the interpretation clause and the import and intention of the provisions which expressly comprehend and apply to companies which are the owners of railways worked by others, as well as companies which work railways belonging to others. Their interest in the traffic on their railway is not extinguished, but only diminished, by the working agreement with the pursuers. Their share of the receipts gives them a substantial interest in the matter of through traffic and rates, and is precisely of the character contemplated and protected by the Act of 1873. Further, the interest of the public in the matter, which is prominently referred to in the statute and in the order of the Railway Commissioners, is obviously unaffected by the existence of a working agreement, or, to be quite precise, by the particular working agreement in question, which is indeed of a very ordinary character, and was made before the Legislature interposed provisions for the protection of the public and of companies against conduct which a new tribunal established for the purpose should condemn as unreasonable and prejudicial. It is true that the pursuers are equally interested with the defenders in the traffic of the Wemyss Bay Railway, but it is intelligible that they have or may have separate conflicting interests to which they may be disposed to sacrifice or subordinate this interest which they share with the defenders, regardless of the prejudice done to the defenders and the public interested in the Wemyss Bay line. There is nothing I can see in the Act and agreement of 1862 to render it impossible, or even *prima facie* improbable, that a case within the mischief contemplated and intended to be remedied by section 11 of the Act of 1873 should arise, and with this opinion I am unfavourable to an argument against the application of the Act and a resort to the Commissioners to ascertain whether or not the mischief when alleged exists, and their authority to provide a remedy if it does. I agree with the Commissioners in holding that the expressions 'forwarding company' and 'company requiring the traffic to be forwarded' apply to any company who, being interested in the traffic of a railway in pursuance of their legitimate interest and that of the public, require that it shall be forwarded by a continuous route on just and reasonable terms as provided by the statute, although the traffic is not under their immediate management. The expressions reasonably admit of this construction, which being consistent with the execution of the Act according to what I believe to be its plain meaning and intention, I should prefer to a more literal interpretation, which is not.

"I am therefore of opinion that the application of the Act 1873 to the case is not hindered by the Act and agreement of 1862.

"2d, With respect to the alternative objection, viz., that assuming the Act to be applicable the enforcement of it must, with respect to the traffic of the Wemyss Bay Railway, be left to the joint-committee, I have to observe, that the grounds on which I think the Act applicable involves an opinion adverse to the pursuers on this objection, for these grounds are—1st, That the defenders, notwithstanding of the agreement of 1862, are a company within the meaning of the Act of 1873; 2d, that they have the precise interest which that Act requires to entitle a company to take proceedings under it; and 3d, that the agreement of 1862 makes no provision on the subject. The pursuers, however, think otherwise, and maintain that this opinion is not inconsistent with the proposition which they accordingly urge alternatively, that the Act can only, with respect to the Wemyss Bay

Railway traffic, be enforced by the joint-committee as charged with the interests of both companies concerned with it, and that if they do not see fit to move in the matter the defenders have no remedy. I am not surprised that the Railway Commissioners should at first sight have thought this point so little worthy of serious consideration as to refuse a case to this Court upon it, although when the Judges of the First Division indicated that they thought it merited discussion, and invited the Railway Commissioners to include it in the case, I must think that the invitation had better have been complied with. Having now to deal with this point urged as an objection to the jurisdiction of the Railway Commissioners to proceed on the application of the defenders, I must repeat that I think the rejection of it is necessarily involved in the opinion which I have expressed as to the applicability of the Act of 1873. That Act creates the right to enforce proceedings which may be taken under it. The right itself did not previously exist. It is not inconceivable that a right may have been parted with, or the power and duty of enforcing it transferred, by an agreement made ten years before it was created, but this is *prima facie* improbable, and an agreement will not easily be so interpreted. There is, I think, nothing in the agreement of 1862 to warrant or even suggest such an interpretation. The Act of 1873 confers the power of enforcing the right which it creates with respect to through traffic and rates on the companies who own *or* work railways which form continuous lines of communication, and takes no account of the bodies in whom by statute or lawful agreement the management of local traffic and the fixing of local rates may happen in particular cases to be vested. Such power of management and fixing rates must exist somewhere with respect to every railway in the kingdom, but the Act of 1873 in every case supersedes it to the extent and effect of enabling through rates to be reasonably fixed and apportioned according to its provisions. It is therefore no more material to the present question that the power of managing the traffic and fixing the rates on the Wemyss Bay Railway is vested in this joint-committee than it is that the corresponding power with respect to the Caledonian Railway is vested (as I presume it is) in the directors of the Caledonian Company. The powers of both must yield to the extent of giving effect to the statutory provisions regarding through rates when duly resorted to and applied to the particular case.

"It is *prima facie* probable that the legitimate interests of the Wemyss Bay Company and of the public—being such interests as the Act of 1873 contemplates and favours—require a reasonable system of through rates to be here established in terms of the Act, and I feel at liberty to refer to the order of the Railway Commissioners as showing that this *prima facie* probability is true in their opinion. I am therefore not disposed to be astute or ingenious in order to find an excuse for frustrating what has been done, and referring it to the joint-committee under the agreement of 1862, or to arbitration should they (as is most likely) be equally divided, to determine whether or not the Railway Commissioners should be resorted to. I should have listened with favour—certainly with no disfavour—to any argument tending to show that the case was not within the mischief which the Act was intended to remedy, or that the remedial proceedings might have been more fairly or conveniently resolved on and prosecuted by another party whose silence or abstinence was an argument that the alleged mischief had no existence. The arguments on which the pursuers rely are of a different and indeed opposite character, and I cannot regard them with favour consistently with the desire which I am bound to have to promote the remedy intended by the Legislature.

"I find it unnecessary to notice the other objections stated by the pursuers on record, beyond saying that they do not, in my opinion, go to the jurisdiction of the Commissioners to make the order complained of. Should the Commissioners have committed any error in law or fact, acting within their jurisdiction, no remedy can be had in this action. I can only decide that in the matter referred to the Commissioners did or did not exceed their jurisdiction. I decide that they did not, by pronouncing decree of absolvitor, and of course with expenses to the defenders."

The pursuers reclaimed.

At advising—

Lord President — The pursuers of this action, the Caledonian Railway Co., complain of an order pronounced by the Railway Commissioners, acting ostensibly under the authority of the Regulation of Railways Act of 1873, and they allege that in making this order the Commissioners have committed an excess of jurisdiction—in other words, that they were not acting within the powers committed to them by that statute. The defenders maintain, in the first place, that this Court has no jurisdiction to entertain the action, and in the second place, that the action is incompetent because the only mode provided by the statute in the 26th section for bringing the orders of the Commissioners under review is in the form of a case stated by the Commissioners for the opinion of the Court, and that all other review is excluded by the terms of that section.

I am of opinion that both of these pleas are ill-founded. If the Railway Commissioners have exceeded their statutory power in a matter directly affecting a Scotch railway company, this Court must have jurisdiction to set aside their order; and as regards the second plea, it is sufficient to say that this is not a process of review, but, on the contrary, an action challenging the jurisdiction of the Commissioners who pronounced the order.

All that is clear enough, but the question remains, whether the pursuers have made out their proposition that the Commissioners in making this order have committed an excess of jurisdiction. Now, the ground upon which that is maintained is that the defenders, the Wemyss Bay Railway Co., are not within the meaning of the Act of 1873 a railway company forwarding traffic or entitled to apply under the 11th section of the statute for regulation of traffic and fixing of through rates. This is stated in a variety of forms by the pursuers, but they all resolve into that one general question, Whether this particular railway company is really a railway company within the meaning of the statute, and particularly within the meaning of the 11th section.

Undoubtedly the position of the Wemyss Bay Railway Co. is a peculiar one, and it becomes necessary to attend to the agreement which pre-

ceded the Act of Incorporation, but which was made the basis of that Act, and which fixes the position of the Wemyss Bay Railway Co. in its connection with the Caledonian Co., not for a term limited, but in perpetuity. The agreement is substantially of this kind. The Wemyss Bay Co. are under the powers of their Act to construct the railway, and when it is completely finished the Caledonian Co. are then to work it. The gross returns from the traffic are to be divided in certain proportions, and the Caledonian Co. on the one hand are to have the appointment of all the servants who are to work the traffic, and the Wemyss Bay Co. on the other hand are to have the appointment of all the office-bearers who are required to carry out the financial department of the company's business; and lastly, there is a joint-committee appointed, consisting of three directors of each of the companies, who are to regulate the traffic. Such is the nature of the agreement generally.

But it is necessary to examine a few of the clauses a little more particularly in order to realise exactly what is the position of the Wemyss Bay Co. under the agreement. The 6th section of the agreement provides that "when the construction of the line has been finished the Caledonian Railway Co. shall take possession of the said railway pier and roads for the purpose of working the same in perpetuity, and shall provide the necessary rolling stock and plant of every kind for the purpose of effectually working the traffic coming to or upon the same." Then it is provided in the 7th section that the Caledonian Co. are to have the appointment of every servant who may be required in the working of the traffic, while the finance and directorial department of the Wemyss Bay Railway Co. is to be left in the hands of that company itself. And then comes the 8th section, which provides that the cost of working the traffic is to be paid in the first instance by the Caledonian Co., but they are to receive 50 per cent. of the gross earnings of the railway in payment of the working of that traffic —a percentage liable in a certain event to be reduced to 45 per cent.—and it is provided that the remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Co.

Now, if the matter had stopped there it would have been very simple indeed, because it would have been an agreement in perpetuity for the Caledonian Co. working this line upon receiving 50 per cent. of the gross receipts. But the other half of the gross receipts, or the remainder of the gross receipts as it is here called, is the subject of the 9th head of the agreement, which is somewhat complicated. It is provided there that out of the Wemyss Bay Co.'s share of the gross receipts there shall be paid by them—1st, the whole charges and expenses of maintaining the railway, and also the public and parish burdens, and so forth; and 2dly, the general charges to be incurred in conducting the ordinary directorial and financial business of the company; and 3d, after providing for these payments, one-fourth of the balance is to belong to and be paid to the Caledonian Railway Co. in respect of their contribution of £30,000 as further provided for in article 14 hereof, and the remaining three-fourths of the balance is to belong to the other shareholders of the said Greenock and Wemyss Bay Railway Co. The Caledonian Co. had in point of fact taken £30,000 worth of shares in the Wemyss Bay Co. as part of this arrangement, and they were to receive as their dividend or return upon that sum a fourth part of the balance of the Wemyss Bay share of the gross profit after deducting from that balance these two heads of expense, being, first, the expense of maintaining the railway and the public burdens, and secondly, general charges in connection with the financial and directorial part of the business. But after setting aside the fourth of this balance as a return upon the share of the Caledonian Co. in the concern, the remaining three-fourths of that balance belongs to the Wemyss Bay Co. itself, or rather, more correctly speaking, to the remaining shareholders other than the Caledonian Co. in that line. The 11th section provides for the appointment of the joint-committee which I have already mentioned, and further that the traffic, including the fixing of the tolls, duties, rates, and charges to be levied or taken, and so forth, is to be managed and fixed by that joint-committee, and there is a certain arrangement as to the number of trains that are to be put on at first. The joint-committee are to be entitled to require more trains to be put on, but the hours of the trains are to be fixed by the Caledonian Co., that being necessary of course in order to prevent any derangement of the mode in which they conduct the traffic.

Now, that seems to me to be the substance of this agreement, and the question comes to be whether it leaves the Wemyss Bay Company in such a position that they are not a railway company within the meaning of the Regulation of Railways Act of 1873, and particularly of the 11th section of that statute. They are certainly deprived by this agreement of some of the functions of a railway company which stands upon its Act of Incorporation with the usual powers, because they cannot work their own traffic. That is quite true. And they are deprived also of the power of managing the receipts from that traffic in the first instance, and of fixing the rates and charges; and also they are deprived of all discretion in fixing the number of trains or the hours at which the trains are to be started. But, on the other hand, it is very clear that they are not deprived of interest in their line, nor are they deprived of interest in the traffic carried on that line. The line still remains their property, and they are interested in its prosperity, and they are interested in the profits of the traffic carried on that line, because after certain deductions which I have already mentioned in connection with the 8th and 9th heads of the agreement, three-fourths of the nett balance of the receipts are payable to the ordinary shareholders of the Wemyss Bay Company.

Now, that being so, let us see whether they answer the description of a railway company under the 11th section of the statute. In the first place, it is necessary to attend to the definition of the term "railway company" in the interpretation clause of the statute, which is, "the term railway company includes any person being the owner or lessee of, or working any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament." Now, that is a very comprehensive description. It includes any person—that is to say, either an individual or a company—being the owner or lessee of or work-

ing any railway. A railway company may mean a person, individual, or corporate who is the owner of a railway, or a person, individual or corporate who is lessee of a railway, or a person, individual, or corporate who works a railway. Then, when we come to the 11th section we have a recital of the provisions of the Railway and Canal Traffic Act 1854, in which there occur certain expressions of some importance. It is recited by section 2 of that previous Act—"Every railway company, canal company, and railway and canal company, shall . . . afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively,"—carrying out the same idea that a railway company may be within the provisions of the statute whether it merely owns a line or works a line or both owns and works it. And further down —"Every railway company and canal company, and canal and railway company, having or working railways or canals which form part of a continuous line of railway or canal, or railway and canal communication . . . shall afford facilities," &c. Then after this recital the 11th section proceeds as follows,—"Subject as herein after mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares." Now, here the form of expression is precisely the same, but we have additional words introduced here—I mean the forwarding and delivering by a railway of the traffic brought by another railway. And then follow certain provisos, the first of which is this, —"The company requiring the traffic to be forwarded shall give written notice of the proposed through rates to each forwarding company, stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded;" and then the machinery is provided by which this shall be settled. If the parties cannot agree, the matter is referred to the Railway Commissioners for final decision; and they are to determine both the rates and the routes if the parties themselves cannot agree.

Now it is said that the Wemyss Bay are not a forwarding company—that is to say, that they do not bring traffic to the terminus which connects with the Caledonian Company, and are not in a position there to demand that the Caledonian Company shall forward that traffic. And it is said, further, that the party who is working that traffic is really the Caledonian Company, and it is the Caledonian Company that is bringing that traffic up to the end of the Wemyss Bay line to connect with the Caledonian line, and to be then forwarded by the Caledonian line. Consequently, it is contended that the Wemyss Bay Company cannot be a forwarding company under this clause, or, in other words, that the Wemyss Bay Company do not possess any traffic at all. Now, no doubt that is a view which may be taken of the statute, and may be supported by much ingenious reasoning which we have heard, but I do not think it is in accordance with the true meaning and intention of this clause. It appears to me that the Wemyss Bay Company, being interested in the traffic carried on its line, not to the same extent, but exactly in the same way, as any other railway company, that is to say, having a vital interest that the most shall be made of its traffic, does possess traffic just as any other railway possesses traffic. No doubt it is not worked by itself, but I do not think the statute contemplates that a company in order to have traffic to forward must necessarily work its own line if it retains an interest in that traffic either whole or partial.

In the course of the discussion in this case it was impossible even for the pursuers to avoid speaking of the Wemyss Bay traffic, because the Wemyss Bay traffic is perfectly and necessarily distinguishable from the Caledonian traffic. The traffic of the Wemyss Bay Company is traffic along that line of railway which belongs to that company, and is just as distinguishable from the Caledonian traffic as the traffic of any other railway in the kingdom. The circumstance that the Caledonian Company is contractor for working the line, and is a shareholder in the line, and has a certain control over the way in which the traffic is to be worked, necessarily resulting from its undertaking to work it, does not prevent the traffic conveyed on that line from belonging (to use a popular expression) to the Wemyss Bay Company—that is to say, it does not prevent the traffic from being the traffic of that line distinctively, and having a special pecuniary interest for the company who is the owner of that line.

Therefore it appears to me that the Wemyss Bay Company is the only party who properly represents the interests of the Wemyss Bay line as opposed to the interests of the Caledonian line. A dispute arises between the two, and what is it? It is this, that the Caledonian Company do not forward the Wemyss Bay traffic upon just and equitable terms, the consequence of which is that the Caledonian shareholders profit at the expense] of the Wemyss Bay shareholders, or, in other words, that the one company profits at the expense of the other. Is not that the very grievance which this clause is intended to redress? And who is the proper party to apply for redress of that grievance? The party who suffers it; and the party who suffers it is the Wemyss Bay Railway Company and nobody else. And therefore I think it would be an erroneous construction of this statute to hold that where a case obviously contemplated by it has arisen—I mean, a grievance which the statute was intended to redress,—the party who suffers from that grievance, being a railway company and its shareholders, shall not be held to have a *locus standi* under it.

I come to the conclusion with the Lord Ordinary that the Wemyss Bay Company was the proper party to apply here, and that the order of the Commissioners therefore is quite within their powers under the statute. I am therefore for repelling the first two pleas of the defenders, but for sustaining the fourth.

Lord Deas—I concur.

Lord Mure concurred.

Lord Shand—I am of the same opinion. It is of importance in the determination of this question to take along with section 11th of the Regu-

lation of Railways Act 1873 the interpretation of the term "railway company" to which your Lordship has so fully referred. The provision of section 3d is that a "railway company" shall include any person being the owner of any railway in the United Kingdom constructed or carried on under the powers of any Act of Parliament. The other parties who may apply to the Commissioners for the facilities mentioned in section 11th are the lessee of any railway or a person working any railway in the kingdom. The Wemyss Bay Company are confessedly owners of the line in question. If by a perpetual lease they had parted with all interest in the traffic, and their sole interest in the line had been annual payment of a definite and fixed nature, and unaffected by the profits earned, there would have been much force in the argument that they could not competently take proceedings before the Commissioners under section 11th of the statute, because they had no interest in the traffic to be forwarded. But concurring as I do in the analysis which your Lordship has given of the provisions of the agreement, it is obvious that they have the most material interest in the working of the line, because they have the largest share of the profits to be made from the traffic passing over it. They are owners of a railway, interested in the profits, and consequently interested in the traffic; and therefore I think that both within the language and the spirit of the statute they were entitled to make such an application as they did to the Commissioners, and to have that application dealt with. If the Caledonian Railway near its point of junction with the Wemyss Bay Railway had another line, the argument maintained for the Caledonian Company would lead to this, that if they found it for their advantage to forward traffic by that other line in competition with the Wemyss Bay line, giving easier, terms or greater advantages to the competing line, they would be entitled to do so, and that the proprietor of the Wemyss Bay line would have no redress. It is plain, I think, that in such a case the Wemyss Bay Company would have the most material interest to say—You shall not forward traffic upon that other line, giving advantages to a competition over us, thereby destroying our line. As owners of the Wemyss Bay line interested in the traffic of the undertaking they would have a title and interest to object, and I am unable to distinguish between that case and the present. The Caledonian Company have maintained in argument that the Wemyss Bay line is to be treated as if it were merely part of their own system—an addition to their own line. But it is obvious that the Wemyss Bay Company, being the parties mainly interested in the profits realised from the traffic, that argument is unsound. Accordingly I agree with your Lordship in holding with regard to this point that the Wemyss Bay Company is a company within the meaning of the statute entitled to demand and enforce reasonable facilities from the Caledonian Company in the carriage of traffic.

I may observe, that having regard to the provisions of sections 6th and 8th of the agreement between the two companies, while no doubt the actual conduct or rather carriage of the traffic is in the hands of the Caledonian Company, yet the true position of that company appears to me to be simply that of contractors for the working of the traffic. It is provided by section 6th that they shall take possession of the line, and shall work the traffic in perpetuity, providing the rolling stock and plant, and the payment to be given for this contract service, as stipulated by section 8th, is 50 per cent. of the gross receipts until a certain event, and 45 per cent. thereafter. That is simply a contract to work the traffic for a certain stipulated remuneration to be paid by the owner of the line to whom the profit on the traffic belongs, subject to certain obligations as to the distribution of it; and in this question it makes no difference that the Caledonian Railway are the contractors. It might have been another company altogether that contracted to work the traffic on these terms. The Caledonian Company would in that event be merely interested in the division of profits in respect of the £30,000 which they contributed. Surely if another party had been the contractor working the line it would have been impossible to maintain successfully that the contractor was the only person who could be regarded as either forwarding traffic or in a position to demand traffic to be forwarded. I take it that the Wemyss Bay Company, as being owners of the line interested in the profits, would have had a right to maintain an application for facilities, and that the right of the Caledonian Company to a share of the profits in respect of their contribution of £30,000 would not have affected that right.

There was a second point urged in the argument which is thus noticed by the Lord Ordinary. He says—"With respect to the alternative objection, viz., that assuming the Act to be applicable, the enforcement of it must with respect to the traffic of the Wemyss Bay Railway be left to the joint committee, I have to observe that the grounds on which I think the Act applicable involve an opinion adverse to the pursuers on this objection;" and he goes on to say that he thinks the joint-committee had no title whatever to make such an application. The view now taken of the more general question in the case renders it unnecessary to decide the question now presented as an alternative, for whether the joint-committee had such a power or not, the Wemyss Bay Company, as the owners of the line interested in the profits, had the requisite power to enforce the giving of facilities.

I think it right, however, to say that so far as I am concerned I am not satisfied that the joint-committee would not also have the power to originate such an application as was made to the Comsioners. I do not think that the one view is necessarily exclusive of the other. Under section 3 of the statute persons in various and different relations towards the line are declared to be within the meaning of the term "railway company." It appears to me, without going over in detail the various provisions of the agreement on the subject, but having in view more particularly those of section 11, that although the Caledonian Company provide the rolling-stock, plant, and service in carrying on the traffic, yet the joint-committee are the parties vested with the actual management of the traffic of the Wemyss Bay line, entitled to give and enforce directions on that subject. That being so, I am not satisfied that that joint-committee could not originate an application as against another railway—either the Caledonian at the one end, or another railway company at the other end of the line the traffic

of which is under their management and control, if there were such a company,—in order to obtain proper facilities for the working of that traffic. I would be disposed to hold, if it were necessary for the decision of the case, that the joint-committee are within the meaning of the authoritative branch of section 3 of the statute persons "working the railway," and under section 11 having "traffic to be forwarded."

But while I think so, I again say, that assuming that power to be in the joint-committee, it does not in my opinion in the least degree exclude the right of the owners of the railway — the Wemyss Bay Company—who have an interest in the profits derived from the traffic, to come forward and make this application.

The Court adhered.

Counsel for the Pursuers (Reclaimers)—Lord Advocate (Watson)—Kinnear—Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defenders—Balfour—Asher—Moncreiff. Agent—John Carment, S.S.C.

Tuesday, July 9.

FIRST DIVISION.

[Sheriff of Banffshire.

STEUART *v.* LEDINGHAM AND OTHERS.

Lease—Landlord's Hypothec—Assignation—Act 30 *and* 31 *Vict. c.* 42 (*Hypothec Amendment* (*Scotland*) *Act* 1867), *sec.* 5.

Where a landlord, in the exercise of his right of hypothec under the Act 30 and 31 Vict. c. 42, had sequestrated cattle belonging to a sub-tenant, who had taken a grass park on lease from the tenant, *held* that the sub-tenant was not entitled to demand from the landlord an assignation of his right of hypothec upon consigning the amount of the rent unless he could show that such assignation would not operate any prejudice to the landlord.

This was a petition brought in the Sheriff Court of Banffshire in August 1873 by Mr Steuart of Auchlunkart, praying for sequestration of the bestial and horses belonging to Alexander Ledingham, his tenant in the farm of Netherton, and others, to whom Ledingham had granted a sub-lease of the grazing on his farm, in security of the sum of £63, 4s. 5d., being the half-yearly rent of the farm due at Martinmas following. The petition set forth section 5 of the Hypothec Amendment (Scotland) Act 1867, which was as follows:—"In the event of the tenant or lessee of any farm or lands having received, and taken thereon to be grazed or fed, any sheep, cattle, or other live stock belonging to any other person, and having agreed with the owner of the same for a *bona fide* payment equal to the just value of such grazing or feeding, such sheep, cattle, or other stock shall be liable to the hypothec of the landlord, lessor, or person entitled to the rent of the farm or lands to the extent of the amount of such payment, and no further: Provided always that so long as any portion of such sheep, cattle, or other live stock shall remain on the farm or lands, the hypothec over such portion shall continue to the full extent of the payment originally agreed upon for the grazing or feeding of the whole of such sheep, cattle, or other live stock, and that in the event of the removal of the sheep, cattle, or other live stock, or any portion thereof, from the farm or lands, the right of hypothec shall, so long as the payment or any part thereof shall remain unpaid, continue to apply to such sheep, cattle, or other live stock to the extent of the amount of the payment or such part thereof as shall be unpaid." It was further averred that Ledingham was to some extent in arrear of his previous year's rent. The cattle were sequestrated, but the sequestration was afterwards withdrawn from some of the animals, and the sub-tenants, under an arrangement, eventually consigned in Court the amount of their rents.

It appeared that when they took the parks the sub-tenants had, according to practice in such cases, granted bills for the rents respectively payable by them to the tenant, and one of their pleas, which was given effect to by Sheriff-Substitute (Gordon) and Sheriff (Bell), was as follows:—"The respondents being entitled to the benefit of the petitioner's hypothec as the correlative of paying the rent, the petitioner is only entitled to the said sums on assigning to them said right, or otherwise securing them therein, in terms of the arrangement by the parties." It is unnecessary to refer to the nature of these arrangements.

The petitioner appealed, and argued that he could not be compelled to assign his hypothec unless it could be shown that such an assignation would not prejudice his interests. Now, there was due to him not merely the half-year's rent which was payable at Martinmas, but the tenant was in arrear, and he was entitled besides to exercise his right for the ensuing half-year's, due at Whitsunday—*Graham* v. *Gordon*, March 9, 1842, 4 D. 903.

The respondents argued that on the broad principle that a surety paying for a debtor was entitled to an assignation of the creditor's right, they were entitled here to an assignation—Bell's Comm. ii. 523 (M'Laren's ed. 417).

At advising—

Lord President—This sequestration was applied for on 20th August 1873, and the statement was that the rent of the farm was £126, 8s. 10d. for crop and year 1873—one-half of that being due at Martinmas 1873, the other at Whitsunday 1874. Now the landlord was quite entitled to use his hypothec for the half-year due at Martinmas following, and that was the extent to which in his petition he proposed to go. In exercising his right he attached not only the stock of the tenant but also the cattle belonging to certain graziers to whom the tenant had let the grazings on some of the parks of the farm, and these graziers have consigned the amount of their sub-rents, if one may so speak. The question is whether the landlord is entitled to receive those sub-rents without being liable to a demand for assignation of his right of hypothec over the principal tenant's stock.

The Sheriff-Substitute and the Sheriff occupied fifteen months in preparing a record, and five years in deciding the case. They have now decided that the landlord is bound to grant an assignation.

If the case were a pure one under the Act of Parliament, and if it could be shown by the sub-tenants that the landlord would suffer no prejudice