would also require to have nothing that could be attributed to tolerance.

On these grounds I have come to the opinion that the Lord Ordinary's interlocutor should be adhered to.

LORD YOUNG concurred.

LORD RUTHERFURD CLARK—The defender has led proof of the servitude which she alleges, and considering first that the two properties belonged to the same person between 1817 and 1834, and (second) that they were in the same occupation from 1860 to 1877, I think she necessarily had a very difficult task. In my opinion the evidence is not nearly enough to prove servitude, and I am quite satisfied with the grounds on which the Lord Ordinary has placed his judgment.

LORD LEE—I concur with what has fallen from your Lordship in the chair, and from Lord Rutherfurd Clark, and I do not know that I have anything to add. But I am clearly of opinion that no case of necessity or constructive necessity has been made out. I think the evidence, so far as it goes, leads to this—that the preponderance of the testimony shows that the road in use was the Holehouse road, and it struck me very forcibly that two witnesses referred to by Mr Kermack spoke to the fact about that which has not been got over—and cannot be got over—and that is the removal of old William Crawford from the farm of Kilburn to Hangingheugh, Kilburn being to the north. It is proved, both by William Crawford, who is aged eighty, and by Mrs Janet Crawford or Thom, that at the time of his removal from Kilburn to Hangingheugh his stock and carts with his goods went round by Holehouse. With regard to the *prima facie* evidence afforded by the existence of a road upon the Burnsyde side of the burn up to the burn, I think the Ordnance Survey map is sufficient to explain and account for the existence of a road there so far, for it shows that the road after reaching the burn rather turned to the south so as to reach other fields on Burnsyde.

On the whole, therefore, without going over the evidence, I am entirely satisfied with the judgment of the Lord Ordinary, and the grounds which he has stated in support of it.

The Court adhered.

Counsel for the Pursuer and Respondent—H. Johnston—Kermack. Agents—Mylne & Campbell, W.S.

Counsel for the Defenders and Reclaimers—Low—Dundas. Agents—Mackenzie & Black, W.S.

Thursday, June 19.

FIRST DIVISION.

[Lord Kinnear, Ordinary.

THE ABERDEEN JOINT PASSENGER STATION COMMITTEE AND THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY *v.* THE NORTH BRITISH RAILWAY COMPANY.

Railway—Station—Use of Joint Station—Management—Title to Sue.

The Great North of Scotland Railway Company and the Caledonian Railway Company (the successors of the Scottish North-Eastern Railway Company) possessed jointly and equally the new joint passenger station at Aberdeen, and it was provided by statute that "the maintenance, management, regulation, and control of the station, and the appropriation thereof, and of the sidings, sheds, offices, and buildings therein, and all other matters incident to the said station, including the power to appoint, suspend, and dismiss the superintendents and other officers and servants, &c.," should be vested in a joint committee representative of the two companies. The North British Railway Company were secured by statute in certain "conveniences and privileges" over the lines now possessed by the Caledonian Railway Company, including "the joint or separate use of the offices, stations, sidings, and other accommodation at the several stations . . . of the Scottish North-Eastern lines, including in so far as the (Caledonian) Company lawfully may" the station referred to. Since 1878 the North British Railway Company had exercised running powers for passenger and goods trains over a portion of the North-Eastern lines from the neighbourhood of Montrose to Aberdeen; they had been provided with accommodation in the joint station, into which they had been allowed to run their passenger trains. The joint committee and the Great North of Scotland Railway Company sought declarator that the North British Railway Company were not entitled without the consent of the Great North of Scotland Railway Company to use the joint station and the railway through the same, and that the joint committee were not bound to admit the defenders' traffic into the station.

Held (*rev.* Lord Kinnear, *diss.* Lord M'Laren) that the pursuers had a title to sue without the concurrence of the Caledonian Railway Company, or calling this Company as defenders.

This was an action by the "Joint Committee" vested by Act of Parliament with the maintenance and management of the Aberdeen Joint Passenger Station, and the "Great North of Scotland Railway Com-

pany," to have it declared that the North British Railway Company were not entitled to use the joint station there without the consent of the Great North of Scotland Company.

The action was raised in the following circumstances:—Prior to 1866 the traffic between Perth and Aberdeen had been carried by an independent company called "The Scottish North-Eastern Railway Company," who used a station of their own at Guild Street, Aberdeen, but in that year the concern was acquired by the Caledonian Railway Company, and became part of their system.

Shortly before this amalgamation took place arrangements had been entered into between the North-Eastern Company and the Great North of Scotland Company, whose trains run chiefly north of Aberdeen (and who had a separate terminus at Waterloo Station there), with reference to the construction of a joint passenger station at Aberdeen.

Under the powers of the Denburn Valley Railway Act 1864 the existing joint passenger station at Aberdeen was built at the joint expense of the North-Eastern Company and the Great North of Scotland Company.

It was provided by the Act of 1864 (sec. 20) that the new station was to be equally and jointly the property of the two companies, and that it was to be under the management of the "Joint Committee" (constituted by sec. 22), and further, that the amount of traffic was to regulate the amount of accommodation which each of the companies was to have in the joint station.

By sec. 22 of the said Act it was further provided, that "subject to the provisions of this Act, the maintenance, management, regulation, and control of the joint passenger station, and the appropriation thereof, and of the sidings, sheds, offices, and buildings therein, and all other matters incident to the said station, including the power to appoint, suspend, and dismiss the superintendents and other officers and servants required for the said station, and the making, alteration, and enforcing of bye-laws, rules, and regulations for the management of the said station, and the government of the said officers and servants, shall, in compliance with the conditions contained in the schedule to 'The Great North of Scotland Railway (Aberdeen Junction) Act 1863,' be vested in a joint committee of six persons, to be called 'The Joint Committee.'" The committee consisted of three members of the Caledonian Board, and three members of the Great North of Scotland Board. By the said section it is further provided that "for the purposes of this Act, and in any matter connected with or arising out of the same, the Joint Committee may sue and be sued in the name of their secretary or clerk."

As already mentioned, the Scottish North-Eastern Company was amalgamated with the Caledonian Company by Act of Parliament in 1866, and by this Act certain rights and privileges in connection with the system of the North-Eastern Railway were conferred upon the North British Railway Company.

Section 106 of the Caledonian and Scottish North-Eastern Railways Amalgamation Act 1866 contains the following provisions:—"The North British Railway Company may, for the purpose of conveying Scottish East Coast traffic, run over and use with their engines, trucks, and carriages of every description, the Scottish North-Eastern lines or any part thereof, and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines; and the North British Railway Company shall be entitled to the conveniences and privileges, and be subject to the regulations and obligations thereinafter mentioned" (that is to say) . . . "4. The joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, wharfs, stopping, loading and unloading places, sidings, and junctions of the Scottish North-Eastern lines, including, in so far as the company lawfully may, the station at Aberdeen, and all conveniences therewith connected."

The North British Railway Company since June 1878 took advantage of this power conferred upon them by the statute above quoted, and ran their trains over a portion of the North Eastern lines from Kinnaber Junction to Aberdeen. Accommodation was also provided for them in the joint-station at Aberdeen, under the powers of the Statute of 1864 above referred to.

In the present action the pursuers sought declarator that the defenders—that is to say, the North British Company—"are not entitled without the consent of the Great North of Scotland Railway Company to use the joint passenger station, or to run over or use, with their engines, trucks, or carriages of any description, the said station, or the railway through the same, or the sidings, accesses, or works, &c." And further, they ask for declarator that the Joint Committee "are not bound to admit the traffic of the defenders, or their engines, trucks, or carriages of any description into or within the said station, as defined by section 20 of the said Act." And there was a conclusion for interdict corresponding to the declaratory conclusions.

The pursuers averred—"The defenders are entitled to use the joint passenger station at Aberdeen and conveniences connected therewith only in so far as the Caledonian Company may lawfully empower them to do so. The Caledonian Company cannot lawfully empower them to do so, if the consent of the pursuers be withheld, as is the case. The defenders in these circumstances, have no right or title to run their trains into the joint station, or to use it for the purposes of their traffic. In or about the year 1870 the defenders claimed from the Caledonian Company under section 102 of the said Amalgamation Act of 1866, which does not apply to the exercise of running powers, certain privileges, including accommodation for booking-clerks at the joint station. The defen

ders and the Caledonian Company having differed with regard to the privileges claimed, the dispute was referred to Mr Eborall, the arbitrator appointed under the Act. Mr Eborall pronounced an award, dated 20th August 1870, in which he found the defenders entitled, under said section 102, to such accommodation so far as the Caledonian Company could give it, and ordered the Caledonian Company to give it, unless prevented by the Great North of Scotland Company. The rights of the Great North of Scotland were expressly recognised and reserved in said award, and the pursuers accordingly made no objection to the said accommodation being provided. The pursuers have further since 1878 allowed the defenders to run their trains into certain parts of the said station. This they have, however, hitherto done under protest, out of regard to the public convenience, and without prejudice to their rights, and in the hope that an arrangement might be made regarding the conditions on which the use of the station by the defenders might be permitted. The defenders have, however, failed to come to any arrangement with the pursuers, and they now claim the right to use the station without their consent, and usurp without payment the services of the pursuers' signalmen, porters, and other servants, to attend to the defenders' trains and passengers." They also alleged that the accommodation of the joint station was not more than sufficient for the traffic of the Caledonian Railway and themselves, and that the introduction of the defenders' traffic was a cause of serious inconvenience.

The defenders relied on the provision of sec. 106 of the Statute of 1860 above quoted, and averred that they were only availing themselves of the privileges conferred upon them by that statute.

The defenders pleaded, *inter alia*—(1) No title to sue.

On 24th July 1889 the Lord Ordinary (KINNEAR) found that the pursuers were not entitled to insist in the action without the concurrence of the Caledonian Company, or without calling the company as defenders for their interest.

Opinion.—"The pursuers the Great North of Scotland Railway Company are joint owners with the Caledonian Railway Company of the joint passenger station at Aberdeen; and the other pursuers are the Joint Committee to whom 'the control and management' of the station is committed by the Act of Parliament authorising its construction.

"The defenders have no independent right in the joint station, but by the Caledonian and Scottish North-Eastern Railways Amalgamation Act 1866 they are entitled to certain 'conveniences and privileges' in connection with the Scottish North-Eastern lines, and among others, to 'the joint or separate use of the offices, stations, sidings, and other accommodation at the several stations . . . of the Scottish North-Eastern lines, including, in so far as the (Caledonian) Company lawfully may, the station at Aberdeen.' Since 1878 the defenders have exercised running powers for passenger and goods trains over a portion of the North-Eastern line from Kinnaber Junction, near Montrose, to Aberdeen; and in connection with their passenger traffic they have been provided with accommodation in the joint station, and have been allowed to run their passenger trains into that station.

"They maintain that as they have been for many years in possession and enjoyment of the use they now make of the joint station with the consent of both of the joint owners, they cannot be excluded at the instance of one of these owners alone without the concurrence of the other. But further, they maintain that the Caledonian Railway Company have power under the Acts set forth on record to procure for them the accommodation, and that if so, they are bound to procure it. This is a question as to the legal construction and effect of the Acts of Parliament which cannot, in my opinion, be determined in the absence of the Caledonian Railway Company; and it is a question which is not raised by the defenders alone, but by the pursuers themselves. Their averment (Cond. 7) is that 'the defenders are entitled to use the joint passenger station at Aberdeen only in so far as the Caledonian Company may lawfully empower them to do so. The Caledonian Company cannot lawfully empower them to do so if the consent of the pursuers be withheld.'

"This is the ground of action; and its validity depends entirely upon the powers and rights of the Caledonian Company, which the pursuers thus propose to define by the declaratory conclusions of the summons. But neither the rights of the Caledonian Company in a question with the pursuers, nor their obligations in a question with the defenders, can be determined effectively in an action to which they are not parties.

"The pursuers' counsel intimated at the bar that they did not desire to have an opportunity for intimating the action to the Caledonian Company, but preferred to have judgment on their title to insist in the action as laid.

"The only result of the proof is to show that while the action was authorised by the Joint Committee, this was done without consultation with the Caledonian Company."

The pursuers reclaimed, and argued only on the preliminary pleas—That the Joint Committee had a statutory existence apart from either company, and they could direct and determine who should and who should not come into the station; and further, as the Committee could sue and be sued in name of their secretary, or clerk, there was no occasion whatever for the Caledonian Railway to be called. No doubt the statute contemplated a third railway obtaining access to the station, but it was only on the condition of reasonable payment for accommodation—this the defenders had never made, but having obtained an entry to the joint station under their Act

they refused to leave unless they were expressly excluded by an act of the Joint Committee. If the consent of the Caledonian Railway to the present action was to be held as indispensable, then it had already been obtained through the Joint Committee, one-half of whom were elected by that company.

Argued for the respondent—The plea of no title to sue was intended to cover a plea of "all parties not called," and it was this more restricted plea which the Lord Ordinary had in fact sustained. In suing an action like the present, the Joint Committee had clearly gone outwith their powers; they were entitled to regulate the rights of those parties who should be found entitled to use the station, but they had no power to say who these parties were. The powers of the committee were statutory, were strictly limited, and might be compared to those of a superior station-master.

At advising—

LORD PRESIDENT—In order to dispose of the question raised upon the Lord Ordinary's interlocutor, it seems to be necessary to enter into some historical detail.

The railways immediately north of Edinburgh, and from Edinburgh to Perth, were originally the Scottish Central Railway, which reached Perth by way of Stirling, and the railway of the Edinburgh, Perth, and Dundee Company, which reached Perth by going through Fife, across the ferry at Burntisland. The former of these was an independent company, and so was the latter, until they became respectively the property of the Caledonian and the North British Companies. In that state of matters, of course, there were two competing lines—one belonging to the Caledonian, and one to the North British, from Edinburgh to Perth; but from Perth to Aberdeen there was still an independent railway company, called the Scottish North-Eastern, and that continued to be a separate and independent company down to the year 1866, when it was acquired by the Caledonian Railway Company. But while it was an independent company there were arrangements made between that company and the Great North of Scotland Company, whose line runs northwards from Aberdeen, particularly with regard to a joint passenger station at Aberdeen. It was under the authority of the Denburn Valley Railway Act of 1864 that that joint passenger station was built at Aberdeen, and lines of railway were constructed through it at the joint expense of the Scottish North-Eastern and the Great North of Scotland Companies, at a cost of £90,000. Prior to the passing of that Act the Scottish North-Eastern Company ran into a station of their own at Guild Street, and the North of Scotland Company into a separate terminus, called Waterloo Station. The lines authorised by the Act of 1864, however, led both companies into this new joint passenger station, which is in question. With regard to that station it was provided by the 20th section of the Act of 1864, that it "shall be jointly and equally the property of the Company" (meaning the Scottish North-Eastern Company) "and of the Great North Company;" and "the joint passenger station, when made, shall be under the control and management of the Joint Committee," which was constituted by the 22nd section of the same Act. It was further provided that the amount of traffic should regulate the amount of accommodation that each of these railway companies was to have in the joint station. And the 22nd section provided "that subject to the provisions of this Act, the maintenance, management, regulation, and control of the joint passenger station, and the appropriation thereof, and of the sidings, sheds, offices, and buildings therein, and all other matters incident to the said station, including the power to appoint, suspend, and dismiss the superintendents, and other officers and servants, &c., shall, in compliance with the conditions contained in the schedule to the Aberdeen Junction Act of 1863, be vested in a Joint Committee of six persons, to be called the joint committee." And it is provided further that that Joint Committee shall consist of three persons chosen by the board of directors of each of the railway companies—six in all. Now the Caledonian Company, as I observed before, acquired right to the Scottish North-Eastern line in 1866, and by the Act of Parliament under which this acquisition was made there were various provisions as to the way in which traffic was to be forwarded, and particularly the eastern traffic from Edinburgh to the north, and a number of provisions are made for the purpose of giving facilities for the forwarding of such traffic. But in addition to that, the North British Railway Company, who ran into the Scottish North-Eastern line, and used a part of its line and stations, were secured in certain running powers, and these are expressed in this way by the 106th section of the Act of 1866—"The North British Railway Company may, for the purpose of conveying Scottish east coast traffic, run over and use with their engines, trucks, and carriages of every description, the Scottish North-Eastern lines, or any part thereof, and the stations, watering-places, works, and conveniences upon and connected with the Scottish North-Eastern lines, and the North British Railway Company shall be entitled to the conveniences and privileges, and be subject to the regulations and obligations hereinafter mentioned;" and among these occur this, "the joint or separate use of the offices, warehouses, stations, sidings, and other accommodation at the several stations, wharves, stopping, loading and unloading places, sidings, and junctions of the Scottish North-Eastern lines including, in so far as the company" (that is the Caledonian Company) "lawfully may, the station at Aberdeen, and all conveniences therewith connected; the extent of such use, and the nature of the arrangements for working the traffic at the respective places to be determined by agreement or by arbitration."

Now, it is quite apparent from these

quotations from the two Acts of Parliament that previous to the year 1866 this joint station belonged in property exclusively to the Scottish North-Eastern and the Great North, and nobody else had any access to it or any right to use it. But the Caledonian Company on acquiring the Scottish North-Eastern line were put by Parliament under certain conditions for the purpose of facilitating the traffic from the south of Aberdeen to places north of Aberdeen—conditions as to the mode in which that traffic was to be forwarded—and among other things they gave running powers to the North British Railway Company, as far as regards the Scottish North-Eastern line, as down to that period it had been, and among others the particular power which I have just read. Now, the North British Company maintain that under that Act of Parliament they are entitled to a use, jointly with the Caledonian and the Great North of Scotland Companies, of the joint passenger station at Aberdeen; and they aver (and that apparently is not disputed) that they have since June 1878 taken advantage of the powers conferred upon them by the Act of 1866, "and have exercised and still are exercising the running powers conferred upon them by the said statute by running their passenger and goods trains over a portion of the Scottish North-Eastern line from Kinnaber Junction, near Montrose, to Aberdeen. In connection with their passenger traffic they are provided with accommodation in the joint station at Aberdeen which has been constructed under the Act of 1864," and then they describe what the amount of that accommodation is. The answer to that by the pursuers is, "that the defenders were subsequent to 1870 allowed certain accommodation at the joint station, and have since 1878 (with the exception of the period from 27th December 1879 to 1st May 1883) been permitted to run their trains into the said station."

It appears to me that these are the facts of the case with reference to which we are to consider whether this interlocutor of the Lord Ordinary should be adhered to.

The action has been raised by the Joint Committee who manage the station, and also by the North of Scotland Railway Company, and it is important to notice what the conclusions of the action are. There is a declarator sought that the defenders, that is to say the North British Company, "are not entitled without the consent of the Great North of Scotland Railway Company to use the joint passenger station, or to run over or use with their engines, trucks, or carriages of any description the said station, or the railway through the same, or the sidings, accesses, or works," &c. And further, they ask for declarator that the Joint Committee "are not bound to admit the traffic of the defenders, or their engines, trucks, or carriages of any description into or within the said station, as defined by section 20 of the said Act." And then there is a conclusion for interdict corresponding to the declaratory conclusions. The defenders plead that the pursuers have no title to sue, but that is not the plea which has been sustained by the Lord Ordinary. Indeed, it appears to me that the Lord Ordinary has sustained a plea which is not to be found on record, because he finds "that the pursuers are not entitled to insist in this action without having obtained the concurrence of the Caledonian Railway Company, or calling the said Company as defenders, or for their interest," and therefore he dismisses the action.

Now, my Lords, if we were to deal with the plea of no title to sue, my present impression is in favour of the pursuers upon that plea. I am not going to give any judgment upon the point, because I think it is not before us, but I do not see why the Great North of Scotland Railway Company and the Joint Committee should not have a perfect right to prevent the appropriation of any part of the joint passenger station by a party who has no right to be there; because, of course, in discussing the question of title to sue, it must be assumed that the pursuers are right on the merits, and that the defenders have no right to be there. Now, surely if they have no right to be there, the North of Scotland Railway Company have a very good right in themselves, and independent of anybody else, to prevent their coming there. Their interest is abundantly plain, and I should think that the title in such a case followed interest. But further, I think the Joint Committee have also a very good title to sue. Perhaps it may be a question whether they could have sued alone, but it must be observed that one of the powers expressly conferred upon that Joint Committee is the appropriation of the station and the regulation of the different parties entitled to use it. Those are the very words of the statute; and therefore whether they would have had a good title to sue by themselves or not, I think it was quite right that the North of Scotland Company should bring their action in conjunction with the committee which has the superintendence and disposal of this joint passenger station, and by whom the portions of the station to be used by the different parties interested are to be appropriated. But, as I said before, I do not desire to give any final opinion upon the question of title to sue, though my opinion is that the Lord Ordinary is wrong in thinking that they are not entitled to insist in this action without the Caledonian Company being somehow represented.

One can very easily understand why the Caledonian Company do not choose to be pursuers of this action, because they have in the Act of 1886 conferred upon the North British Company, so far as they lawfully could, a right to use this joint station, and it would have been rather an inconsistent proceeding upon their part to seek to withdraw any right that they had so given, or to exclude the North British Company from this use of the station. That sufficiently accounts for their not being pursuers. But the Lord Ordinary thinks that if they are not to be pursuers they ought to be called

as defenders. I do not think that their presence as defenders here is at all necessary. The North British Company are their assignees under the Act of 1866. The Caledonian Company have given to the North British all that they could give them in the way of right to this joint station under that statute, and they can give them no more; and the North British being thus assignees of the Caledonian, have a perfectly complete and sufficient title to defend themselves in this action without the aid of anybody else. I could have quite understood, in different circumstances, that a party interested as the Caledonian Company are here ought to have an action of this kind intimated to them, and if that were all that was proposed I should not at all object to it, but that would be obviously a very vain and useless proceeding, because the Caledonian Company are necessarily just as well aware of the institution of this action and of the proceedings taken by the Joint Committee, and by the North of Scotland Railway Company, as these parties themselves are. The intimation therefore would be a mere idle form.

And therefore, upon the whole matter, I have come to the conclusion that this interlocutor of the Lord Ordinary cannot stand, and that we should recall it and remit to his Lordship to proceed with the cause.

LORD SHAND—With reference to the argument which we have heard in this case, I think it is necessary to have in view the pleas-in-law of a preliminary nature which the defenders have stated on record. The first plea is "No title to sue;" and there are some branches of the second plea that are directed to the same point. "(1) The defenders should be assoilzied, or otherwise the action should be dismissed in respect the Joint Committee have not authorised the same,"—that enters into the pursuers' title or right to pursue the action; (2) The Joint Committee have no power to authorise the same; (3) The action should be dismissed because the defenders are authorised by the Caledonian Railway Company, and for many years have been with the consent of the pursuers, in possession and enjoyment of the use now had by them of the station" — a branch of the second plea which raises rather a question on the merits of the case. Now, I think that the Lord Ordinary meant to deal with these pleas, and that he has dealt with them, because he finds that the pursuers are not entitled to insist in the action, that is, they are not entitled to maintain the action, and he therefore concludes by sustaining an objection to title. The argument on the reclaiming note ranged over the question of title, and I feel myself therefore bound to state the opinion which I have formed upon that question, which is the only preliminary question raised on record; for I find no plea to the effect that all parties are not called.

Now, the first observation which I have to make on the case in that aspect is this, that apparently the Lord Ordinary has come to the conclusion that the pursuers have a title to sue. His Lordship says the pursuers are not entitled to insist in the action without having the concurrence of the Caledonian Company or calling the said company as defenders. In his Lordship's view apparently, therefore, if the Caledonian Company were called as defenders that would satisfy all that the defenders can require or demand. If that be so, then this is a case which the pursuers have a title to sue. His Lordship does not, so far as I can judge from his opinion, think it necessary even that they should call the Caledonian Company in any separate or supplementary action, for he says—"The pursuers' counsel intimated at the bar that they did not desire to have an opportunity of intimating the action to the Caledonian Company, but preferred to have judgment on their title to insist in the action as laid." His Lordship therefore seems to be of opinion that there is a good title here provided the pursuers will merely intimate the action to the Caledonian Company.

Now, I am clearly of opinion with the Lord Ordinary that there is a title to sue, but I do not think it is incumbent on the pursuers either to intimate this action to the Caledonian Company or to call them as parties to the action, and indeed I see no plea to that effect stated by the defenders upon record.

In regard, first, to the title to sue, your Lordship has stated in the narrative which you have given the circumstances in which the action has been raised, and it is unnecessary for me to repeat the statement either as to the origin of the parties' rights or as to what the parties' rights are. It is clear that the property of the station was originally vested in the Great North of Scotland and the Scottish North-Eastern Railway Companies, and in the Act which authorised them to hold the station and relative accommodation jointly there was a provision that the whole administration connected with it should be vested in another body altogether. Neither the Great North of Scotland Railway Company nor the Scottish North-Eastern was entitled to act by itself in reference to any matter affecting the arrangements of the station or the accommodation to be given to each of these companies. The whole direction and control of the station and station ground and conveniences and accommodation were vested in the Joint Committee. Now, that Joint Committee here say that an intruder has come in. I use the word of course in no offensive sense, but simply to describe the legal position in which they represent the North British Company to stand as being now trespassers or intruders. The Joint Committee bring this action to have the North British Company excluded from use of the station. It is true that the North British Company have been allowed the use of the station for a considerable length of time, but it is equally true that there is no averment in this action that this use was given to them as matter of purchase by them, or right acquired by them, or in virtue of any

agreement or transaction with the joint owners. The two parties who possessed and owned the station and the central ground lying between the lines of the two companies respectively, and separating these lines from each other, were the Great North of Scotland and the Scottish North-Eastern Companies. The North British Company in the year 1866 received, not from the Caledonian Company by way of conveyance or agreement or contract, but from Parliament, quite independently of the Caledonian Company—for aught that I can see the Caledonian Company may have resisted the clause, but whether it was inserted in the statute of consent or not I think is not in the least material—such power as the Caledonian Company might lawfully give them to the use of the joint station. The words of the clause are "the joint or separate use of the offices, stations, &c., including, in so far as the company lawfully may, the station at Aberdeen, and all conveniences connected therewith." So that their right is a right derived not from the joint proprietors of the station but from Parliament, and is limited to such right only as one of the joint proprietors was able lawfully to give to them, to the use of the station and conveniences. The defenders say that following upon the Statute of 1866 they have been allowed to go on for years to use the station. The pursuers admit this, but that goes no way in the determination of any question of right here as affecting the question of title, because the defenders do not say that they did so under any new arrangement by which they acquired a right not only from the Caledonian Company but from the Great North of Scotland Company to the use of the station. If they could have said that they obtained this use under an agreement between them and the two companies, following up the statute of 1866, I think that would have entered very deeply into the question of title. But the state of matters was simply this, that they were allowed to use the station after the Act of 1866. The North of Scotland Company may have tolerated or consented to this use, and so the committee may have allowed it because that company found it an advantage to have the traffic brought there and because it created no inconvenience. But the use is not said to have been given under any permanent right or arrangement with either the Great North Company or the Joint Committee, and both of these bodies now claim to bring the use to an end for the reasons stated on record.

Now, I am of opinion with your Lordship, in the first place, that the Joint Committee, even if they were here alone as pursuers, have a title to maintain an action against persons whom they represent as intruders in the station. They may fail to show that the defenders are intruders. The North British Company may, on the merits of this case, be able to show that they have a right to the use of the station and that they are not intruders; but it appears to me that the Joint Committee—who are the administrators of the station in possession or administration under their statutory title solely for the use of the two owning companies, and vested with all the rights and powers as to making arrangements, including the accommodation to be given as between the companies—have themselves a title to sue this action. But I go further, and hold that the Great North of Scotland Company even if they stood alone as pursuers would have a title to sue this action. They are one of two joint proprietors of the station. It is quite true that according to our law one of two joint proprietors cannot sue an action against a third party when that third party has derived his right from both of the joint owners. If two joint *pro indiviso* proprietors let a property to a tenant, and the lease runs on for a time, one of them cannot bring an action of removing, because the defender is entitled to say, "I trace my right to both of the joint *pro indiviso* proprietors, and one of them cannot turn me out." But in the present case the defenders do not say that they had any right from the Great North of Scotland Company. Their right was entirely derivative under the Act of Parliament of 1866, and was derived from such rights only as the Caledonian Company had. Therefore this is not a case in which the joint *pro indiviso* proprietors require to sue an action of this kind, for it is quite settled that one of two joint *pro indiviso* proprietors may object to an intruder on the property, or may take action to remove anyone who has not got a title from the joint *pro indiviso* proprietors. And so, taking this as a question of title, I am prepared upon the discussion we have had to repel the objections to title.

The question remains, Whether the pursuers are bound to call the Caledonian Company? Now, the North British Company come into this station, or insist on remaining there, and the Joint Committee, and the Great North of Scotland Railway Company as one of the proprietors, challenge their right to do so. The answer is, We have a right by Act of Parliament; we have all the right the Caledonian Company have. That is a matter which will be discussed, and can be perfectly well discussed by the defenders for themselves. If the right which they have got from Parliament is good it will be sustained, if it is not good it will be repelled; but in either case why should the Caledonian Company be made by the pursuers a party to this action? The defenders can maintain their right for themselves under the statute on which they found. They have not suggested that the Caledonian Company should be made a party to the action by their pleas, and it looks to me rather as if the Lord Ordinary regarded this as *pars judicis*, and so held that they must be made parties. I fail to see any reason for it. I think the North British Company must justify their being there, but they are quite in a position to do so under their Act of Parliament without the assistance of the Caledonian Company. For aught I see that Company can give no assistance in the matter. For aught I see the Caledonian Company neither desire nor can

take, to any practical effect, any part in the action. The defenders must stand upon the Act of Parliament; and so far as the Caledonian Company can give them rights, the North British Company have got them. What can the Caledonian Company say more on that subject? I presume the Caledonian Company have no desire further to fortify the rights of the North British. From what we know of these companies we may assume that to be beyond question. So far as I can see they have given no right which they are called on to defend, and if they had done so this is a matter which does not concern the pursuers. Accordingly their position must be this, take the Act of Parliament and use it to the best of your power; if it is good you will gain your case; we are not coming into Court to help you nor to frustrate you, seeing Parliament has given you the rights you have; and, in any case, we have no question in dispute with the pursuers. On that ground I am of opinion that the pursuers cannot be called on to make the Caledonian Company parties to this action. At the best it seems that an intimation would be sufficient. If so, it occurs to me that it would have sufficed to direct the defenders to intimate the existence of the action. But it is quite plain that the Caledonian Company need no intimation, for they know all about it. They have three representatives on the Joint Committee, and at a meeting of the Joint Committee these three representatives concurred in a resolution to raise this action in its present shape. Therefore I think it would be idle to intimate the action to a company represented on this Joint Committee by three of its own directors. Accordingly I think the intimation to or calling the Caledonian Company as parties to this action is unnecessary. So far as I am concerned I should be disposed to repel the first plea as to the title to sue, and also the second plea in its first and second heads, and to find that the defenders are not bound to call the Caledonian Company as parties to the action; but I am quite content with the interlocutor which your Lordship proposes.

Lord Adam—The station is admittedly the joint property of the Great North of Scotland Railway Company and of the Caledonian, as coming in place of the Scottish North-Eastern. It is under the control and management of a Joint Committee, consisting of three members of the Caledonian board and three members of the Great North of Scotland board of direction. That Joint Committee are pursuers of this action, and the Great North of Scotland Company are also pursuers; and their object is to have it found and declared that a third company, the North British Company, have no right or title to use the joint station without the consent of the Great North of Scotland Company. That is the question on the merits, and the only question. The Lord Ordinary has pronounced an interlocutor, which is, I think, in somewhat unusual terms, and I confess I do not understand it. His Lordship has sustained no plea. He has not sustained or repelled any plea to title. There was no plea that all parties were not called, and he has sustained no such plea; but his Lordship seems to have been of opinion that, in one form or other, either as pursuers or defenders—he does not seem to have made up his mind which — the Caledonian Company were necessarily parties to this action going on; and the interlocutor which he has pronounced is this—"That the pursuers are not entitled to insist in this action without having obtained the concurrence of the Caledonian Railway Company, or calling the said company as defenders, or for their interest." Now that seems to me to imply that if the Caledonian Company had been called as defenders for their interest his Lordship would have been of opinion that the pursuers were entitled to insist in this action, and I think with Lord Shand that that seems to follow. And if the Caledonian Company were entitled to insist in this action, it seems to me to follow that they could only be entitled to insist because they had a title. But I am in doubt whether the Lord Ordinary meant to sustain or repel their title to sue at all—I mean as distinct from a title to insist. I rather think he meant—"I will not apply my mind to consider whether you have a title to sue or not until the Caledonian Company are parties to the necessary action for the purpose." I think it was rather in the Lord Ordinary's mind when he put it in that form, that unless the Caledonian Company were called he would not allow them to insist in this action, but if in any other action they chose to call the Caledonian Company then the present pursuers might or might not have a title to insist. I think that is what was rather in the Lord Ordinary's mind. Now, with Lord Shand, I think the question of title to sue is necessarily involved in the question of title to insist, and having had a full argument on the subject, I am not disposed to express an opinion on that question. If they have no title to sue they cannot possibly have a title to insist; if they have a title to sue they must have a title to insist, so that it appears to me that the question of title to sue is involved in this action. Now, I concur in holding that the Great North of Scotland Company or the Joint Committee have a title to sue this action. I think the position of the North British Company is this—that they are insisting upon a right entirely independent of the Caledonian Railway Company or any other company—a right which they say is conferred upon them by Act of Parliament—and that in order to the exercise of that right they do not require the consent of the Caledonian Company, one of the joint owners of the station, or of any other person. They stand on the 106th clause of the Act of Parliament, which they say gives them a right to insist on the use of the station. It entitles them to certain conveniences and privileges, and among other things to the separate use of the offices, warehouses, &c., at the stations on the North-Eastern lines, including, so far as the Caledonian Company lawfully may,

the station at Aberdeen, and all conveniences therewith connected. They say the Caledonian Company have no power to consent or refuse consent to anything; it is an independent statutory right conferred on the North British Company. Now, if that be so, it is not at all a case where the right depends on the consent of the joint owners. If the North British Company have an independent right, and do not require the consent of the joint owners, why have not the Great North of Scotland Company, one of the joint owners of the station, a right to say, "No, you have no right to come here, and that is not a proper construction of the Act of Parliament?" It appears to me that they are, I will not say the only, but the proper parties to contest that right. And I do not see that the Caledonian Company should be here at all. They stand aside. They are content to say the Legislature has conferred certain rights on the North British Company; whatever they are they cannot be increased or diminished by anything we can do, and why they should be here I cannot see. If one of the joint owners of a station comes forward and says, "You are a third party, and you have no right here, you are intruding here," surely they have a right to contest that. Therefore I think if the Great North of Scotland Company had been the sole pursuers they would have had a sufficient title. But I also think the Joint Committee have a right to appear as pursuers. They have a right to regulate and control the use of this station, and the appropriation of the space in the station, and what can be more pertinent to that than the assertion of a right by a third party who says he will insist on using a portion of the station in spite of them. Surely a statutory body charged with the appropriation, control, and maintenance of this station have a right to ascertain what their rights are in that matter. I cannot conceive anything that would be more pertinent than an action at their instance to ascertain what the extent of their rights is in that matter. If it was a question between joint owners, the one saying the North British Company have a right to be there, and the other saying they have no right, I could see some ground for saying that both joint owners should be parties here. But that is not the case. There is no dispute between the joint owners. The Caledonian Company say, "Whatever are the rights conferred by the statute, let them be ascertained;" the Great North of Scotland say, "You have no right under the statute to be here." On the whole matter I am of opinion that both the Great North of Scotland Company and the Joint Committee have a right to sue this action, and if so, is it necessary that the Caledonian Company should be called? I do not think it is necessary, and my view is that the Caledonian Company are taking up quite the proper position here. For what purpose is it necessary to call them? Do the North British Company require the aid of the Caledonian Company to enable them to argue their case on the construction of the statute? Do they want to force the Caledonian Company into this action to say that they think the North British Company have no right to be in the station? I do not see that the North British Company have any right whatever to insist that the Caledonian Company shall be called here, and I concur with your Lordship and with Lord Shand in thinking that the Lord Ordinary's interlocutor ought to be recalled.

LORD M'LAREN—I agree with the Lord Ordinary, and my view of the case would even lead to a more extreme conclusion, because I should be prepared to sustain the plea of no title to sue.

But I am content to accept the Lord Ordinary's proposition, which is, that the Caledonian Company is a necessary party to an action of this description, and that the company if not a pursuer must be called as a defender. This is not precisely the view maintained by the defenders in the record, because their plea is that the pursuers have no title to sue. But under the Court of Session Act 1868 we are directed to make all such amendments of the record as are necessary for the purpose of determining the question in controversy between the parties (sec. 29), and in this case the question in controversy is the Lord Ordinary's finding, which is impugned by the one party and maintained by the other. If therefore your Lordships had been in agreement with the Lord Ordinary and myself I cannot doubt that you would have made the necessary amendment.

We have to consider (1) the question of right raised in the action; (2) the legal character of the Joint Committee by whom this action is promoted in conjunction with the Great North of Scotland Company.

The North British Company has running powers over a section of the Caledonian line terminating in Aberdeen, and in the Act of Parliament conferring the running powers it is provided that the North British Company shall be entitled amongst other privileges to the joint or separate "use of the offices, warehouses, stations, sidings, and other accommodations at the several stations . . . of the Scottish North-Eastern lines, including, in so far as the Caledonian Company lawfully may, the station at Aberdeen, and all conveniences connected therewith; the extent of such use and the nature of the arrangements for working the traffic at the respective places to be determined by agreement or by arbitration." Power is given to the arbitrator to order the enlargement of stations in consideration of an annual payment to be made by the North British Company. The qualifying words, having reference to the use of the Aberdeen station, were inserted doubtless for the purpose of saving the right of the Great North of Scotland Company, because the Aberdeen station is the property of the Caledonian and Great North of Scotland Companies. The Great North of Scotland Company did not object, and since the passing of the Act the North British Company have enjoyed the use of

accommodation in the Aberdeen station provided for them as an adjunct to their running powers. This use has been obtained partly by agreement and partly through the intervention of the statutory arbitrator. I understand that the running of separate trains was discontinued for a time after the fall of the first Tay Bridge, but this was not in the assertion of any right on the part of the Great North of Scotland Company or the Joint Committee, but, as explained at the bar, because it suited the North British Company to discontinue for a time the running of separate trains. Practically the North British Company have had continuous use of the necessary station accommodation at Aberdeen in the assertion of their statutory right.

In the present action it is sought to deprive the North British Company of this use at the instance of the Great North of Scotland Company and the Station Committee.

It is clear enough that the Great North of Scotland Company, suing by themselves only, would not have a title to try this question, because one of two joint proprietors cannot try any question affecting the right of both without making his co-proprietor a party to the action. But it is maintained by the pursuers that in this action the instance of the Station Committee is sufficient. Now, this is a question of proprietary right, because the North British Company is claiming a use or servitude in perpetuity over a part of the station. In this question the Station Committee has no interest, as it is only an administrative committee to manage the business of the station for the two companies who are the proprietors.

I shall not attempt to enumerate the powers of the Station Committee. They are to be found in the 22nd section of the statute, but I may say, in general terms, that the Station Committee is to consist of six directors, three to be nominated by each of the constituent companies, and that its powers include the apportionment of the area of the station between the two companies who have right to it, and the regulation of the use of that part of the station the use of which is common to the two companies. No proprietary interest in the station is given to the committee, and I think its position may be correctly described as that of an administrator or agent for the two companies in relation to certain property in which they were to have a common interest. Accordingly, when the representatives of the companies or the committee are unable to agree, and the committee is equally divided in opinion, there can be no resolution, and the matter is referred to arbitration by a clause in the statute. I do not overlook the circumstance that the committee has the capacity of suing and being sued. If a refreshment-room, for example, is to be let, or a contract is to be made for the erection of a station building, the committee must have the power of suing for performance, and I do not doubt that the Station Committee might eject a mere trespasser and maintain an action of ejection against him.

The right of suing on contracts is usually held to be conferred as an adjunct to the institorial power, and I see nothing in this specially to differentiate the case from that of any mercantile house in Glasgow employing an agent in Aberdeen for the management of his business there. In any view, it would seem that the capacity of suing and being sued will not entitle the Station Committee to represent the two companies in matters which are not within the scope of the duties and powers of the committee.

Now, let me suppose that a new company in the assertion of an alleged statutory right were putting forward a claim to the use of this station, and that the right of the claimant company was in dispute, who are the parties between whom this question of right would be raised? I should imagine that the only parties interested in its decision would be (1) the two companies who are the proprietors of the station, and (2) the company claiming the right of use. In such a question the Station Committee ought to occupy a perfectly neutral position. Its business is not to find out who have the right to the use of the station, but to regulate the use of the station, and to apportion the station accommodation fairly amongst the parties entitled to the use, whoever these may be. The functions of the Station Committee are merely those of a local agent, or as suggested in the argument, a sort of exaggerated stationmaster. Such a being, even when constituted by statute, cannot represent its constituents in a question of proprietary right. These considerations, if well founded, apply very strongly to the case of the attempted recission of the privilege which the North British Company has confessedly enjoyed for a period of years. The chief difference between my view and that taken by the majority of the Court is, that in the opinion of some at least of your Lordships the case is assimilated to that of an action against a mere trespasser, which is of course not the true position of the North British Company.

I can hardly think that if the two proprietary companies were willing that the North British should have the use of the station this committee would have come forward with an action of interdict, or if they had done so that the Court would have recognised its title to institute such an action. I wish to add, that while I sympathise with the objections which are sometimes made to the disposing of cases on points of form, I consider that in this case the defence has substance in it.

The Caledonian Company could not have raised this action in its own name, because it is bound by its statutory agreement to give the use of the station "so far as it lawfully may," and this doubtless is the reason why the Caledonian is not a party to the action. I am of opinion that the difficulty cannot be got over by bringing the action in the name of the Station Committee—first, because the Station Committee has no independent rights distinct from those of the constituent companies; second, because in my view the Station Committee is not entitled to represent the Caledonian Com-

pany in this question; and thirdly, because, even if it were entitled to represent the Caledonian, it would be in no better position than the Caledonian itself, being then equally affected by the equity which disables the Caledonian Company from insisting in such an action in its proper name.

The Court recalled the Lord Ordinary's interlocutor, repelled the first plea-in-law for the defenders, and remitted to the Lord Ordinary to proceed with the cause.

Counsel for the Pursuers—Sir C. Pearson—Ferguson. Agents—Gordon & Falconer, W.S.

Counsel for the Defenders—Comrie Thomson—Dickson. Agents—Millar, Robson, & Innes, S.S.C.

HOUSE OF LORDS.

Tuesday, February 25.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Bramwell, and Herschell.)

SIR WILLIAM M'ONIE AND ANOTHER (BUCHANAN'S TRUSTEES) *v.* WHYTE AND ANOTHER.

Husband and Wife—Postnuptial Contract—Antenuptial Contract inapplicable by Change of Circumstances—"Heirs and Assignees," Meaning of—Power of Apportionment.

A husband and wife, on the narrative that their antenuptial contract had become unsuitable, executed a postnuptial contract, whereby the husband bound himself and his heirs, in the event of his predecease, to make certain provisions for his wife, who accepted thereof in satisfaction of her legal claims, and further gave, granted, and disponed from her, her heirs and successors, to her husband and his heirs and assignees whomsoever, her whole estate real and personal now belonging to her or that might belong to her at the time of her death. She bound herself to infeft and seise her husband and his heirs and assignees in the heritable property so disponed, and she empowered her husband to uplift and discharge the whole estate, and appointed him to be her sole executor and universal legator. Further, she constituted her husband and his foresaids her assignees to the rents and duties of the said lands and others "from and since the term of Whitsunday last, which is hereby declared to have been the term of the said husband's entry to the said subjects, and in all time coming, surrogating hereby and substituting the said husband in her full right and place of the premises for ever."

The parties reserved power to alter the contract.

Under her grandfather's will the wife was entitled to a share of the residue of his estate, which was secured to her in liferent (exclusive of the *jus mariti*), and in fee to anyone whom she might appoint by a writing under her hands.

The husband predeceased, having conveyed his whole estates to trustees.

The First Division found that the wife had validly exercised her power of appointment over the share of the residue of her grandfather's estate by the general conveyance in her postnuptial contract, and this decision was not questioned.

But *held* (*rev.* the decision of the First Division) that the postnuptial contract was not of a testamentary character, but rather a deed of contract granting to each of the parties the right of a creditor, which vested at once, and therefore that the wife's share of residue which had been conveyed to the husband was carried by his disposition, and now vested in his trustees.

This was a Special Case presented for the opinion of the First Division by (1) the trustees of the late Mr James Rodger, who died in 1834; (2) Sir William M'Onie and others, trustees of the late Mr James Buchanan, for the interest of the City of Glasgow; and (3) Mr Buchanan's heirs *in mobilibus*, and representatives of heirs.

Mr Rodger, who was the grandfather of Mrs Buchanan, by codicil to his disposition of August 1831, directed his trustees to make payment to her of certain sums, exclusive of *jus mariti*, and declared that she should have the same share of the residue of his estate as any other grandchild. By the 7th codicil he gave her an additional legacy. These legacies were paid. By the 9th codicil of 3rd September 1833 he directed:—"Secondly, that the share in the residue of my estate, directed to be set apart for my granddaughters, shall be secured by my trustees to them in liferent for their liferent use allenarly (seclusive of the *jus mariti* of their respective husbands, &c.), and to their respective children equally among them in fee, and failing any of them without children, then to any person or persons whom they may appoint by a writing under their hands."

Mr and Mrs Buchanan executed an antenuptial contract of marriage in 1817, and a postnuptial contract in 1850. Mr Buchanan died in 1857, aged seventy-two; and Mrs Buchanan in 1883, aged eighty-six, without issue.

By the antenuptial contract Mr Buchanan obliged himself to pay £4000 if Mrs Buchanan survived him, to be invested upon heritable security for an annuity for her. And further he renounced his legal rights. Mrs Buchanan accepted this provision as in full of her legal rights.

The postnuptial contract was executed while the parties were living at 49 Moray Place, Edinburgh, and Mrs Buchanan was then childless and 53 years of age. It narrated that the antenuptial contract had become unsuitable. Mr Buchanan thereby