

schedule by deleting the amount of the claim at common law and inserting the lesser sum claimed under the statute. I agree that we ought not to do so.

The fault averred against these defenders is, that they allowed a defective system, or rather that they allowed a system, to which no objection could be taken if properly worked, to be defectively worked, and, as Lord Kinnear has pointed out, there is a distinct averment on record that this defective system, or rather this abuse of the proper system, was directly authorised by the defenders. But it is said that there should have been more specification, so as to show how and in what manner the directors of the company or the secretary or managing director of the company had directly authorised the abuse, or at any rate to show that they had knowledge of the abuse.

I agree that as the case has to go to a jury at any rate, we should leave the facts to come out before them, and accordingly I concur with your Lordships in approving of the issue.

The LORD PRESIDENT was absent.

The Court approved of the issue and found the defenders liable in the expenses of the discussion.

Counsel for the Pursuer—Lees—A. S. D. Thomson. Agent—A. B. Cartwright Wood, W.S.

Counsel for the Defenders—W. Campbell. Agents—Gill & Pringle, W.S.

Tuesday, June 21.

FIRST DIVISION.

[Lord Low, Ordinary.]

THE TOWN COUNCIL OF OBAN v. THE CALLANDER AND OBAN RAILWAY COMPANY.

Railway—Compulsory Acquisition of Land—Extinction of Servitudes Affecting Land Acquired—Callander and Oban Railway Act 1878 (41 and 42 Vict. cap. 167), sec. 28.

When land is taken by a railway company under compulsory powers, all servitudes which affected the land prior to its acquisition by the railway company are extinguished, unless the company's Act contains a provision to the contrary.

By the 28th section of the Callander and Oban Railway Act it was provided that the company incorporated under the Act should satisfy every claim competent to the Town Council of Oban for the loss of all rights of servitude then possessed by the public along part of the bay of Oban of which they should be deprived "by the construction of the company's works."

A portion of the ground acquired by the company under their statutory powers was laid out by them as orna-

mental ground in front of the station which they constructed at Oban. Prior to the acquisition of this piece of ground by the company, the public of Oban had possessed a servitude of way over it.

Held that this servitude had been extinguished, as the land had been acquired for the purposes of the company's works, although no part of the works had been constructed upon it.

By the Callander and Oban Railway Act 1878 the Callander and Oban Railway Company, thereby incorporated, were authorised, *inter alia*, to construct a branch line from Callander to Oban, and a quay and sea-wall in the bay of Oban. By the 28th section of the Act it was provided, *inter alia*—"That the company shall satisfy every claim competent to the Town Council for the loss to the public of all rights of servitude which they at present possess along the embankment erected by Robert Macfie upon the shore of Oban Bay of which they shall be deprived by the construction of the company's works." . . .

In 1879 the company acquired for the purposes of their works, by compulsory purchase from Mr Macfie of Airds, a strip of ground lying along the shore of Oban Bay. The company, however, did not use the whole of this ground for the construction of their works, but after these had been completed, a portion of the ground lying immediately in front of the station at Oban remained unoccupied. This piece of ground the company enclosed, and planted with shrubs and flowers.

In March 1891 the Town Council of Oban brought an action against the railway company, in which they sought to have it found and declared, *inter alia*, that the pursuers and other members of the community of the burgh of Oban had a right of servitude over the said piece of ground, which, as already stated, the company had acquired under their statutory powers, but had not used for the construction of their works.

The pursuers founded on a grant of servitude over the piece of ground in question which Mr Macfie had made to them in 1877 in order to preserve to the public a right of access to the shore of Oban Bay.

The defenders pleaded—" (6) The alleged servitude being inconsistent with the 1878 Act, and the execution of the railway works thereunder, has ceased to exist."

On 19th January 1892 the Lord Ordinary (Low) assoilzied the defenders from the conclusions of the summons.

"*Opinion.*— . . . The next conclusion of the summons is for declarator that the pursuers have a servitude of way over a piece of ground marked D on plan No. 2. . . There is no doubt that in 1877 Mr Macfie granted a servitude of way over the ground marked D, and that although the defenders acquired the land they did not acquire the servitude. . . .

"The matter is dealt with in the 28th section of the Act, which provides that 'the company shall satisfy any claim competent to the Town Council for the loss to the

public of all rights of servitude which they at present possess along the embankment erected by Robert Macfie upon the shore of Oban Bay of which they shall be deprived by the construction of the company's works; and then follow provisions as to the manner in which the amount of compensation is to be settled.

"Now, it is not disputed that this section refers to the servitude in question, and it is admitted that the Town Council have not claimed, and have no intention of claiming compensation for the loss of the servitude, for the obvious reason that they have received from the company a better road than the servitude way, and one equally convenient, and have therefore suffered no damage from the loss of the servitude. The pursuers' argument, however, I understand to be that the section does not apply, because the company have not constructed 'works' upon the ground covered by the servitude. Now, the company acquired the whole of B and C, the object being to obtain an access to their station from that side. They did not require the whole of the ground for the road of access, but they laid out what was not required for the roadway as ornamental ground, with the view of improving the general appearance of the access to the station. There is no doubt that they spent a good deal of money upon the ornamental ground by building a new breast-wall to the Black Lynn, and levelling-up and enclosing and planting the ground. No authority was quoted to me to the effect that it was *ultra vires* of a railway company to lay out a piece of ornamental ground as an adjunct to their station or the access to their station, and undoubtedly it is quite a common practice for that to be done. It seems to me that the ground having been acquired and used by the railway company in connection with their railway, the 28th section of the Act applies, and that the pursuers are only entitled to claim compensation in the manner therein provided for the loss of the servitude." . . .

The pursuers reclaimed, and argued—The rule that servitudes affecting land taken by a railway company were extinguished was subject to the conditions, that the land should actually be used for the purposes of the undertaking, and that there should be no provision in the Act keeping the servitudes alive. Here the land in question had not been used for the company's works, and accordingly the servitude affecting it was not extinguished. Apart from common law this was clearly the case under the 28th section of the Act.

The defenders argued—When a railway company acquired land for its works by compulsory purchase, all servitudes affecting such land were extinguished, unless the special Act contained a provision to the contrary—*Walker's Trustees v. Caledonian Railway Company*, January 21, 1881, 8 R. 405, and March 29, 1882, 9 R. (H.L.) 19. It was not necessary for the

operation of this rule that the land acquired should actually be used for the works, and section 28 of the special Act could not be read as taking the case out of the ordinary rule. Further, a railway company was entitled to lay out ground which it had acquired under its statutory powers for purposes only indirectly connected with its authorised undertakings—*Walker's case*; *Harris v. London and South Western Railway Company*, May 11, 1889, 60 L.T. 392. The pursuers' case accordingly failed.

At advising—

LORD PRESIDENT.— . . . The next question is the pursuers' claim of servitude of way marked D D D, and I think that it admits of decision on a definite legal ground. The servitude was constituted by deed over land which has since been taken by the defenders under their compulsory powers. Now, when land is so taken by the railway company, it is taken absolutely, with a resulting extinction of all servitudes, unless there be some particular provision in the special Act keeping them alive. Here it is suggested that this result is operated by the 28th section of the defenders' Act. I do not think this is the case. I assume (although the defenders disputed) that the section applies to this particular right-of-way; and I find that it makes special provisions for compensation. *Prima facie* this does not point to any alteration of the general statutory result upon servitudes of the taking of the servient tenement. It was argued, however, that the words "of which they shall be deprived by the construction of the company's works" imply that unless and until works are constructed on the ground, the servitude shall continue to subsist, and it was said that as the ground is at present occupied as a garden, therefore that event has not yet occurred, and the servitude still exists. I think this argument unsound. I do not think that the words in question relate to the specific physical occupation of the ground in question by the structures or excavations of the works. The company's works have been constructed under their statute, and the land in question was taken for the purposes of the company's works; these facts seem to me to make up the event contemplated by section 28. So far, therefore, from displacing the ordinary statutory result, viz., the extinction of the servitude—the section assumes and provides for it.

I am therefore against the pursuers on the whole of their case as laid on servitude.

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

The Court adhered.

Counsel for Pursuers—C. S. Dickson—Craigie. Agents—Macpherson & Mackay, W.S.

Counsel for Defenders—Asher, Q.C.—Deas. Agent—R. Bruce Cowan, W.S.