Thursday, May 17.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GILMOUR *v.* NORTH BRITISH RAILWAY COMPANY.

(*Ante*, vol. xxx. pp. 450 and 947, 20 R. 409, *ibid.* (H. L.) 53.)

Railway—Special Act—Statutory Obligation to Stop Trains—Ordinary Train.

A railway company were bound by their Special Act obtained in 1855 to erect and maintain a temporary goods and passenger station at a point to be fixed by agreement on an estate which was to be intersected by their line, and to stop all "ordinary" trains at this station for the purpose of traffic. The Act also contained a proviso that if after the expiry of five years the traffic proved unremunerative the company should no longer be bound to maintain the said station. After the station had been erected, in terms of the Act, the company and the proprietor concluded an agreement which provided that the company should complete the station as a permanent station and maintain it in all time coming at their own expense.

In 1892 the then proprietor brought an action to have it declared that the company were bound to stop all ordinary trains at the station, and that certain specified trains which ran over the part of the line which intersected his lands were "ordinary" trains within the meaning of the Act of Parliament. It appeared from the evidence that the line on which the station was situated was originally a branch from the main line of the North British Railway Company from Edinburgh to Dundee. By successive extensions it had been carried on until it re-joined the same main line at another point. The line was not used as a through route, and did not serve important termini, but was used entirely for the purposes of local traffic. The trains about which the parties were in dispute stopped at half the stations on their journey. Their average speed was 24¾ miles an hour as compared with 18¾ miles an hour in the case of the trains which stopped at the station on the pursuer's property.

Held that the trains in question were "ordinary" trains in the meaning of the Act, and that the company were accordingly bound to stop them at the said station.

Opinion indicated by Lord M'Laren, that looking to the character of the line, and in the absence of expressions in the Act pointing out trains of a special or ordinary class, the word "ordinary" was meant to include all trains belonging to the regular service advertised in the company's time table, and running daily over the line.

In 1885 the Leven and East of Fife Railway Company applied for an Act authorising them to make a branch line from Thornton Junction on the North British Railway Company's main line from Edinburgh to Dundee. The proposed line intersected the estate of Lundin, and by the 36th section of the Act obtained by the railway company, it was enacted, on the narrative that the owner of the estate had laid out a portion of the estate on the proposed line to be let in lots or feus for building, that the company should "erect and maintain a temporary goods and passenger station at or near to Sunnybraes, or at any other point on the said estate which may be agreed upon by and between the company and the owners of the said estate for the time, and at the said station all ordinary trains shall stop for the purpose of traffic." A proviso followed that if at the expiry of five years from the opening of the line the traffic had proved unremunerative the company should be freed from the obligation.

In accordance with this enactment a station was erected which was known as Lundin Links Station. No proposal was ever made to abandon it, but in 1858 the railway company entered into an agreement with the proprietor of Lundin, whereby they undertook to complete the station as a permanent station, and maintain it in all time coming at their own expense.

In 1892 Mr John Gilmour, the then proprietor of Lundin, brought an action against the North British Railway Company (who had acquired the undertaking of the Leven and East of Fife Railway Company in 1877), in which he sought declarator that the defenders were bound to stop all "ordinary" trains at Lundin Links Station, and that certain specified trains running between Thornton Junction and Anstruther were "ordinary" trains within the meaning of the Act of Parliament.

The defenders admitted that the trains specified in the summons did not stop at Lundin Links Station, but explained that four of them were express trains; and contended, *inter alia*, that express or fast trains were not in contemplation of the parties in 1855, and that the statutory obligation did not apply to these trains.

After certain procedure (reported *ante* vol. xxx. pp. 450 and 947, and 20 R. 409, *ibid.* (H. of L.) 53) a proof was allowed. The evidence was largely directed towards showing the meaning attached by railway officials to the word "ordinary," the pursuer maintaining that "ordinary" trains were distinguished from "special" or "excursion" ones, while the defenders maintained that "ordinary" should be distinguished from "fast" or "express" trains, and that the trains under dispute fell under these last two heads. It appeared that the line on which Lundin Links Station was situated was a single line which branched off from the North British Railway's main line between Edinburgh and Dundee. By

successive extensions the line had been carried round the coast of Fife until it re-joined the main line at Leuchars Junction, its whole length being about 39 miles. The line was not, however, used as a through route, and did not serve important termini, but was used entirely for the purposes of local traffic. The four trains which the defenders maintained were fast trains, ran between Thornton Junction and Anstruther, stopping at four stations, and passing four without stopping. The slowest of them took 47 minutes to the journey, while the fastest of the stopping trains took 52 minutes. The average speed of the four trains in question was 24¾ miles an hour as against 18¾ miles an hour in the case of the stopping trains.

The defenders' witnesses maintained that for a single line this speed was such as to justify them in calling the trains "fast" or "express," and quoted so-called "express" trains on other lines of no greater speed.

The further results of the evidence sufficiently appears from the Lord Ordinary's note.

On 23rd December 1893 the Lord Ordinary (STORMONTH DARLING) pronounced the following interlocutor:—"Finds, decerns, and declares, and decerns and ordains, in terms of the conclusions of the summons: Finds the pursuer entitled to expenses in the Outer House, &c.

"*Opinion.*—The defenders are bound by section 36 of the 'East of Fife Railway Act 1855,' to stop 'all ordinary trains' at Lundin Links Station, and the question is whether certain specified trains, viz., the trains leaving Thornton Junction for Anstruther at 11-38 a.m. and 5-34 p.m., and the trains leaving Anstruther for Thornton Junction at 7-45 a.m. and 4 p.m., are ordinary trains within the meaning of that section. Two other trains are mentioned in the conclusions of the summons, but as to these the defenders now admit that they are ordinary trains and must be stopped at Lundin Links.

"It appears from the judgment of the House of Lords in *Burnett* v. *The Great North of Scotland Railway Company*, 10 App. Cas. 147, that a stipulation of this kind between a landowner and a railway company is not to be viewed with any disfavour, but must be construed in its natural and reasonable sense. Except to that extent, the *Crathes* case is not a guide to the present, because in the phrase there was 'all passenger trains,' which, of course, is a more comprehensive phrase than 'all ordinary trains.'

"The evidence shows that there is great difference of opinion among railway men as to the meaning of the word 'ordinary' when applied to a train, and probably the truth is that the meaning varies according to the connection in which the word is used. The pursuer's witnesses say that the proper antithesis of 'ordinary' is 'special,' and that all trains are ordinary which are advertised in the company's time-tables as running regularly for the accommodation of the public. Under 'special' they would include excursion trains, and also such post-office trains as are not under the control of the company, but have their hours and their places of call prescribed by the Postmaster-General. The defenders' witnesses, on the other hand, say that the proper antithesis of 'ordinary' is 'express' or 'fast,' and that no trains are ordinary except those which stop at all or most of the stations on the line.

"The pursuer's definition is, no doubt, the generic one, for it includes the whole regular train service of the company, and it excludes only what everybody would admit ought to be excluded. It is in this sense that the word is used in the Post-Office Act (1 and 2 Vict. cap. 98), in the defenders' book of rules, and in their time-tables at pages 3, 118, and 126. On the last of these pages, for example, are the bye-laws and regulations made by the company with the approval of the Board of Trade, and one of the bye-laws provides that if a passenger travel by an 'ordinary' train in a class of carriage inferior to that for which he has a ticket, the difference of fare shall be immediately returned to him on application being made before the departure of the train. It is conceded that this would apply to an express train.

"On the other hand, if the word were used with reference to a question of speed or of fare, it would be used as a rule in opposition to the word 'express.' In former days there was a very common distinction between the fares charged by ordinary and express trains, though it is almost unknown now, and to this hour there is a well-understood distinction between ordinary and express speed.

"In the present case the word occurs in a contract between a landowner and a railway company, for it is none the less a contract that it has received the sanction of the Legislature. Moreover, it refers to a line which was at the date of the contract, and still is, essentially a local line, serving a populous district, with very frequent stations. By successive extensions the line has been connected with the defenders' main line to Dundee at both ends, *i.e.*, at Thornton and Leuchars; but there is no through service of trains in the proper sense, and of the four trains which are in question here, two commence their journey and the other two complete their journey at the town of Anstruther. No doubt there are through carriages and a through guard by these trains between Anstruther and Edinburgh, but it is no disparagement to that ancient burgh to say that it is not a terminus of importance in a railway sense. In short the trains are run, not for the convenience of Anstruther in particular, but for the convenience of the group of stations along the Fife seaboard.

"The question then is, what did the parties intend by using the phrase 'all ordinary trains' in this connection? It is plain that if ordinary trains meant trains which stopped at every station, the landowner took nothing by his clause. But the defenders say, 'a train may pass a few stations without stopping and yet be an

ordinary train.' Well then, I ask, how many? The trains in question stop at four and pass four. If they stopped at Lundin Links, as the pursuer says they ought to do, they would stop at five and pass only three. Why should they not be classed as ordinary trains? The only answer is that they are 'fast' trains. I think the defenders' witnesses feel the difficulty of calling them express trains and therefore they fell back on the word 'fast.' The slowest of them (the 11·38 from Thornton) takes forty-seven minutes to get to Anstruther, while the fastest of the stopping trains (the 9·40 from Anstruther) takes fifty-two minutes to get to Thornton—a difference of only five minutes. The average speed of the so-called fast trains is at the rate of 24¾ miles an hour as against an average of 18⅞ miles an hour for the stopping trains. The defenders' manager says that the trains in question have marks—two discs by day and two lamps by night—which distinguish them as express or fast trains. But I demur to the notion that a railway company can convert a train from an ordinary to an extraordinary train by simply putting on discs or running it past a few stations and simply calling it 'fast.'

"In short, it seems to me that the character of these trains enables me to decide the case in favour of the pursuer without attempting any precise definition of the word 'ordinary' as used in the Act. If the East of Fife branch had become a great through route between (let us say) Dundee and Edinburgh, with real express trains running over it, the change of circumstances might have been so great as to make it unreasonable to hold that the parties had such trains in contemplation when they framed the clause under construction. But the trains in question have no such character. They are essentially local trains, serving not termini but a district, just as trains on that line have done all along; and if they are local trains of the best class, that only makes it the more natural that the landowner should desire to have the benefit of them. He must be held to have stipulated for something which the voluntary action of the company was not likely to give him. When, therefore, he stipulated that all ordinary trains should stop, I think the agreement was that all ordinary trains should stop which did not clearly belong to some other category, and I am of opinion that the trains in question do not belong to any other category.

The defenders reclaimed, and argued—If the pursuer's contention that "ordinary" were merely distinguished from "special" trains were right, there would be no meaning in the expression used in the clause, for naturally the pursuer would have no right to use a special train. "Ordinary" trains were really distinguished from "fast" or "express" trains. That this was the true distinction was borne out by the evidence of the managers of the largest systems of railways. The case of *Turner* v. *London and South-Western Railway Company*, 1874, L.R., 17 Eq. 561, showed that in such agreements as these the word "ordinary" was restricted to slow stopping trains. The case of *Hood* v. *North-Eastern Railway Company*, July 29, 1869, L.R., 8 Eq. 666, L.R., 5 Ch. App. 525, recognised this distinction between "ordinary" "express" and "fast" trains. That being the recognised distinction, they had shown that the trains in question were fast trains and therefore need not be stopped. When the agreement was made the line was only seven miles long, but now it was part of the North British system, so "ordinary trains" in the small system would not include all trains running over that part of the line in the present system. Moreover there had hardly ever been a time between 1857 and 1892 when all trains stopped at this station. The case of *Burnett* v. *Great North of Scotland Railway Company*, February 24 1885. 12 R. (H. of L.) 25, did not apply, the words used there being "all passenger trains."

Argued for respondent—There was no special technical meaning attached to "ordinary" which the proprietor would understand so as to distinguish it from "express" in the agreement. It was constantly used to distinguish the trains appearing in a company's bills from "special" or excursion trains. The contract should be interpreted according to the common meaning of the words, there was no reason for interpreting it against the proprietor, as was erroneously laid down in *Turner* v. *London and South-Western Railway Company*, *supra*. This view was adversely criticised in *Burnett* v. *Great North of Scotland Railway Company*, *supra*. The defenders' evidence went on the assumption that the trains in question served important termini outside the local area, whereas in reality the traffic by them was purely local.

At advising—

LORD PRESIDENT—I think the Lord Ordinary's judgment is right, and his Lordship has stated the grounds of his conclusion with great clearness, and I think has taken a very judicious view of the construction of the contract. I therefore content myself with saying that I agree in his conclusion and reasons.

LORD ADAM—I am of the same opinion.

LORD M'LAREN—I am quite satisfied to rest my judgment upon the grounds stated by the Lord Ordinary, but I desire to add this. The case has been argued to us on two grounds. It has been contended on behalf of the proprietor, on the one hand, that "ordinary" trains include all trains which are run daily and regularly, and that, on the other hand, if "ordinary train" in the contract is used in a sense which would distinguish express trains from those which are sometimes called "ordinary," even in that view it cannot be said that on this little line, which is only a single line and only serves local traffic, there are many trains which can be called "express" or other than "ordinary"

trains. The latter is the view which the Lord Ordinary has taken, and it appears to me sufficient for the decision of this case. But it is plain in construing an expression of this kind that, apart from some special category or description suggested by the context, the word "ordinary" is a word of very vague and indeterminate meaning, and I should have difficulty in knowing what was intended to be excluded by the word "ordinary train" in the absence of expressions in the agreement, pointing out trains of some extraordinary or special class. And therefore I should be disposed also to adopt the argument to the effect that in a line of this description every train which appears in the company's time-tables, and is one that is run daily for the conveyance of passengers, is to be called an ordinary train. The exclusion would then apply to special trains or excursion trains, or trains indeed of any description other than those that are advertised and that are regularly run. It may very well be that under other agreements between railway companies and owners of land adjacent, a different principle of construction might be applied, and it may be an element of importance that the station is on a main thoroughfare, on which trains have been run at express speed, conveying passengers without stopping from one terminus to another. But there is nothing here either in the local situation or character of the line or in the context of the agreement which to my mind suggests a use of the word "ordinary" as meaning the exclusion of any trains such as run regularly for the convenience of passengers.

LORD KINNEAR—I agree with your Lordship. I am not prepared to define exhaustively all the kind or kinds of trains which would be excluded from the operation of the contract as being extraordinary. I think it sufficient for the judgment to say that I agree with the Lord Ordinary that the trains in question have not been shown to us to be other than ordinary trains, and that as they do not belong to any other category they must necessarily fall under the clause in question.

The Court adhered.

Counsel for the Pursuer—A. Jameson—C. N. Johnston. Agents—Macpherson & Mackay, W.S.

Counsel for the Defenders—Dickson—Deas. Agent—James Watson, S.S.C.

Saturday, May 19.

FIRST DIVISION.

WELSH *v.* RUSSELL.

(*Supra*, p. 611.)

Process—Expenses—Proof—Part or Branch of Case—Act of Sederunt of 15*th July* 1876.

A party having been found entitled to expenses, objection was taken to the Auditor's report on the ground that he ought in taxing the account to have disallowed the expense of the proof in the case. The Court *repelled* the objection, *holding* that the question whether the expense of the proof should have been disallowed was one for the Court and not the Auditor to decide.

In this case the First Division dismissed the action as incompetent, and found the defender entitled to expenses. The pursuer now objected to the Auditor's report on the ground that he ought to have disallowed the whole expense of the proof, in the exercise of the power given him by the regulations contained in the Act of Sederunt of 15th July 1876.

The fifth of the general regulations as to the taxation of accounts contained in that Act provides as follows—"Notwithstanding that a party shall be found entitled to expenses generally, yet if on the taxation of the account it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings."

It was argued for the pursuer that the necessity for a proof had been caused by the nature of the defence stated, and that as the proof had turned out to be unnecessary the Auditor should have disallowed the whole expense of it.

The defender argued, *inter alia*—The regulation referred to did not enable the Auditor to disallow a party found entitled to expenses the expense of the proof. The question whether that expense should be disallowed was for the Court not the Auditor, and it was too late to raise it now.

At advising—

LORD ADAM—The objection taken to the Auditor's report appears to me not to raise a question for the decision of the Auditor at all. I do not think the meaning of the regulation is that the Auditor should decide whether or not particular pleas should have been stated. That is not a branch of the case at all.

LORD M'LAREN—I agree that the Act of Sederunt does not entitle the Auditor to disallow the whole expense of the proof, but only of a particular branch. If it was desired that the whole should be dis-