result, according again to his own statement, that the demand which existed ultimately got less, and that he adopted this mode for his own profit, and advised and instructed his shopman, while he was in charge, to carry on the same mode, I say, taking all that into consideration, I think this case points to the defender being made to suffer all that could reasonably be supposed to be the result of such conduct on the pursuers' trade. The Lord Ordinary says, in language which your Lordship quoted, that "the proof affords no ground for making any safe calculation of the amount of loss sustained by the pursuers' firm." I fancy what his Lordship means is "any precise calculation," because "safe calculation" would affect a finding of £10 as much as £1000. But I agree with the Lord Ordinary in thinking that in this case no precise figure is positively proved as the substantial damage arising from the defender's conduct. I think, again, upon the defender's own evidence that there was damage done, because he says that the result of the discouragement of the trade was to decrease that trade. Therefore there was some damage done by the defender's wrongful and fraudulent proceedings. It was answered that there was no proof of damage, because it was said that Thomson's trade increased even in that district. That may be quite true, because it may be that there was an increase there in respect of the intrinsic value of the manufacture, notwithstanding what the defender had done to hurt it; but the necessary consequence of the defender's own statement is that the trade, now progressing favourably, would have progressed more favourably if the defender's fraud had not interfered with it, because he said himself that the demand for Thomson's whisky which existed when he went into that district and when he began his discouraging process certainly got less. In these circumstances, while it is impossible to say that the actual amount of damage done to the business was £20 or £2000, we can as a jury estimate reasonably what the loss may be that the pursuers sustained by the defender's conduct. Upon that matter I agree that, sitting as a jury, we are not giving the pursuers too much by assessing the damage by the defender's fraud at £100.

Lord Moncreiff — I am of the same opinion. I think this is a case in which the pursuers are entitled to substantial damages, and I do not think the sum of £100 is excessive. I think the Lord Ordinary has been influenced to a considerable extent by the sum awarded in the case of *Begg*. I was the Lord Ordinary in that case, and, speaking from recollection, the misdoings of Begg were trifling compared with the misdoings of the defender in the present case. I do not think that in *Begg's* case there was any evidence of any avowed intention on his part to injure the trade of the pursuers. That being so, I think the Lord Ordinary was probably misled in taking the sum awarded in that case. The present case is very different. The number of instances in which the defender is proved to have sold as the pursuers' whisky an adulterated whisky is six times as numerous at least as in *Begg's* case. He avows the intention in one way or another—although he does not admit that it was adulterated whisky that he endeavoured to substitute—of putting a stop to the sale. On the whole matter, I think £100 is not too large a sum to award.

The Court pronounced the following interlocutor:—

"Recal the interlocutor reclaimed against: Find and declare, interdict, prohibit, and discharge in terms of the conclusions of the action: Ordain the defender to pay to the pursuers the sum of £100 sterling in name of damages: Decern, and find the defender liable in expenses."

Counsel for Pursuers — Balfour, Q.C. — Salvesen. Agents — Boyd, Jameson, & Kelly, W.S.

Counsel for Defender—Jameson—N. J. D. Kennedy. Agents—Macpherson & Mackay, W.S.

Saturday, July 17.

FIRST DIVISION.

[Lord Low, Ordinary.

PARK YARD COMPANY *v.* NORTH BRITISH RAILWAY COMPANY.

Servitude — Way-Leave — Railway—Transmission of Obligation to Singular Successors.

By an agreement entered into between a superior, his vassals, and two railway companies, it was provided that the first company should be allowed to lay down a tramway line on certain lands held by the superior, and on others held from him by the feuars. The successors of the vassals were not expressly bound by the agreement, but the successors of the company were taken bound to implement certain obligations which were also declared prestable to the successors of the superior. It was provided that in the event of the tramway ceasing to be used, the superior or his successors, without consents, and the feuars, with consent of the superior, might call upon the company or their successors to remove the tramway. Lastly, it was provided that "no warrandice and no privilege in perpetuity" was given by the superior and feuars, "but simply their respective consent" to the formation of the tramway.

By a further agreement arranged at the same time among the same parties, it was provided that the second railway company was to take over the line when made, and "thereafter in perpetuity work and manage

the traffic upon it. There were provisions by which the feuars bound themselves personally to send all their traffic along this line, and by which they were to have special rates. It was further provided that the second railway company was to have the option of purchasing the line when completed from the first company.

Held that the agreement was not binding on singular successors of the vassals who were parties to it, and that such successor was entitled to have the tramway removed from the lands held by him.

Title to Sue—Railway Company—Right-of-Way.

Opinion (*per* Lord Low) that a railway company has no title to sue a declarator of right-of-way in the public interest.

An agreement known as "the construction agreement" was entered into in May 1872 between Mr Archibald Smith, proprietor of the lands of Whiteinch, Partick, of the first part, the North British Railway Company of the second part, the Whiteinch Railway Company of the third part, and certain feuars of Mr Smith upon the estate of Whiteinch of the fourth part. The agreement narrated that the Whiteinch Company proposed to lay down upon part of the lands of Scotstoun, which marched with the lands of Whiteinch, and also upon part of the lands of Whiteinch, a railway and tramway to communicate with the railway of the North British Railway Company, that certain of the second, third, and fourth parties had entered into an agreement for the working of the railway and tramway, and that the whole parties, "for their several and respective rights and interests, agreed to the construction of the said tramway so far as passing through the said lands, and the use thereof, on the following express terms and conditions:—*First.* That the said first party shall allow the third party to construct and lay at their own expense a tramway on the lands of Whiteinch, and that from the western boundary of the said lands eastward along unfeued ground till it reaches the western extremity of South Street, and thence, with consent of said first party and fourth parties, along South Street to the eastern extremity of the ground belonging to said Barclay, Curle, & Company, and lying on the south side of said South Street, and, in the option of the first party and his successors, and when required by them, to continue the said tramway from said last-mentioned point eastwards to the eastern march of the said lands of Whiteinch"—[Then followed a provision giving power to the first party to call upon the third party to deviate a certain part of the tramway to another site to be provided by them]—"But the said first party shall be bound to stipulate with his future feuars along said Hill Street and South Street for power to form the said tramway without their consent, and which requisition the third party bind and oblige themselves and their successors to implement and fulfil. *Seventh.* That the said tramway, so far as upon the said lands of Whiteinch, shall be used solely for the conveyance of traffic to and from the works situated upon the said lands of Whiteinch and in the lands of Scotstoun, and it shall not be used for the conveyance of traffic to the east of the first party's said lands; neither shall it be connected with any tramway which may be made to the east of the said lands, without the consent in writing of the first party or his successors, and the first party shall have power to call upon the second and third party or their successors to form and make as many sidings as may be necessary or required to connect the unfeued lands of Whiteinch with said tramway, and in feuing his unfeued lands he shall also have power to confer upon his feuars right to have such accesses formed with said branch tramway, all for traffic as above stated. *Eighth.* In the event of the said tramway ceasing to be used, the first party, or his successors, or their factor, without the consent of the fourth parties, or any of them, and also the fourth parties, with the consent of the first party, or his successors, or their factor, shall have full power and the privilege of constructing said tramway is conferred upon this express condition, to call upon the third party, or their successors, by written requisition addressed to them and sent through the Post Office, to lift and remove, within six months of the date of said notice, the said tramway and whole works connected therewith, so far as on the said lands of Whiteinch or streets thereon, or any part thereof, and to restore and leave the said lands and streets, and also the fences, in good order and condition, to the satisfaction of the first party or his successors or factor, and that without being entitled to object to such requisition or to said removal and restoration, and without having any claim against him or them thereanent; and the said third party bind themselves and their successors to implement and fulfil said requisition. *Lastly.* That the consent of the said first party, and also of the fourth party, to the formation of said branch tramway and the work and maintenance thereof shall not be held as warranting their respective powers to confer the same, it being distinctly understood that no warrandice and no privilege in perpetuity, notwithstanding anything in the foresaid agreement to the contrary, is given by them respectively, but simply their respective consent thereto under the conditions foresaid, and of its removal as aforesaid; and the whole parties hereto consent to registration hereof for preservation and execution."

Another agreement, known as "the working agreement," was arranged at the same time, though executed somewhat later, between (1) the North British Railway Company, (2) the Whiteinch Company, and (3) the majority of the feuars who were parties to the other agreement. The narrative upon which the agreement proceeded was that the second parties intended to lay down a branch railway or

siding to communicate with the railway of the first parties, in terms of the first agreement, and that the first parties had agreed "for the passage of their engines, waggons, and other carriages over the said branch, and the conveyance of traffic over the same . . . and the division of the rates exigible in respect of that traffic, upon the terms and conditions hereinafter expressed"—"(*First*) The proposed branch railway or sidings shall be constructed by and at the expense of the said second parties, except the points and signals at the junction with the Stobcross section, which shall be constructed by and at the expense of the first parties. When so constructed and approved of by the engineer of the North British Railway Company, the said first parties shall enter upon and use the said branch for the conveyance of all traffic to the like effect as if the same formed part of their own undertaking, and they shall thereafter in perpetuity work and manage, in a proper and satisfactory manner the traffic upon and maintain the said branch railway. . . . The said railway, so far as passing on the lands of Whiteinch and streets thereof, shall be constructed and worked and managed in terms of, and subject to the conditions and provisions of, the said agreement with the said Archibald Smith, including specially, and without prejudice to said generality, the provisions as to the extensions, deviation and removal of the portion of the same passing through the said lands in the events therein mentioned, and the prohibition of the use of locomotives or stationary engines thereon. (*Fourth*) The said third parties shall be bound, each for himself or themselves, to forward and receive, and cause to be sent *via* the said branch and the railways of the first parties, all their traffic, so far as under their own control. . . . (*Fifth*) The rates chargeable in respect of the conveyance of the traffic conveyed by the said first parties under this agreement shall be the following. . . . (*Eighth*) It shall be in the option of the said first parties, within four years after its opening, to purchase the said branch, upon payment to the said second parties of the sum of . . . If deemed necessary by the first parties to obtain the sanction of Parliament to such purchase, the said second and third parties shall be bound to assist and co-operate with the said first parties, but at the expense of the first parties in soliciting such sanction. (*Tenth*) This agreement shall be contingent on the second parties being able to make arrangements with the owners and occupiers of the lands, the road trustees, and others interested, for the acquisition of the lands required for the formation of the said railway."

The tramway was constructed by the Whiteinch Company under the terms of these agreements, and it was thereafter acquired by the North British Railway Company in terms of a memorandum of agreement, dated 12th September 1878, to which the feuars who had been parties to the working agreement were parties. By the first clause, it was provided that from the 1st October 1878 the North British Company "should be deemed to be the absolute owners" of the undertaking of the Whiteinch Company, and that the latter as well as the feuars "should at that date cease to have any right of ownership in the same."

In 1881, by a conveyance following upon this agreement, the Whiteinch Railway Company conveyed their undertaking to the North British Company, which contained a warrandice clause in the following terms:—"And we, the said Whiteinch Company, Limited, grant warrandice, and the said consenters grant warrandice from fact and deed only, excepting always therefrom the conveyance to said tramway, which the granters hereof do not warrant in any way."

Mr James Gray Lawrie, one of the feuars on the Whiteinch estate who had been a party to the above agreements, disponed his feu in 1890 to the Park Yard Company, Limited, Glasgow. In 1896 they wrote to the agents of the North British Railway Company requesting them to remove the tramway from their property, and intimating that if they failed to do so they would themselves remove it. The North British Railway Company having obtained interim interdict against interference with the tramway, the Park Yard Company raised an action against them and certain other persons for their interests in the subjects, craving for declarator, *inter alia*, "(*Third*) That the pursuers, as proprietors of the said several subjects and others, are entitled to hold the same, for their respective rights and interests therein, free of any burden, servitude, or restriction whatsoever, other than the reservations above referred to, as specified and contained in the said last-mentioned disposition, and to possess the same free of any servitude or burden alleged by the defenders, or any of them, and particularly of the right claimed by the defenders the said North British Railway Company to maintain and use a tramway upon the *solum* of the said subjects immediately to the south of the north boundary thereof: And the defenders, the said North British Railway Company, ought and should be decerned and ordained, by decree foresaid, to remove the said tramway so far as constructed upon the *solum* of the said subjects, and to leave the said subjects void and redd, so that the pursuers may have the exclusive use and possession of the same." . . .

The pursuers pleaded — "(2) The defenders having no right of property in, or of servitude or other right or restriction in or over the said subjects, are not entitled to occupy the *solum* thereof, as condescended on."

The defenders, the North British Railway Company, stated certain preliminary pleas to the effect that the pursuers were not the true *domini litis*; and pleaded further — "(*b*) The land in question is burdened with a servitude in favour of these defenders, by which they are entitled to maintain and use the said tramway and land for purposes of passage and the conveyance of goods thereon. (*c*) The land in question is a

public road or street. (*d*) The land in question is subject to a public right-of-way. (*f*) These defenders, under the agreements founded on by them, are entitled to maintain and use the tramway as laid."

The Lord Ordinary (Low) on 9th March 1897 repelled the defences, and decerned against the defenders conform to the conclusions of the summons.

Opinion.—"The pursuers the Park Yard Company are the proprietors, and the pursuers Smellie & Hill are the superiors, of certain lands at Whiteinch. Smellie & Hill hold the superiority in trust for the other pursuers.

"The main object of the action is to have it found that the pursuers hold the lands free of a servitude or burden claimed by the defenders the North British Railway Company to use and maintain a tramway across the lands. . . .

"The first question upon the merits is, whether the North British Company have a right of servitude over the pursuers' lands which entitles them to have a tramway upon these lands.

"The tramway was originally laid down in pursuance of an agreement called the construction agreement entered into in May 1872. The parties to the agreement were (1) Archibald Smith, the superior of the lands of Whiteinch, and the predecessor in the superiority of Smellie & Hill, (2) the North British Railway Company, (3) the Whiteinch Railway Company, Limited, a company which, I understand, was formed for the purpose of making a railway or tramway to connect certain shipbuilding yards on the Clyde with the North British Railway; and (4) certain feuars of Mr Smith upon the estate of Whiteinch, among whom was Mr James Gray Lawrie, who was the predecessor of the Park Yard Company in the *dominium utile* of the lands to which the present action relates.

"The agreement relates that the Whiteinch Company proposed to lay down upon part of the lands of Scotstoun, which marched with the lands of Whiteinch, and also upon part of the lands of Whiteinch, a railway and tramway to communicate with the railway of the North British Company, and that the whole other parties to the agreement, for their several and respective rights and interests, agreed to the construction of the tramway so far as passing through the lands of Whiteinch.

"The first and fourth parties therefore consented that the third parties should at their own expense construct a tramway on the lands of Whiteinch running in a particular line and upon certain conditions.

"The last head of the agreement is in these terms—'That the consent of the said first party and also of the fourth party to the formation of the said branch tramway, and the work and maintenance thereof, shall not be held as warranting their respective powers to confer the same, it being distinctly understood that no warrandice and no privilege in perpetuity, notwithstanding anything in the aforesaid agreement to the contrary, is given by them respectively, but simply their respective consents thereto under the conditions foresaid.'

"There is no obligation in the agreement to convey any land for the purpose of the tramway, nor is anything said in regard to the Whiteinch Company or the North British Company having any right in or to the lands. The contract appears to me to be a purely personal contract on the part of the superior and the feuars, which would not transmit against a singular successor in the lands along with the lands. I do not think that it is possible to spell out of the contract the constitution of a right of servitude, and there is this insuperable difficulty that there is no dominant tenement. It was said that the dominant tenement was the part of the tramway passing through the lands of Scotstoun. That does not appear from the agreement, and further, the tramway was not made at the time of the agreement, and I imagine that the Whiteinch Company had not even acquired the land on the Scotstoun estate upon which the tramway was to be constructed, because the company was not registered until after the date of the agreement.

"There was another agreement (referred to as the working agreement), which, although it was executed at a later date than the construction agreement, appears to have been arranged at the same time. The agreement is between (1) the North British Company, (2) the Whiteinch Company, and (3) the majority of the feuars (including James Gray Lawrie) who were parties to the other agreement.

"The narrative upon which this agreement proceeded was that the second parties intended to lay down a branch railway or siding (that is, the tramway) to communicate with the railway of the first parties, and that the first parties had agreed, upon the completion of the branch railway, to work it in connection with their railway, and to a division of the rates exigible for the traffic. It was then agreed that when the branch railway had been constructed by the second parties, the first parties should enter upon and work it 'in perpetuity.' The third parties then bound themselves to send all their traffic by the branch railway, and the rates to be charged were fixed, and also the proportions in which they were to be divided between the first and second parties.

"That was a purely working agreement, and could not enlarge the right which the North British Company and the Whiteinch Company had acquired under the construction agreement.

"I think that the working agreement also shows that it was intended that the Whiteinch Company should acquire the lands required for the formation of the tramway, because section 10 provides—'This agreement shall be contingent on the second parties being able to make arrangements with the owners and occupiers of the lands, the Road Trustees, and others interested, for the acquisition of the lands required for the formation of the said railway.'

"That section, however, may refer to the

acquisition of lands on the Scotstoun estate, but if so, it confirms what I have already indicated, that when the construction agreement was made there was no subject which could be the dominant tenement in the alleged servitude.

"The tramway was constructed by the Whiteinch Company, and subsequently the undertaking of that company was acquired by the North British Company in terms of an agreement dated 12th September 1878, to which the feuars who had been parties to the working agreement were parties.

"The North British Company founded strongly upon the first clause of that agreement, which is quoted in their answer to the fifth article of the condescendence. The part of the clause upon which they found is that in which the feuars (including James Gray Lawrie) declare that from the 1st October 1878 they shall 'cease to have any right of ownership in the' undertaking. Now, it is not stated what interest these parties had in the undertaking of the Whiteinch Company, but to give up any right of ownership which they might have in the undertaking was a very different thing from giving up the right of ownership to land upon which part of the tramway had been constructed. It is impossible, in my opinion, to read the agreement of 1878 as amounting to a conveyance to the Whiteinch Company of the land in question in this case.

"The agreement of 1878 was followed in 1881 by a conveyance to the North British Company by the Whiteinch Company of their undertaking with consent of the feuars, who were parties to that agreement.

"By the conveyance the Whiteinch Company disponed to the North British Company a number of plots of land to which they had acquired right, and the right also which they had acquired to cross certain public roads. The conveyance of the tramway, in so far as it was upon the lands of Whiteinch, ran thus—'All and whole all right which we, the Whiteinch Railway Company, Limited, have in and to the tramway constructed and laid by us on the lands of Whiteinch, under and in terms of' the construction agreement.

"The warrandice clause was in the following terms—'And we, the said Whiteinch Railway Company, Limited, grant warrandice: And the said consenters grant warrandice from fact and deed only, excepting always therefrom the conveyance to said tramway, which the granters hereof do not warrant in any way.

"I think, therefore, that this conveyance of the undertaking clearly recognises that the Whiteinch Company had no title to the land upon which the tramway, in so far as it passed through the Whiteinch estate, was laid.

"The North British Company further state that the land upon which the tramway is laid is a public right-of-way.

"I do not think that that is a relevant defence. The Railway Company appear to me to have neither interest nor title to maintain it.

"Assuming that the public have by prescriptive use acquired a right-of-way over the line traversed by the tramway, that would not, in my opinion, aid the Railway Company. The fact that the pursuers' lands were burdened with a public right-of-way would not disentitle them to have it declared that the lands were not also burdened with a servitude or other right on the part of the Railway Company entitling them to have a tramway. I therefore do not think that the Railway Company have any interest in the question of public right-of-way.

"Further, I think that they have no title to raise the question. It is not the function of a railway company, and they have not the power, to sue a declarator of right-of-way in the public interest.

"Upon the whole matter, therefore, I am of opinion that the pursuers are entitled to a judgment in their favour."

The defenders the North British Railway Company reclaimed.

In the course of the debate in the Inner House the pursuers obtained leave to amend their summons by inserting in their third conclusion the words "without prejudice to any public right-of-way that may be established along the said mentioned boundary."

Argued for reclaimers—The agreements gave a contractual right to put the tramway down on the lands and to keep it there, and were binding upon singular successors. All the parties interested in the land consented to the tramway being laid down on specific lines, the superior bargaining that he might lift part of it on condition of providing land for another. With regard to the last clause of the construction agreement, the parties saw that perpetuity might be inconsistent with the conditions on which the contract might come to an end, viz., those contained in clause 8, and accordingly they inserted the last clause to prevent that inconsistency. But under that clause the tramway could only be removed either by the superior, or with the consent of the superior, by all the feuars. It followed, therefore, by implication, that a single feuar, who had ceased to use the tramway had no title to have it removed. The provisions as to extension were quite inconsistent with the view that an isolated feuar could put an end to the arrangement, and it would be a most unreasonable reading to hold there was no perpetuity. Where an instrument *de futuro* extending over a tract of time, which on the face of it was indefinite and unlimited, was alleged not to be perpetual, the burden of proving that allegation was on the person making it—*Llanelly Railway & Dock Co.* v. *London and North-Western Railway Co.*, 1875, L.R., 7 H.L. 556. A servitude such as was claimed was not a novel or unprecedented one—*Addie* v. *Henderson and Dimmack*, Nov. 10, 1863, 2 Macph. 41; *Cowan* v. *Stewart*, May 24, 1872, 10 Macph. 735. It was true that there were certain conditions in the working agreement which were clearly personal and did not affect singular successors, but

that did not detract from the permanency of the main right.

Argued for respondent—There has been no acquisition of heritable property in the land over which the tramway passed. This was evident from the terms of the disposition. Nor was there any permanency in the agreement affecting anyone beyond the individual feuars bound in it. The last clause in the construction agreement clearly proved that no permanent privilege was conferred at all, and it was the only clause in that agreement in which the word "perpetuity" was used. Nor was there any use of the word servitude, and the fact that there was no dominant tenement was fatal to the contention that any servitude had been created. To have obtained such a right as the defenders claimed, they should have obtained a deed containing a distinct reference to the fact that the burden was to run with the land. Here, on the other hand, any reference to the successors of the feuars was pointedly omitted.

At advising—

LORD PRESIDENT.—It was remarked by the reclaimer's counsel that the two agreements upon which they found are to be read together, and this is quite true. At the same time the construction agreement is that upon which the question between the parties really turns. My opinion is that, when read along with the working agreement, as well as in its own terms, it is not conceived as an agreement binding singular successors in the lands of the vassals, and was not intended to affect them. Three considerations at least lead to this conclusion.

1. The first arises from the language of the deed. Where it is intended to impose an obligation which is to affect singular successors, it is reasonable to expect that the words of obligation should express this idea. In this deed, not merely is there an omission to bind the successors of the fourth parties; but that omission derives point from the fact that the deed expressly binds the successors of the reclaimers, and also expresses certain obligations in favour of the superior as prestable also to his successors.

2. The reclaimers were constrained to allow, in argument, that certain important obligations in the agreement affecting the fourth parties are only personal, and were not intended to affect singular successors. I refer particularly to the clauses binding the feuars to send their traffic to the reclaimers, and the corresponding clauses giving them special rates. Now, it is extremely difficult to hold that, while this part of the agreement would not apply to singular successors, there should yet survive, and affect them, an obligation to keep the tramway on their lands. The proper way to test the question is to suppose that all the feus have been sold, and that none of the purchasers trade with the reclaimers. Then as regards the continued existence of the tramway itself, both parties must be bound if either. According to the reclaimers' argument, they would be bound to keep the tramway there although they were getting no traffic, while the new feuars would be bound to submit to it although it was doing no good to them or to the reclaimers. The true view, to my thinking, is that the two parts of the agreement are relative and exist and cease together, and as it is admitted that one part does not apply to singular successors neither does the rest.

3. The clause in the construction agreement titled, "lastly," strongly supports the same construction. (I agree with the reclaimers in thinking that the word "fourth" seems to have dropped out before the word "party," in the line above "G" on p. 32, but this does not much matter.) No warrandice and no privilege in perpetuity is given by the parties, but simply their respective consents to the formation of the tramway and its work and maintenance, and to its removal as provided in the agreement. On a full review of both agreements I think that this is the intentional and deliberate restriction of the deeds to a personal agreement.

The argument to the contrary was plausible, but I think it is fallacious. The reason of the clause, it was said, was that in the working agreement the word "perpetuity" was used; and in framing the constructive agreement the parties, adverting to this word, qualify it by pointing to the 8th article of the construction agreement as stating the conditions under which the rule of perpetuity does not apply. Then it is said that the 8th article is inconsistent with the idea that one of the feuars could of his own pleasure remove the part of the tramway on his lands.

This last point is sound enough, but then it (and the whole argument) leaves untouched the question, to whom does this system apply, and it then appears that "lastly" simply negatives the word "perpetuity" as the true statement of the duration, and does nothing more except leave the duration to be determined by the scope and terms of the agreement itself, which is declared not to contain any warrandice but only the consent of the parties to the deed.

The construction which I place upon the deed itself supersedes the question of the effect of knowledge on the part of the purchaser which was argued on the relevancy of the reclaimers' averments. Two other questions discussed in the Lord Ordinary's opinion do not require decision,—the first, second, and third pleas of the reclaimers were not insisted in, and an amendment of the record saved, and therefore removed from discussion, any claim they may have to assert a public right-of-way.

This being so, we have no occasion to consider whether the Lord Ordinary's opinion is tenable, that a railway company has no right to assert a public right-of-way.

I am for adhering.

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

The Court adhered.

Counsel for the Pursuers — Guthrie — Burnet. Agents — Clark & Macdonald, S.S.C.

Counsel for the Defenders—D.-F. Asher, Q.C. — Cooper. Agent — James Watson, S.S.C.

Saturday, July 17.

FIRST DIVISION.

[Sheriff Court of Aberdeen.

BROWN'S TRUSTEES *v.* MILNE.

Sheriff — Decree by Default — Failure to Lodge Accounts — Reponing — Sheriff Court Act 1853 (16 *and* 17 *Vict. cap.* 80), *sec.* 6—*Sheriff Court Act* 1876 (39 *and* 40 *Vict. cap.* 70), *sec.* 20.

In an action of accounting in the Sheriff Court raised against the law-agent of a trust, and concluding for payment of an arbitrary sum on failure to account, the defender lodged no defences, but put in a minute craving for a sist to allow of the production of the accounts. The Sheriff - Substitute granted the sist, and on the defender's failure to produce the accounts decerned against him for payment of the sum sued for. The defender appealed to the Sheriff, who, in respect of no appearance by the appellant, dismissed the appeal. The defender thereafter appealed to the Court of Session to be reponed.

The Court (*dub.* Lord Adam) *recalled* the Sheriff - Substitute's interlocutor, and *remitted* to the Sheriff with directions to consider the defender's motion to be reponed, provided he lodged his accounts within eight days.

The Sheriff Courts Act 1853 (16 and 17 Vict. c. 80), section 6, enacts—"Where any condescendence or defences, or revised condescendence or revised defences or other paper shall not be given in within the periods prescribed or allowed by this Act the Sheriff shall dismiss the action or decern in terms of the summons as the case may be, by default, unless it shall be made to appear to his satisfaction that the failure to lodge such paper arose from unavoidable or reasonable causes, in which case the Sheriff may allow the same to be received on payment of such sum in name of expenses as he shall think just."

The Sheriff Courts Act 1876 (39 and 40 Vict. c. 70), section 20, enacts—"Where in any defended action one of the parties fails to appear by himself or his agent at diet of proof, diet of debate, or other diet in the cause, it shall be in the power of the Sheriff to proceed in his absence, and unless a sufficient reason appear to the contrary he shall, whether a motion to that effect is made or not, pronounce decree as libelled, or of absolvitor (as the case may require), with expenses."

Mr Robert Brown, hotel keeper, Aberdeen, died intestate in 1887, survived by his widow and five children. Mrs Brown was appointed his sole executrix, and in 1892 she and her children assigned the whole executry estate to trustees for certain purposes.

Mrs Brown died in 1893, after which date the executry estate of Mr Brown was managed by the trustees, original and assumed, who appointed Mr Milne, one of their number, to act as law-agent in the trust.

In 1896 it was resolved that the executry estate should be wound up, and the other trustees called upon Mr Milne for an accounting and for delivery of the papers connected with the estate. Mr Milne having delayed to produce these, though repeatedly called upon to do so, an action was raised against him by the other trustees in the Sheriff Court of Aberdeen.

The pursuers craved the Court—"To ordain the defender to produce a full account of his intromissions as one of the trustees and as law-agent for the trustees acting under the said trust-disposition and deed of nomination; and to pay to the pursuers the sum of £500 sterling, or such other sum as may be the true balance due by him to them, with the legal interest thereof from the date of citation hereon till payment: And failing his producing such account, to ordain the defender to pay to the pursuers the sum of £500 sterling with interest as aforesaid: Further, to ordain the defender to deliver to the pursuers the whole title-deeds, writs, books, accounts, vouchers, notices, receipts, and all other documents whatsoever that have come into his possession as a trustee under the foresaid trust-disposition as law-agent for the said Robert Brown or for the said trustees; to find him liable in expenses; and to grant warrant to arrest on the dependence."

No defences were lodged by the defender, but he lodged a minute in the following terms—"The defender has in course of preparation the trust accounts, and expects to have them ready for production to the Court in the course of next week. The transactions extend over a considerable period of time, are numerous and somewhat involved, and the labour of producing them is pretty considerable. The accounts will show a debit balance against the trust-estate, for which the defender has a lien over the whole title-deeds, writs, books, accounts, and other documents called for by the trustees in this action, and he claims his right to retain these until the said balance is settled. In respect of this minute the defender craves the Court to sist the process for a period of fourteen days to allow of the production of the accounts, or, alternatively, to pronounce an order for production of the accounts within the time specified."

On 12th May 1897 the Sheriff-Substitute, in respect of the minute, sisted the cause for ten days to allow of production of defender's accounts.

On 26th May the Sheriff-Substitute pronounced the following interlocutor—"On the pursuers' agent's motion, in respect of defender's failure to lodge defences or produce the accounts in question, decerns against the defender for payment to the