pleas-in-law for the defenders: Dismiss the action, and decern: Find the defenders entitled to expenses, and remit," &c.

Counsel for the Pursuer — Salvesen — Younger. Agents — Boyd, Jameson, & Kelly, W.S.

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

Wednesday, May 31.

SECOND DIVISION.

[Lord Low, Ordinary.

BERNARDS LIMITED *v.* NORTH BRITISH RAILWAY COMPANY.

Contract — Homologation — Locus Pœnitentiæ—Adjusted Draft.

A correspondence between a railway company and a trader with reference to a siding having been sent to the company's law-agent to prepare a formal agreement, a draft was accordingly prepared, and was subsequently adjusted and approved by the trader and his law-agent, and by the general manager and the law-agent of the railway company. The draft was then extended, and the extended deed was signed by the trader. *Held* that the railway company were not thereafter entitled to refuse to execute it also.

Contract—Written Contract—Deletion and Alteration Made on Written Contract after Execution by One Party but before Execution by Both—Right to Resile.

A written agreement embodying a draft adjusted by the parties was sent to one of them for signature and was returned by him duly executed, but with some words deleted, and with a proposed alteration—to take effect only in an event which ultimately did not happen—made in pencil upon one of the clauses. Circumstances in which *held* that the deletion and proposed alteration did not entitle the other party to resile from the agreement, and that they were accordingly bound to execute it also.

Railway—Trader's Siding—Terminal Services—Railway and Canal Traffic Acts 1888-1894.

An agreement between a railway company and a trader with reference to a siding belonging to the trader provided as follows:—"The first parties (*i.e.*, the Railway Company) shall work the second party's (*i.e.*, the trader's) traffic at the said siding. . . . If the first parties perform any shunting or marshalling of waggons or other service at the said siding for the second party other than the mere taking away and delivering of waggons, the second party shall pay therefor to the first parties such sums as may be agreed on, and failing agreement, as may be determined by an arbitrator to be appointed by the Board of Trade." *Held* (*per* Lord Trayner) that this clause did not give the trader any advantage beyond his statutory rights under the Railway and Canal Traffic Acts as interpreted in the case of *Pidcock* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1895), 9 R. & C.T. Cas. 45.

This was an action at the instance of Bernards Limited, brewers, and Daniel Bernard, Marchmont House, Greenlaw, Berwickshire, against the North British Railway Company, in which the pursuers concluded (1) for declarator that an agreement executed by the said Daniel Bernard on 3rd March 1893 between him and the defenders with reference to the making and working of a siding into his brewery was a valid and complete agreement and binding on the defenders, and (2) whether decree in terms of this declarator was pronounced or not, for declarator that the defenders were bound to execute the said agreement and to deliver a duplicate thereof duly executed to the pursuers, Bernards Limited, and (3) for decree ordaining the defenders to do so.

The pursuers pleaded—"(1) The said agreement having been duly completed, the pursuers are entitled to decree of declarator in terms of the first conclusions of the summons. (2) The pursuer, the said Daniel Bernard, having paid the price of the said siding, and acted on the said agreement on the faith of it being complete and binding, the same is now binding *rei interventu*. (3) The defenders having homologated the said agreement cannot now resile therefrom. (4) The defenders having agreed to execute the said agreement, and having obtained the signature of the pursuer, the said Daniel Bernard, thereto, are now bound to execute and deliver the same."

The defenders pleaded—"(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons. (3) The defenders never having completed the agreement with the pursuer Daniel Bernard, sought to be established, are entitled to absolvitor. (4) The defenders being willing to enter into a formal agreement with the pursuers in terms of the correspondence ending October 1892, are entitled to absolvitor. (5) The pursuer Daniel Bernard having in June 1895 agreed with the defenders that the alleged agreement of 1893 between him and the defenders should be departed from, the defenders are entitled to absolvitor."

The defenders ultimately consented to raise no question as to the title of Bernards Limited to sue the present action, founding upon a document signed by Mr Bernard, notwithstanding that when he signed it the company was not yet in existence.

In 1892 the pursuer Daniel Bernard was proposing to erect a new brewery at Gorgie, and he wished to arrange with the defenders for the making and working of a siding into his new premises. A correspondence on the subject took place between him and

the defenders' manager. On 20th September Mr Bernard wrote to Mr Conacher, the defenders' manager—"What I desire is an agreement embodying the following points, viz.—That on account of this siding I am entitled to terminal charges, and also all allowances provided for under the Railway and Canal Traffic Act if I do the work. That I get the maximum drawback for cartage should it not be exempted from the rates. I also desire to know the rate you are going to charge for working the traffic on the siding. I trust to have this draft in the course of a few days, as I do not see my way to erect new premises until some agreement is come to, as they will be erected to suit the siding." On 26th September 1892 Mr Bernard wrote to Mr Conacher—"With reference to all kinds of traffic that will be received at or forwarded from a brewery, your people have a general idea without my enumerating them, but I fail to see what that has to do with the following questions, viz., will you recognise that my siding *is entitled to terminal charges*, and will you work it; even the remuneration for so doing could be mutually or otherwise arranged afterwards. A letter signed by yourself acknowledging that I am entitled to terminal charges, and that you will work the siding is all that is necessary to allow me to proceed with my arrangements, which, as already pointed out, are now urgent."

On 27th September Mr Conacher wrote to Mr Bernard—"Any siding constructed by a trader at his own expense is clearly a siding for the use of which the company cannot make any charge, but if the company should render any service upon that siding, they will be entitled to such charges as the Act allows."

Mr Bernard acknowledged receipt of this letter on 29th September, and accepted the estimate for the siding and connections, and also wrote as follows:—"With reference to the charge for working the siding and haulage, or haulage only to main line, and which you hereby undertake to do, and to give the usual trader's siding facilities in the ordinary course of business, it is to be mutually or otherwise arranged afterwards according to the Act."

This correspondence was thereafter transmitted to the defenders' law-agent in order that a draft might be prepared embodying the arrangement arrived at, and a correspondence took place between him and Mr Bernard's law-agents on the subject.

On 7th February 1893 the defenders' law-agent Mr Watson wrote to Messrs Simpson & Lawson, who were Mr Bernard's law-agents—"I presume you quite keep in view that there is as yet no agreement whatever with regard to the siding, and there will not be any until the draft has been finally adjusted."

To this letter Messrs Simpson & Lawson replied as follows:—"As we have repeatedly intimated, both verbally and in writing, we hold that there is a completed agreement between Mr Bernard and the Railway Company embodied in the letters which passed between them."

On 23rd February 1893 Mr Watson wrote to Messrs Simpson & Lawson—"I have now obtained the general manager's approval to the draft agreement, which is enclosed. You will see your alterations have been adopted, except that the endurance of the agreement must be twenty-five years. Mr Conacher writes me—'I am having the relative plan prepared in duplicate, and I will send it to you so soon as I receive it from the engineer.' Be so good as return the draft for engrossment in duplicate, and I will get it engrossed and sent to you for the signature of your client, with plan attached without delay."

On 24th February 1893 Messrs Simpson & Lawson wrote to Mr Watson—"We have your letter of yesterday's date with the draft agreement, which we have submitted to our client. We now return it, and we shall be glad to receive engrossment in duplicate, with relative plans, for signature, and draft for comparison, with the least possible delay."

On 3rd March 1893 Mr Watson sent the agreement engrossed in duplicate for Mr Bernard's signature, with relative plan, and estimate of cost annexed.

On 16th March 1893 Messrs Simpson & Lawson returned the agreement executed by Mr Bernard. When returning it they wrote as follows to Mr Watson—"We also return the agreement as to the siding at Gorgie in duplicate, signed by our client along with the draft. Mr Bernard sent to us some time ago a cheque for £150, being the price which he understood the company had agreed to accept for the pavement in New Street. On our informing him that you had written that the company would not take less than £300, he stated that he had accepted the siding agreement on the faith of the company agreeing to the minute of sale as prepared by us, with power to remove the pavement without any payment, but he afterwards agreed to pay £150. If the company still decline to accept this price, Mr Bernard desires that the endurance of the siding agreement should be fifty years instead of twenty-five. We have made this alteration accordingly in the siding agreement, but hope that the company may see their way to accept Mr Bernard's offer for the pavement. Please send us authority to take down the wall. It would be well for you to have a report on its present state. Kindly let us hear from you in answer to our letter to you about the objection to the siding on the part of the Caledonian Railway Company. *P.S.*—You will observe the deletion on the engrossments of the siding agreement, and that 'C' should be substituted for 'D' where marked."

The agreement thus executed by Mr Bernard, in so far as of importance to the present question, was as follows:— . . . (*Third*)—[*After providing for the erection of, first, a sleeper fence, and subsequently a stone wall between the points A and C on the plan*]—"Declaring that the portion of said wall between the points A and B on said plan shall be erected on the first parties' ground, and shall be their property, and the

portion of said wall between the points B and C on said plan shall be erected, one-half on the first parties' ground and one-half on the second parties' ground, and shall be a mutual fence between the two properties, *and between the points C and D on said plan the building which the second party is to erect entirely on his own ground will serve as a fence:* Declaring that the whole of said fence from A to D shall, after erection, be maintained in perfect order and condition at the expense of the second party and his foresaids. . . . *Fifth*, The first parties shall work the second parties' traffic at the said sidings, but the first parties shall not be bound to lift or deliver traffic at the siding more than once a day, and only at such an hour as may be from time to time mutually agreed on. If the first parties perform any shunting or marshalling of waggons or other service at the said siding for the second party, other than the mere taking away and delivering of waggons, the second party shall pay therefor to the first parties such sums as may be agreed on, and failing agreement, as may be determined by an arbitrator to be appointed by the Board of Trade. . . . *Seventh*, Nothing herein contained shall in any way prejudice or affect the rights of parties under the Railway and Canal Traffic Act 1888, or any further Act of Parliament as regards rates, terminal or service charges, or any other matter." [The words in italics in the third clause were deleted in the original.]

In the present case no proof was led, but a voluminous correspondence was produced.

The following statement of the facts, so far as admitted or disclosed in the correspondence, and not narrated *supra*, is in substance taken from the opinion of the Lord Ordinary (Low):—"In order to appreciate the meaning and effect of that letter (the letter of 16th March 1893, quoted *supra*) it is necessary to state the circumstances under which it was written—There were two contracts which had been in course of adjustment between Mr Bernard and the defenders. Mr Bernard was leaving the brewery at which he had previously carried on business, and was about to erect a new brewery. The first contract was for the sale of the old brewery to the defenders, and the second contract (to which this action relates) was for the construction of a siding at the new brewery. It appears that Mr Bernard was to be entitled to take away the fixed machinery from the old brewery, and as he found he could not move the machinery without taking up the pavement to which it was affixed, he proposed to take away the pavement also. At first the defenders would not agree to the proposal, but ultimately a clause was inserted in the agreement authorising Mr Bernard to remove the pavement. It was not, however, settled upon what terms he was to do so, the defenders being willing to take £300 for the pavement, and Mr Bernard offering £150.

"Now, when the siding contract was sent for Mr Bernard's signature on 3rd March, the contract for the sale of the old brewery had not been finally adjusted. Mr Bernard had always wanted the two contracts to be executed at the same time, and as the defenders would not agree to that, he took the matter into his own hands by keeping back the siding agreement (although it appears that he had actually signed it upon the 3rd of March) until the agreement of sale was ready. The latter agreement was sent for Mr Bernard's signature one the 13th March, and his agents' letter of 16th March was written when they returned to the defenders' agent both the agreement of sale and the siding agreement duly executed by Mr Bernard."

In the letter of 16th March, accordingly, Mr Bernard's agents first referred to the agreement of sale, and then wrote as follows in regard to the siding agreement:—[*His Lordship then quoted the part of the letter quoted supra*].

"In regard to the deletion which is referred to in the postscript, it occurred in a part of the agreement which dealt with the fencing of the ground upon which the siding was to be placed, and the words deleted provided that a building which Mr Bernard was to erect was to serve as a fence at a particular part. I understand that Mr Bernard had resolved not to erect the building, and his counsel stated that the deletion was made simply for the purpose of rendering the agreement consistent with the actual state of matters, and in no way affected the contractual part of the agreement.

"The explanation seems to me satisfactory and probable, and although the defenders would make no admission on the point, they did not contradict the pursuers' explanation, nor did they state what in their view was either the purpose or effect of the deletion.

"The proposal to make the term of endurance of the agreement fifty years instead of twenty-five was more serious, as that was a material alteration of the agreement which, if insisted in, might, I think, have entitled the defenders to hold the whole agreement at an end.

"The question therefore is, whether the letter amounted to a demand on Mr Bernard's part that the term of endurance of the agreement should be doubled, and a refusal to regard the agreement as completed unless that demand was conceded?

"I do not think that the letter when fairly read admits of such an interpretation, nor do I think that the defenders so read it at the time.

"In the first place, the agreement is referred to in the letter as one which had been actually accepted, and the proposed alteration only as a thing which was desired in the event mentioned. I therefore do not think that the letter necessarily meant more than that in the event of the defenders insisting upon receiving £300 for the pavement, Mr Bernard considered that it would be fair that the endurance of the agreement should be extended, and reading the letter in the light of the circumstances

under which it was written, it seems to me that it is the fair interpretation to put upon it.

"I have already pointed out that Mr Bernard had always insisted that the two agreements should be executed at the same time, and that accordingly he kept back the siding agreement until he had received the agreement of sale for execution. Now, the letter in question was written when both the agreements were returned executed (Mr Bernard having thereby carried his point that they should be executed at the same time), and yet it is said that Mr Bernard signed the siding agreement subject to the condition that the defenders should agree to a material alteration which they had more than once positively refused to consider. Such an interpretation of the letter does not commend itself to my mind.

"There is, however, one sentence in the letter which requires explanation. The writers say—'We have made this alteration accordingly in the siding agreement.' The defenders founded strongly on that sentence. Mr Bernard, they argued, had not only expressed a desire that the agreement should be altered as regarded duration, but he had actually altered it to that effect. What he proposed therefore was a new agreement, and his signature must be taken as referable to the new agreement which the defenders were under no obligation to accept.

"Now, the sentence which I have quoted does not correctly represent what Mr Bernard's agents had actually done. They had in no way altered the agreement, but they had noted on the margin in pencil against the article of the agreement dealing with its duration the words which would fall to be substituted if the term of endurance was altered. The sentence therefore in the letter referring to an alteration having been made upon the agreement, when read in the light of what had actually been done, does not appear to me to affect the meaning which that letter would upon a fair reading bear if it had not contained that sentence, and I have already indicated my view of what that meaning is.

"The letter of the 16th of March was not answered by Mr Watson until the 22nd March, as he had been from home. On that day, however, he wrote—'All that I can do is to inform the secretary what you say about the £150. . . . With regard to the siding agreement, the objection on the part of the Caledonian Railway Company may necessitate an alteration on the plan of the siding, as to which I have written the General Manager and the Company's engineer, and I have also called their attention to the deletion made by you in the third article of the agreement.'

"With reference to the Caledonian Railway Company, it is in regard to a matter with which I shall deal presently, but before doing so, I think it is well to trace what happened in regard to the deletion which Mr Bernard made in the agreement, and his request for an extension of its duration.

"In regard to the deletion, it is never mentioned again in the correspondence, and looking to the explanation given by the pursuers, and the inability of the defenders to give any other explanation, I think the conclusion to be drawn is either that the deletion was right, or was a matter of no consequence.

"In regard to the extension of the duration of the agreement, all question in regard to that was brought to an end by the defenders' acceptance of £150 as the price of the pavement. Mr Watson's letter ackowledging receipt of that sum is dated 28th March 1893. At that date therefore the ground upon which Mr Bernard had expressed a desire to have the duration of the agreement extended disappeared. That being so, and the deletion never being so much as mentioned after Mr Watson's letter of 22nd March, why did the defenders not execute the agreement? I think that the reason, at all events at first, is to be found in the question which had arisen with the Caledonian Railway Company mentioned in Mr Watson's letter.

"That question arose in this way. Mr Bernard had presented a petition to the Dean of Guild to obtain sanction to the plans of the new brewery. On 8th March the agents of the Caledonian Railway Company wrote to Mr Bernard's agents saying that the engineer of the company had examined the plans, and found that the siding according to the plans was carried forward on ground belonging to the company, and that the company would not agree to such an arrangement. Mr Bernard's agents very properly forwarded that letter to Mr Watson on the 9th March, and asked what he proposed to do about the objection raised by the Caledonian Company.

"It was in answer to that letter, as well as to the letter of 16th March, that Mr Watson wrote the letter of 22nd March, which I have already quoted.

"Now, the defenders in their argument treated the question which was raised by the Caledonian Company as falling within the same category as the deletion which Mr Bernard made in the agreement, and the suggestion that the term of endurance should be increased—that is to say, they treated it as being an objection raised by Mr Bernard to the agreement, which justified the defenders in treating the agreement as being still an open question. It is plain that that was not so. The objection was communicated to the defenders, not as indicating the slightest desire on Mr Bernard's part to resile from the agreement, but as a matter which required to be dealt with, and which the defenders were the proper parties to deal with. If the objection (assuming it to have been well founded) had made it impossible for the defenders to make a junction between the brewery and their line, that would have raised a different question; but neither in the correspondence nor in the argument was it suggested that that was its effect. If the objection of the Caledonian Company could not be removed, all that required to be done was to alter the line of the siding so as not to encroach upon the Caledonian Company's

land. And the agreement contemplated that it might be necessary or expedient to alter the line of the siding from that shown upon the annexed plan, and power was reserved to the defenders to do so. Further, as under the agreement Mr Bernard was taken bound to pay the cost of the work, the defenders had no interest, so far as appears, to object to such alteration being made on the line of the siding as might be necessary to obviate the objection. Accordingly, Mr Watson, in his letter of 22nd March, simply said—'The objection on the part of the Caledonian Railway Company may necessitate an alteration on the plan of the siding.'

"Mr Bernard's agents subsequently, with the approval of Mr Watson, wrote upon the subject to the General Manager of the Caledonian Company, and the latter replied that the proper course appeared to him to be for the defenders to communicate with him. The two companies accordingly got into communication, and ultimately, although not until the year 1895, the matter was adjusted between them. I do not know what were the questions in dispute between the two railway companies; but whatever they were, they did not interfere with the construction of the siding, because it was completed and paid for in the year 1893.

"The correspondence to which I have been referring took place in March 1893, and in April of that year Mr Bernard applied to the defenders to put down a temporary siding, which they agreed to do upon the condition, *inter alia*, that Mr Bernard should pay the cost. Upon 11th May Mr Bernard's agents wrote to Mr Watson in reference to the terms upon which the defenders had expressed their willingness to construct a temporary siding. They say—'We have your favour of yesterday's date, which is satisfactory. Our client's acceptance of this temporary arrangement, however, is to be without prejudice to the completed bargain contained in the agreement executed and delivered by our client. We hope that you will press the Caledonian Railway Company for an early settlement of the question raised.'

"On 15th May Mr Watson replied in the following terms—'I have received your letter of 11th inst., and will press the Caledonian Company for an early settlement. Of course you quite understand that I do not admit any completed bargain with Mr Bernard as to the siding.'

"That is the first intimation by Mr Watson that his position was that there was no completed bargain, and it is to be observed that, although Mr Watson does not state the ground upon which he held that opinion, he writes in reference to the question with the Caledonian Company.

"The next letter to which I shall refer is one written by Mr Watson upon the 12th October 1893. In it he says—'You appear to ignore the fact that the agreement has not been finally adjusted, and I am sorry that owing to some questions which have arisen with the Caledonian Company I have not yet been able to settle the terms of the agreement with the General Manager to be sent to you for approval. I hope to be in a position to do so soon.'

(In reply on 13th October the pursuers' agents protested against the idea that the agreement was not finally adjusted.)

"Matters continued very much in the same position during the year 1894, Mr Bernard's agents pressing for delivery of his duplicate of the agreement duly executed by the defenders, and Mr Watson maintaining that the terms of the agreement were not finally adjusted.

"Then on 9th January 1895 Mr Bernard's agents wrote—'We are surprised that you should describe the agreement entered into between Mr Bernard and the Railway Company as "incomplete and unexecuted. . . . As you are aware, we, at your special request, delayed pressing you for delivery of Mr Bernard's copy of the deed until some questions between the North British Railway Company and the Caledonian Railway Company which you thought bore on the subject were settled.'

"On the 15th January 1895 Mr Watson wrote—'A decision has now been given in the reference with the Caledonian Company, which was causing the delay in adjusting Mr Bernard's agreement. I have no doubt, as previouly expressed to you, that the matter will be satisfactorily settled, and I will now take it up without delay.'"

After the settlement of the question with the Caledonian Railway Company Mr Watson proposed that a new agreement should be prepared and executed. On 27th February 1895 he wrote to the pursuer's agents—"The engineer informs me that the plan is not correct, and seeing that the siding has been completed I think it is desirable to alter somewhat the form of the agreement. I therefore enclose one of the duplicates altered in pencil, as I think it should now be re-extended in duplicate and signed by the parties, and I shall be glad to have your approval." Mr Bernard objected to the agreement executed by him in 1893 being in any way regarded as still incomplete, and insisted that any alterations upon it should be by means of an additional agreement, and insisted upon the 1893 agreement being at once executed by the defenders. On 2nd March 1895 Mr Watson wrote to Messrs Simpson & Lawson stating "that he had no wish to make any alteration upon the substance of the agreement as engrossed and sent to Mr Bernard" (that is in 1893), "but as many of the statements in it as it stands are not now correct I will not advise the Railway Company to execute it without knowing its terms to be right."

"One would have expected that proposal to have led to a settlement, because if the substance of the agreement was unaltered, Mr Bernard could hardly have objected to such alterations as were necessary to meet the changes which had been made upon the line of the siding. Mr Bernard, however, would have nothing to do with a new agreement unless it was conceded that there had been a binding agreement since 1893. So far as I can gather, Mr Bernard's

only reason for taking up that position was that certain alterations upon the siding which the defenders had resolved to make had not actually been carried out.

"During the summer of 1895 Mr Bernard's business was taken over by a limited liability company, who carried it on under the title of 'Bernards Limited,' Mr Bernard being the managing director. By that time all questions in regard to the agreement seem to have been practically adjusted, because on 9th July 1895 Mr Bernard's agents wrote Mr Watson referring to a meeting which they had had, and reminding him that it was then arranged that when the company was formed 'the agreement as adjusted between us, with any necessary modifications, should be executed by the new company. . . . As the siding has now been formed and the cost of construction paid, the agreement may be simplified, and we shall thank you to send us the original draft with the necessary alterations on it for revisal.'

"On the 22nd August 1895 Mr Watson sent a new draft (as the original draft had gone amissing), but that draft was not returned by Mr Bernard's agents revised until January 1897, and Mr Watson then informed them that he could not advise the defenders to enter into the agreement' in terms of the draft. The draft of 1895 as framed by Mr Watson embodied clauses 5 and 7 as they stood in the agreement of 1893 without alteration.

"On 15th February 1897 Mr Watson wrote to Messrs Simpson & Lawson—'This Company are quite willing to proceed with and complete the agreement with Bernards Limited, which I sent you for revisal on 22nd August 1895, and which you returned to me revised with your letter of 26th ult. But for your delay in revising the draft, the agreement would doubtless long ere this time have been completed. I have sent the revised draft to the General Manager, and asked him to get the company's engineer to check your red ink alterations on the third article. Looking to the decisions of the Railway and Canal Commission, which have been pronounced since I drafted the agreement in 1895, I think article 5 and article 7 are inconsistent, and the last sentence of article 5 will have to be deleted from the draft. As pointed out in my letter of 27th ult., there never was any agreement of any kind to put Mr Bernard, with regard to his siding and services thereat and in connection therewith, in a different position than he was in under the public statutes. Mr Bernard was always very particular himself upon that point, and article 7 of the draft agreement of 1895 was in accordance with Mr Bernard's repeated demand.' The pursuers' agents refused to accept the draft with the last clause of article 5 deleted, and pointed out that this clause was framed in 1893 and transferred to the altered draft in 1895 by the defenders themselves. After some further correspondence, to which it is not necessary to refer, the present action was brought.

"Apparently the agreement with Bernards Limited, of which Mr Watson sent the draft in August 1895, did not differ in any essential particular from the agreement of 1893, and the only reason I gather why it was not accepted was that Mr Bernard disputed an account for some £29 which the defenders had rendered to him for shifting certain telegraph poles in making the siding. As to the merits of that question I know nothing, but I see no reason to suppose that by concluding the proposed agreement with Bernards Limited, Mr Bernard's position in regard to the account would have been in any way prejudiced. If he had accepted that agreement the present action would not have been necessary, but of course that in no way affects the question whether there was a concluded agreement in 1893.

"The reason why the defenders refused to conclude the contract with Bernards Limited in 1897 was this. The 5th article of the agreement provided that if the defenders should perform certain services at the siding, the pursuers should pay therefor such sums as should be agreed upon or fixed by arbitration. The 7th article provided that nothing contained in the agreement should affect the rights of parties under the Railway and Canal Traffic Act, or any further Act of Parliament, as regarded rates. It appears that owing to a new Act of Parliament which was passed in regard to railway rates the defenders found that the provisions of the 5th and 7th articles of the agreement would have an effect which they had not anticipated. Indeed, I understood their counsel to say that the agreement would be unworkable. That of course is a matter which cannot be dealt with and cannot affect the result of this action.

"I now turn to the actings of parties which followed the adjustment of the draft in 1893.

"The pursuers narrate various acts which they aver were done upon the faith of the agreement. As regards several of these alleged acts, the parties are not agreed upon the facts, so I leave them out of view. The most important of all the acts, however, is not disputed, namely, that in the summer of 1893 the siding was constructed by the defenders, and the price paid by Mr Bernard.

"Now, how did that come to be done unless it was in pursuance and upon the faith of the agreement? Unless there was an agreement, the defenders were under no obligation to construct the siding, and they had no right to enter upon the pursuers' lands for that purpose.

"Mr Cooper attempted to meet the difficulty by arguing that there was a previous completed agreement for the construction of the siding in October 1892. I think that it is plain that that was not the case, because although the defenders had intimated their willingness to construct a siding to the brewery substantially upon the terms proposed by Mr Bernard, the details were never settled until the draft was adjusted and approved in February 1893. Further, the defenders can hardly

maintain that there was a concluded agreement in 1892, because on 7th February 1893 Mr Watson wrote to Mr Bernard's agents, 'I presume you quite keep in view that there is as yet no agreement whatever with regard to the siding, and there will not be any until the draft is finally adjusted.' I may remark with regard to these last words that Mr Watson's then view apparently was that an agreement would be completed when the draft was adjusted, which is just the reverse of what the defenders now maintain.

"The defenders in the next place argued that the construction of the siding could not be regarded as being in pursuance of and referable to the agreement, because the work was not commenced until after Mr Watson's letter of 15th May 1893, in which he said that he 'did not admit any completed bargain with Mr Bernard as to the siding.'

"The answer to that letter appears to me to be important. On 27th May Mr Bernard's agents wrote, referring in the first place to a meeting which they had had with Mr Watson, and then saying, 'Mr Bernard is, as you are aware, putting up expensive buildings on the faith of obtaining the siding contracted for as described in the minute of agreement which he signed, and if he is not to get this, it would be better to stop the works altogether. We have had a further call from our client, who has instructed us again to urge you to get the siding originally agreed upon constructed forthwith, and to intimate to you that he will be compelled to hold your company liable in damages if this is not done within a reasonable time.'

"I may say parenthetically that the word 'originally' there used plainly refers to the agreement now in question as distinguished from the subsequent agreement for a temporary siding.

"Now, that letter of Mr Bernard's agents is sufficiently distinct, and was an intimation to the defenders that Mr Bernard held that an agreement had been concluded, that he was acting upon it, and that he would claim damages if the defenders did not carry it out.

"What followed upon that letter? The defenders immediately put the work in hand, completed it, and received payment from Mr Bernard in terms of the agreement. The defenders appear to me to have thereby accepted the position taken up by Mr Bernard's agents in their letter of 27th May, and it was not until after the works were completed and the greater part of the price paid that Mr Watson again, on 12th October 1893, reverted to the view that the agreement 'has not yet been finally adjusted.' Further, I observe that in the interval letters passed between Mr Bernard and Mr Conacher, the general manager of the defenders' company, which seem to me to show that at that time Mr Conacher believed, and was acting on the belief, that there was a concluded agreement."

On 8th December 1896 the Lord Ordinary pronounced the following interlocutor:—"Repels the defences, and finds, decerns, and declares against the defenders in terms of the conclusions of the summons for declarator, and finds, decerns, and declares in terms of the remaining conclusions of the summons: Finds the pursuers entitled to expenses, and remits," &c.

Opinion.—"The pursuers contend that an agreement was concluded between Mr Bernard and the defenders when the draft was finally adjusted, as it is shown to have been by the letters passing between the agents of the parties on 23rd and 24th February 1893.

"The defenders, on the other hand, maintain that, seeing that it was contemplated that there should be a formal deed, there was *locus pœnitentiæ* until that deed was practically executed.

"Now, no doubt in certain circumstances, if parties make a special stipulation that their bargain shall be put in writing, there is *locus pœnitentiæ* until writing is adhibited, but it is different where the precise terms of the agreement are contained in an offer and acceptance, or in a draft adjusted and approved by both parties. In such a case the contract is complete, although it may be contemplated that a formal deed embodying the contract is to be drawn up and executed, or although either party may be entitled to demand that such a deed shall be executed—*Erskine* v. *Glendinning*, 9 Macph. 656; *Smeaton* v. *St Andrews Police Commissioners*, 9 Macph. (H.L.) 24. Of course there is an exception in the case of contracts concerning heritage, where the contract can only be constituted by a probative writing, or by an informal writing followed by *rei interventus*. In this case, however, the contract is in regard to the construction of a railway siding, and the terms upon which it is to be used, and it was not contended that the rules as to what are requisite to the constitution of a contract in regard to land are applicable to this case. The defenders' argument in support of the view that there was no concluded contract was simply that the parties had agreed that there should be a formal writing. Now, I do not think that the parties had agreed that there should be a formal writing, except in this sense, that they regarded it as a matter of course that the contract should be embodied in a formal deed. But that did not, in my judgment, prevent the contract being concluded when its precise terms were finally settled by the adjustment of the draft, and the approval thereof by both parties. All that then remained to be done was to put the contract which had been concluded into the form of a probative deed.

"I am therefore of opinion that when the draft was returned approved by the pursuers' agents to the defenders' agent on 24th February 1893 the contract was complete, and that either party could have held the other to the bargain which had been made.

"But then it was said that after the draft was adjusted and approved and the deed extended for execution, Mr Bernard insisted upon its terms being materially altered. Now, if that was the case, I do not think

that Mr Bernard could complain if the defenders accepted the position and dealt with the matter as still open.

"It is, therefore, necessary to see how the facts disclosed in the correspondence actually stand.

[*His Lordship then discussed the facts with reference to the letter of* 16*th March* 1893, *and the correspondence up to the date of the decision in the reference between the defenders and the Caledonian Railway Company.*]

"These letters" (*i.e.*, the letters of 12th October 1893 and 15th January 1895 from Mr Watson, and the letter of 9th January 1895 from Mr Bernard's agents, quoted *supra*) "show, I think, with sufficient clearness the position taken up by the parties respectively, and all question of the extension of the duration of the agreement having been put an end to by the acceptance by the defenders of £150 for the pavement, and no mention ever being made of the deletion, there seems to me to be only one ground upon which Mr Watson could and did maintain that the agreement had not been finally adjusted, and that the defenders were not bound to execute and deliver it, the ground, namely, mentioned in the letters, that there was a question pending with the Caledonian Railway Company. Now, I repeat, that if it had been the case that the intervention of the Caledonian Company made it a physical impossibility for the defenders to give Mr Bernard a siding, that would have raised a different question. But that view was not stated in argument nor is it pleaded on record, and it is plain that at most the objection of the Caledonian Company involved the alteration of the line of the siding. Now, if it was found to be impossible to make the siding in the precise line shown upon the plan attached to the agreement because it would encroach upon the property of the Caledonian Company, I do not think that that would have entitled the defenders to resile from the agreement, because Mr Bernard was entitled to assume that the defenders knew when they made the agreement what was their property and what was the property of the Caledonian Company. I think that (assuming a concluded contract) Mr Bernard would have been entitled (especially as he had to bear the cost) to require the defenders to construct the siding upon such a line as their proprietary rights rendered possible. And that seems to have been the view which Mr Watson himself at first took of the question, because he merely said that the plan of the siding required to be altered.

"I am therefore of opinion that the question with the Caledonian Company did not justify the defenders in maintaining that there was no concluded agreement with Mr Bernard. It would have been reasonable enough for the defenders to ask that the final execution and delivery of the agreement should be delayed until it was seen what the actual line of the siding was to be, so that the plan attached to the contract, and the references to that plan in the contract, might be made consistent with actual fact, and it is plain that Mr Bernard had no objection to delay for that purpose. But Mr Watson went much further than that, and maintained that there was no contract at all, although the essential stipulations of the contract were not affected by the question with the Caledonian Company.

[*His Lordship then detailed the further history of the correspondence down to the raising of the action, and the facts and contentions of parties with regard to the construction of the siding as narrated supra.*]

"It seems to me that the construction of the siding by the defenders, in the circumstances which I have narrated, is conclusive of the matter, and that the pursuers are entitled to judgment."

The defenders reclaimed, and argued—(1) If the pursuers had asked for a declarator that a contract was concluded by correspondence between the pursuer Bernard and the defenders' general manager, and that that contract should now be embodied in a formal deed, the defenders would offer no objection. Under the correspondence it was never proposed, and it was not now contended, that any further rights were given to the trader than were given to him by law. What the pursuers were now contending was that they, having under clause 5 of the agreement, through an inadvertence on the part of the defenders' law-agent, got something more than the law, as interpreted in the case of *Pidcock & Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1895), 9 R. & C.T. Cas. 45, gave them, were now to hold the defenders to that clause, although they had never executed the deed, simply on the ground that the law-agents of the parties had approved of the draft. The law-agents' approval of the draft did not make a concluded agreement binding upon the parties. Indeed, where as here a formal deed was contemplated by both parties, there was *locus pœnitentiæ* until the deed was signed by both. The defenders, however, were not here concerned to dispute that there was a concluded contract between the parties on the correspondence. The agreement embodied in the original correspondence was of importance, and the execution of the formal contract would have been binding, but the letters of the law-agents sending the draft approved by each of them respectively were of no special significance, and did not constitute a contract binding upon the parties. If a law-agent had introduced into a clause in a formal deed which was intended to embody the effect of a correspondence between the parties, some provision which was not in the correspondence, and was never contemplated by either of the parties, could it be maintained that if this error were discovered before the deed was executed by both of the parties, one of them would be debarred from refusing to sign it upon the sole ground that the unauthorised provision was to be found in a draft approved by his agent? (2) When the deed was returned by the pursuers' law-agents

executed by the pursuer Bernard, deletions and alterations had been made upon it to which the defenders had not consented, and never did consent. Whether the deletion was important or not did not signify. The deed as altered by the deletion could not become binding upon the defenders until they had approved of it. The fact that one of the alterations was in pencil was in this case of no importance. The nature of the proposal was — Either (1) accept our offer of a sum smaller than you demand at present, or (2) accept our extension of the agreement from a period of 25 to one of 50 years, or (3) it must be assumed, let the bargain be considered off. If the first alternative was accepted, then the pencil alteration became unnecessary, but it was quite open to the defenders to refuse either of the first two alternatives, and in that state of matters it could not be considered that there was an agreement then binding upon them. If there was no binding contract at that date, then at what date did the contract become binding? It was a curious circumstance that the pursuers in this case could not name any date at which the contract came into force, and they did not attempt to do so. This, however, just showed how impossible it was to regard this deed as a binding agreement. Throughout the whole subsequent negotiations, whatever might have been said by the pursuers' law-agents, it had never in fact been treated as such. (3) With regard to *rei interventus* what had been done by Mr Bernard was not "unequivocally referable" (Bell's Pr. 26) to the agreement, but might equally well be referred to the contract contained in the correspondence. Moreover, *rei interventus* was only of importance where the party who has not signed a deed allows the party who has to act upon the deed, whereas here the defenders throughout protested that there was no concluded agreement. (4) The pursuer Bernard departed from the 1893 agreement in 1895, when, as suggested by the pursuers' law-agents on 9th July 1895, negotiations for a new agreement were proceeded with in view of the formation of the company. (5) The importance of this question to the defenders was that if they were bound to execute this deed, then if the pursuers' view of clause 5 of the agreement was correct, and that clause gave them more than they were entitled to under the law as interpreted in *Pidcock*, *cit.*, the defenders would have to forego the advantage of that decision with all their traders who had sidings, and whether it was correct or not they would have to litigate the question with the pursuers before the Railway and Canal Commission.

Argued for the pursuers and respondents —(1) The adjusted draft was submitted to and approved by the defenders' manager, within the scope of whose authority it was to arrange such a matter. The defenders' position at that stage was that they were not to be bound by the correspondence, but by an adjusted draft, and the draft being adjusted and approved by the manager, they were accordingly bound by its terms. (2) With regard to the deletion, and the alteration in pencil, and the subsequent negotiations, and also with regard to the question of *rei interventus*, the pursuers' argument sufficiently appears from the Lord Ordinary's opinion *supra*.

Lord Justice-Clerk — Three questions have to be considered in this case — (1) whether an agreement was entered into between the pursuers and defenders; (2) whether if an agreement was entered into, anything has occurred since to justify the defenders in refusing to sign the formal deed, which was prepared by their own solicitors, embodying the terms which had been agreed upon; and (3) whether the pursuer has done anything in the way of altering the extended agreement which can justify the defenders' refusal to complete it formally by signing it.

As regards the first of these questions, viz., whether an agreement was entered into, it is I think clear that if Mr Conacher, the general manager of the defenders' company, had authority to enter into such an agreement, then an agreement was completed. This is I think beyond doubt, for the manager Mr Conacher and the company's solicitors so treated the matter. There was a draft agreement adjusted, and thereupon the solicitors had the deed extended and transmitted to Mr Bernard for signature, and accordingly it was duly signed by him. Up to that point there was no suggestion on the part of any official of the company that things were not ripe for formal execution. It therefore must have been held by Mr Conacher and the solicitors that nothing further was required to complete an agreement than had been done already. It was ingeniously suggested by the Dean of Faculty that it was an error on the part of the solicitors to suppose that the matter was complete, and that the defenders could not be held bound by what their solicitors had put into the agreement, if they had not in fact agreed to what was in it. And if that was all that appeared to have taken place, the argument would be quite sound. But I cannot hold the fact to be so. I am satisfied that the general manager had made the agreement, and that the agreement was such, and in regard to such a matter that the manager could make it for his employers. I do not find that this point was raised before the Lord Ordinary, as he does not refer to it in his note, and I confess I am not surprised. His Lordship holds that when the draft had been adjusted expressing what was agreed on by the company's manager and Mr Bernard, the contract was concluded, and what remained to be done was only to put it into probative form. I hold he was right in coming to that conclusion.

The next question is — Has anything occurred to justify the refusal of the defenders thus formally to give effect to the agreement? In regard to this matter three things are referred to. The first is that a difficulty arose with the Caledonian Railway in consequence of its appearing to be the fact that part of the siding which

formed the subject of the agreement came on to ground belonging to the Caledonian Company, and that this was leading to a dispute. Now, plainly that was a matter which did not concern Mr Bernard, and it was so treated by the defenders, and whatever difficulty it might create for the defenders, I do not see how it could relieve them from completing formally an agreement they had entered into with the pursuers. But further, this difficulty was taken out of the way, and therefore could not affect the present liability of the defenders to execute the deed. The second point raised is that Mr Bernard altered the terms by substituting 50 for 25 as the number of years that the agreement was to last. That matter arose in this way. There had been a contract of sale of Mr Bernard's old brewery to the defenders, and a difficulty having arisen as to the removing of some of Mr Bernard's machinery without removing the pavement, negotiation had taken place as to a price for the pavement, in which there was a difference of £150 between them. Mr Bernard intimated that if the company insisted on their price he would ask them to extend the time in the siding contract to 50 years instead of 25. And he expressed this suggestion by making a pencil alteration on the extended deed which he signed. Now, that was not in fact an alteration but a suggestion for a concession to be made in a certain event, for the deed as signed by him could not be affected by a pencil marking, and the fact that it was a pencil marking only is inconsistent with the contention of the defenders. This matter was also taken out of the way by the company agreeing to the terms proposed by Mr Bernard, and therefore the pencil marking, which was only a suggestion, was put aside altogether. The third and last point is that some words were deleted in the extended deed. That deletion arose in this way, Mr Bernard was bound by the agreement to fence the siding by a wall, which the defenders were to erect, and Mr Bernard was to pay for it. It was stipulated in the deed that as Mr Bernard was going to erect a building along part of the boundary line of the siding, that building should be held to be the fence at that part. It turned out that it was expedient not to place the building close to the line, and therefore that the wall fence would have to be erected along that part of the siding also. Accordingly, the deletion was for the purpose of putting right this insignificant matter of detail, by removing the reference to the building which was to serve as a fence at one part. Had the matter stood there, I do not think that anything more than a plausible argument could have been raised on this ground. But in point of fact the deed as it now stands is in conformity with what was actually done. The Railway Company built the wall, including that part which runs along the line where the building was intended to have formed the fence, and Mr Bernard paid for the whole wall. There was never any dispute on this matter, and what was done was exactly in conformity with the deed as expressed when it was returned to the company signed by Mr Bernard. The modification was one in no way touching the agreement in its essentials, and was never founded on or referred to at the time, the defenders taking up the position, not that this was in any way an infringement of an agreement already made, but that no agreement had been made.

I therefore agree with the Lord Ordinary in the conclusion expressed in his judgment. I do not doubt that all this resistance on the part of the Railway Company has taken its rise from circumstances which have arisen since Mr Conacher and Mr Bernard came to the agreement, formal execution of which is now sought. The company seems to be in some fear of consequences which might follow from a legal decision given in England some time ago being applied in this matter. I incline to the impression that these alarms have no ground, looking to the ample reservation of protection contained in the 7th head of the agreement. But whatever reasons the Railway Company have for desiring to escape from this agreement, I am unable to see that they have any legal ground for doing so, and I would therefore move your Lordships to adhere to the interlocutor of the Lord Ordinary.

Lord Young concurred.

Lord Trayner—The main contention urged before us on the part of the reclaimers was that they were not finally bound by any agreement entered into by correspondence between their general manager and the pursuers until they had executed the formal deed embodying that agreement which, in the contemplation of the parties, was to be prepared and executed. I take the same view of this question which, in my reading of his judgment, the Lord Ordinary took, although the manner in which the Lord Ordinary has expressed himself may be open to criticism. I think the Lord Ordinary held that the agreement between the parties was contained in the correspondence, and that if any doubt arose as to what the agreement there made was, that the draft of the formal agreement adjusted between the same parties might be taken as the contemporaneous interpretation of their bargain. The case does not appear to me attended with difficulty. The pursuers were desirous of having a railway siding constructed which would connect their work with the defenders' system. The pursuers and the general manager for the defenders entered into correspondence on the subject, with the result that it was agreed that the siding should be constructed, and the terms on which that was to be done were arranged. The defenders do not now dispute that Mr Conacher (the defenders' general manager) had authority to make such an agreement. On the contrary, they admit that whatever contract Mr Conacher made is binding on them, and they are ready to implement it. The real question presented for our

determination is whether the deed No. 6 of process is or is not in terms of the contract so made, and that question was by the argument narrowed down to this, whether article 5 of the deed was conform to the contract made by correspondence. No objection is taken by the defenders to the terms of any other article in the deed.

I think the fifth head of the deed before us is conform to the contract made. In the pursuers' letters of 20th and 26th September 1892 they stipulate that they should be "entitled to terminal charges, and also all allowances provided for under the Railway and Canal Traffic Act." That they should be entitled to terminal charges was, of course, a wrong expression, and they meant that they should be exempt from terminals, and their meaning was plain enough to Mr Conacher, who on 27th September wrote thus—"Any siding constructed by a trader at his own expense is clearly a siding for the use of which the company cannot make any charge, but if the company should render any service upon that siding, they will be entitled to such charges as the Act allows." In reply the pursuers wrote on 29th September—"With reference to the charge for working the siding and haulage, or haulage only to main line, and which you hereby undertake to do, and to give the usual traders' siding facilities in the ordinary course of business, it is to be mutually or otherwise arranged afterwards according to the Act." Now, what was the bargain thus made concerning which the parties were quite at one. It does not appear to me doubtful that it was a bargain under which (in so far as the siding and service rendered by the company in connection with it were concerned) the pursuers should be entitled to all the privileges and allowances which the law gave to the owner of such a siding, and the defenders equally entitled to all the charges which the law authorised them to exact for services rendered at or in connection with the siding. The rights and obligations of both parties were to be regulated by the provisions of the Railway and Canal Traffic Acts. That appears to me to be the bargain expressed in the fifth article of the agreement; and it is not immaterial to notice that the language of the fifth head is the language of the defenders, approved by their manager, who made the agreement with the pursuers.

It is difficult to see exactly what the parties are here litigating about. The pursuers pretended that the fifth article of the agreement gives or may give them an advantage beyond their statutory rights, but they cannot or will not specify what this advantage is. The defenders, on the other hand, express some apprehension that the agreement may give the pursuers some advantage, but what it is they cannot or will not point out. In my opinion the pretension of the one and the fears of the other are equally groundless. For even if (contrary to the view I take of it) the fifth article was capable of an interpretation which would confer on the pursuers some advantage beyond their statutory rights, that appears to me to be overridden by the seventh head, which both parties agree should stand. By that head it is distinctly stipulated that nothing in the agreement (and therefore nothing in article 5) shall prejudice or affect the rights of parties as these are fixed by the Railway and Canal Traffic Acts, and of course by any decisions interpreting these Acts.

I do not think the pencil alteration on the formal deed, or the deletion made by the pursuers, affect the result. The former was only a proposal which has been agreed to. The pursuers are willing to restore the deleted lines if the defenders desire it.

On the whole matter I think the Lord Ordinary's interlocutor should be adhered to.

LORD MONCREIFF—I am of opinion that the Lord Ordinary's judgment should be affirmed.

The leading pursuers in the action are a company called "Bernards Limited, Brewers." The agreement founded on bears to have been executed by the pursuer Daniel Bernard as an individual; but it was expressly admitted by the defenders' counsel during the debate that if the agreement accurately represents a concluded contract between Daniel Bernard and the defenders' company, the pursuers Bernards Limited are entitled to the benefit of it.

Having examined the whole of the correspondence, I am of opinion that an agreement was finally concluded between Mr Daniel Bernard and the defenders at latest when the final draft agreement was adjusted and approved in February 1893. It is too late for the defenders now to suggest that their manager Mr Conacher had no authority to conclude an agreement with Mr Daniel Bernard. No notice of this was given on record, and such a defence was not hinted at in argument until the speech of the senior counsel for the defenders; but I understand that he ultimately conceded that if it were proved that a concluded agreement was entered into between Mr Conacher and Mr Bernard, the company would be bound by it. Mr Conacher held himself forth throughout as having authority to bind the company, and no step was taken without consultation with him.

The extended agreement having been signed by Mr Daniel Bernard on or about 3rd March 1893, and returned to the company's solicitor, it was both recognised and acted on by the company as a concluded agreement. This appears very clearly from the letters which passed between Mr Bernard and Mr Conacher between August 1893 and June 1895, which are printed in the appendix. In these letters Mr Conacher refers more than once to the "agreement," which necessarily means the extended agreement which Mr Bernard signed.

Again, supposing that it were necessary to prove *rei interventus*, we have it proved that the defenders entered upon Mr Bernard's ground, broke it up, and constructed the siding upon it, and were paid for it according to the schedule rates appended to the agreement; and that they allowed

Mr Bernard to proceed with the building of his brewery on the faith that an agreement had been finally concluded.

In regard to the slight alteration made by Mr Bernard on the third article of the extended deed, I think the explanation given by the pursuers and accepted by the Lord Ordinary and your Lordships is satisfactory.

I also agree that the pencil jotting suggesting fifty years instead of twenty-five for the duration of the agreement was merely tentative, and was brought to an end by the defenders' acceptance of £150 as the price of the work.

It is not necessary to express an opinion as to whether the pursuers will obtain any benefit by the retention of the fifth clause of the agreement. It may be doubted whether under that clause they can obtain any higher right than they would have been entitled to under the seventh clause. But for the reasons which I have stated, I think the pursuers are entitled to have the agreement executed as it stands.

The Court pronounced the following interlocutor:—

"Refuse the reclaiming-note: Adhere to the interlocutor reclaimed against, and decern: Find the pursuers entitled to additional expenses, and remit," &c.

Counsel for the Pursuers—W. Campbell, Q.C.—Graham Stewart. Agents—R. R. Simpson & Lawson, W.S.

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

Wednesday, May 31.

FIRST DIVISION.

[Lord Low, Ordinary.

CHRISTIE *v.* CORPORATION OF CITY OF GLASGOW AND OTHERS.

Road—Burgh—Reparation—Glasgow Police Act 1866 (29 *and* 30 *Vict. c. cclxxiii*), *secs.* 310, 317, 320, *and* 322.

Section 317 of the Glasgow Police Act 1866 enacts that the Master of Works may, by notice given, require "any proprietor of a land or heritage adjoining . . . any public street to form . . . and from time to time alter, repair, or renew to his entire satisfaction foot-pavements . . . in such road or street opposite such land or heritage."

Section 321 provides that such notice "shall specify the period allowed for the execution of such work;" and sec. 322 that the proprietor may object within six days of the receipt of such notice.

A notice was sent to the proprietor of a building in a public street calling upon him to repair the foot-pavement adjoining his property within a period of ten days. *Held* that he was not liable in damages for an accident occurring to a foot-passenger through the defective state of the pavement, on the fifth day after the notice had been sent.

Police—Statute—Statutory Limitation of Time within which Action must be Raised—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1.

The Public Authorities Protection Act 1893, sec. 1, provides, *inter alia*, that any action, prosecution, or other proceeding against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, shall not lie or be instituted unless it is commenced within six months next after the Act complained of.

An action was raised against the proprietors of a building adjoining a public street for damages in respect of an accident which had occurred more than six months previously, owing to the defective state of the pavement opposite the building. The action was founded upon the alleged failure of the proprietors to comply with a statutory requisition to repair the pavement.

Held (*per* Lord Low) that the action was excluded by the Act of 1893.

Question (*per* Lord President and Lord M'Laren) whether the application of the Act is not limited to the undertakers of public works, or persons holding some official position towards the public.

Expenses—Public Authorities Protection Act 1893 (56 *and* 57 *Vict. c.* 61), *sec.* 1 (*b*).

Held that the provision of the Public Authorities Act, by which, in any action against a public authority, a final judgment in favour of the defender entitles the defender to expenses as between agent and client, is peremptory, and that it was immaterial that the defenders succeeded on a plea allowed by way of amendment.

An action was raised by Dr David Christie, M.B., Glasgow, against, first, the Corporation of the City of Glasgow, and second, the trustees of the Wellington United Presbyterian Church, Glasgow, concluding for payment of the sum of £500, being damages in respect of an accident sustained by the pursuer.

The pursuer averred that on the evening of 11th October 1896 he was walking down Piccadilly Street, and in passing the premises No. 21, which were the property of the second defenders, he put his foot into a hole in the foot-pavement, whereby he was thrown and severely injured his right leg, and that the said hole was neither fenced nor lighted.

He further averred—"(Cond. 5) The said accident was caused by the negligence of the defenders, or one or other of them, or of their servants, or others for whom they are responsible, in allowing the said pavement, for the maintenance of which they are responsible, to fall into a dangerous state, and in failing duly to repair the same. It was the duty of the said managers and trustees, as owners of the said pavement,