Saturday, January 13.

SECOND DIVISION.

[Lord Pearson, Ordinary.

DAVIDSON'S TRUSTEES *v.* CALEDONIAN RAILWAY COMPANY.

(*Ante*, vol. xxxvii., p. 150.)

Railway — Mines and Minerals — Illegal Working—Amount of Damages.

Held that a railway company having purchased the surface of the ground, and having *mala fide* worked minerals reserved in the disposition to the superior, were not entitled to plead in answer to a claim by the superior for damages (1) that the superior could not have worked the minerals to a profit, or (2) that he could not have worked them at all without coming to an agreement with the railway company as owner of the surface. *Held*, accordingly, that in estimating the amount of damages due to the superior the market value of the minerals was to be taken under deduction only of the cost of working and winning them.

The case is reported *ante*, p. 150.

Counsel were heard on the question of the amount of damages due to the pursuers.

At advising—

LORD TRAYNER—Having already decided that the defenders are liable to the pursuers in damages or compensation for the freestone belonging to the pursuers which they have taken, it remains for us to determine what the amount of that damage or compensation should be. On this subject we have heard the parties. I have found this matter of assessing damage attended with difficulty, because, among other things, the evidence bearing upon it is so conflicting. But I have, after repeated consideration of the evidence and the arguments of parties, arrived at a conclusion which I think meets the justice of the case. Before stating what that conclusion is, I think it necessary to make one or two preliminary observations, which will show or suggest the grounds on which I have proceeded.

1. It was strongly urged by the defenders that they had demonstrated that the freestone in question was worth nothing to the pursuers as it could only be worked at a loss, and that therefore the pursuers were not entitled to any compensation or damage at all. Such an argument seems to me to be altogether untenable. It is absurd to say to the owner of a subject—Your property is of no value to you; you can make make no profit out of it, but it is useful to me, and therefore I shall take it from you for nothing. But that is what the defender's argument comes to. Apart from the answer which the owner of the subject may give, to the effect that he is content to keep his property as it is, and take his chance of some day making it profitable (and I may observe in passing that that day arrived when the defenders came upon the ground and required the stone), the defender's argument based upon the worthlessness of the stone is answered by their own witnesses, who state that that freestone was worth over £5000. It is true that the defenders' witnesses also say that to gain the £5000 worth of stone would cost £10,000. But it can scarcely be credited that the defenders would in any case act so foolishly as to pay out £10,000 for £5000 worth, and it becomes less credible when we learn from the same witnesses that the defenders could have got from adjoining quarries stone as suitable for their purposes as that which they took from the pursuers at market prices. This evidence, however, as to cost of working, is at best the speculations of expert witnesses. The defenders have not supported the views of their witnesses by any evidence of the actual outlay disbursed by them in working this freestone although such evidence was doubtless within their power, and more valuable than mere opinion—just as much more valuable as fact is than theory when it is fact that is in question.

2. Again, the defenders maintained that if they were to be made liable at all they were entitled, when the amount of their liability came to be fixed, to favourable consideration on the ground that in taking the freestone they had acted *in bona fide*. The defenders could scarcely expect this view to be adopted after the opinions which have already been expressed in this case. I pointed out on a previous occasion that the defenders knew that the freestone was the property of the pursuers' author, and that if they had not discovered this from an examination of Allan's title (from whose trustees they acquired), as I did not doubt they had, they were distinctly informed of the fact by letter from the pursuers' agents dated 30th August 1892—that is, little more than six weeks after the date of the conveyance in their favour and when their quarrying operations had but commenced. There is no room for doubt that the defenders, when they took the freestone in question, knew that it was the property of the superior, and that they had no right to it as Allan's successor. Their subsequent actings and correspondence show, to my mind quite clearly, that the defenders not only knew that they were invading the pursuers' rights, but had determined to persist in the course they had adopted without any intention of acquiring right to the freestone or of paying for that freestone unless compelled. All idea of *bona fides* on the part of the defenders appears to me to be absolutely excluded.

3. The defenders made a great point of the impossibility of the pursuers working the stone to profit on account of the claims they would have to answer at the instance of the owners of the surface; and being now the owners of the surface the defenders place their supposed claims *per contra* against the pursuers' demands. But the pursuers would probably not have proposed to work the stone if the demands of their vassal had been such as to preclude their working to profit. At all events, they did not. The owners of the surface (the defen-

ders) without request on the part of the pursuers, or intimation to them, by their own act placed the freestone in a position which made it workable to profit, and the pursuers are entitled to take advantage of that. So long as the defenders confined themselves to operation on the surface the pursuers could not interfere with them; but when they reached and began to work the minerals the pursuers' right to stop them emerged. The defenders' proceedings no doubt put the pursuers in a better position to work and win the minerals, of which they now take advantage. But the defenders' proceedings were taken at their own hand and for their own convenience, and if these proceedings result in a benefit to the pursuers so much the better for them; but they cannot be called on to pay the defenders for doing what they did entirely on their own account, and certainly with no intention of benefiting the pursuers.

4. In fixing the amount payable by the defenders, the first thing necessary to be done is to fix the quantity of freestone excavated by them. Here the proof is conflicting, but in the estimate I have made I proceed chiefly on the evidence of Paterson the quarrymaster, who had charge of the workings in question. No one had better means of knowing what stone was excavated than he, and I see no reason to doubt the accuracy of his testimony. But if the defenders suffer any disadvantage through the evidence of Paterson being taken as the standard for ascertaining the amount of stone removed they have themselves to blame. They should have seen (especially after the warning they got from the pursuers' agents) that an exact record was kept of all the stone removed; and when asked to do this early in April 1893 they refused.

Turning now to the question more immediately before us, I find that according to the pursuers' statement there was abstracted by the defenders freestone to the extent of 18,414 cubic yards. The defenders state the amount at 16,300, the difference being 2114 cubic yards. I think full justice is done to the defenders if one-third of this difference be deducted from the pursuers' estimate, and I make the deduction so large in order to meet as far as possible the difference which exists between the pursuers' and defenders' witnesses about the line from which the good rock was to be calculated. One-third of the difference is, say 704 cubic yards, which, deducted from the pursuers' estimate, leaves 17,710 cubic yards of rock to be paid for. Of this quantity one-third is to be charged for as cube stone at 10d. per cubic foot, although part of the defenders' evidence would probably warrant a somewhat higher rate, one-third to be charged for as ruble at 3s. per cart, and the remaining third to be treated as waste, for which no charge is made, although the waste did produce something when sold for making up roads, making concrete, &c.

The third to be charged as cube stone amounts to 5903 cubic yards, equal to 159,381 cubic feet, which at 10d. per foot gives £6540, 13s. 6d.

The third to be charged as ruble amounts (as before) to 159,381 cubic feet. I estimate (on the basis of the pursuers' figures) that there are roughly 19 cubic feet to the cart. That gives 8388 carts. This exceeds the number of carts as stated by the pursuers in the print. But there, as regards the second seam, the pursuers charge one-half of the rock as cube stone, while I have allowed only one-third as cube, thus reducing the cube but increasing the ruble. Taking the carts of ruble as 8388 at 3s. gives £1258. This sum added to the amount brought out for cube stone gives a total of £7898, 13s. 6d.

From this there falls to be deducted the cost of working and winning the stone. Here again there is the usual conflict of testimony. But again I proceed chiefly on Paterson's estimate, whose evidence I prefer. I disallow altogether the defenders' charges, or supposed charges (for they are merely speculations after all), for interest on capital, expense of management, severance damage, &c. They are not chargeable in my opinion against a proprietor whose property is taken away against his will by a wilful trespasser. But I increase Paterson's allowance somewhat, and find that the defenders are entitled for working expenses to the sum of £3750. None of the sums I have allowed, either as debit or credit, can be taken as the precise result of the proof. To get at a precise or exact result was impossible; but the result I have reached seems to be as exact as in such a case can be obtained. Deducting the £3750 which I have allowed for working and winning the stone from its value as above estimated, this leaves a balance of £4148, 13s. 6d. in favour of the pursuers, for which, in my opinion, they are entitled to decree with interest at 5 per cent. from the date of citation.

LORD MONCREIFF — I concur in Lord Trayner's opinion. The most plausible point made for the defenders, and the one which has caused me most difficulty, is that if the surface had been in the hands of another proprietor the pursuers could not have worked the reserved minerals to profit on account of the compensation which they would have been obliged to pay to the owner of the surface. Circumstances may be conceived in which this would have been so; but I do not think that the defenders are entitled to speculate upon or take benefit from this. They became the owners of the surface, and in the full knowledge that they had not acquired right to remove the minerals in question, proceeded to do so for their own convenience and to their own profit. This having been done in spite of the remonstrances of the pursuers, the latter are entitled to take things as they find them. They have no innocent surface owner to deal with or compensate, and therefore I think that they are entitled simply to call upon the defenders to account and pay for the minerals which have been unwarrantably removed and sold or used, under

deduction only of the cost of working and winning them.

I have thoroughly examined the papers, and I am satisfied that Lord Trayner's calculations are correct, and that on the above assumption the award proposed is reasonable.

LORD JUSTICE-CLERK — That is my opinion also.

LORD YOUNG was absent.

The Court found the amount due to the pursuers by the defenders to be £4148, 13s. 6d., and gave decree for that amount.

Counsel for Pursuers — Shaw, Q.C. — Younger. Agents — Campbell & Smith, S.S.C.

Counsel for Defenders — Lord Advocate (Graham Murray, Q.C.)—Clyde. Agents—Hope, Todd, & Kirk, W.S.

Wednesday, January 31.

SECOND DIVISION.

[Sheriff of Lanarkshire.

SCOTT *v.* WILSON.

Issues—Counter-Issues—Slander—Veritas—Specification.

Counter-issues of *veritas* respectively *allowed* and *disallowed* in an action of damages for slander.

This was an action brought in the Sheriff Court at Glasgow by James Scott, 16 India Street, Partick, against J. Havelock Wilson, Member of Parliament for Middlesborough, in which the pursuer craved decree for the sum of £1000 as damages for slander. The pursuer was a superintendent at Glasgow in the employment of the Shipping Federation, Limited, and the defender was the President of the Sailors and Firemen's Union.

The defender pleaded, *inter alia*, "(4) *Veritas.*"

A proof having been allowed, the pursuer appealed for jury trial.

The following issues and counter-issues were, *inter alia*, proposed for the trial of the cause :—

Issue I. Whether during the month of November 1898 the defender stated to Mr W. H. Raeburn, one of the Committee of the Shipping Federation, Limited, in his office at 81 St Vincent Street, Glasgow—(1) that two years ago the pursuer was found helplessly drunk in Argyle Street, Glasgow, and taken in charge by two policemen to the Central Police Station; (2) that the pursuer had been seen by police officers taking common prostitutes into the Federation Offices at all hours of the night, meaning thereby that he was a man of immoral character, and had taken prostitutes into said office for the purpose of fornication; and (3) that in the early part of the year 1898 the pursuer was drunk and incapable at the Shipping Federation Office, 9 James Watt Street, Glasgow, or used words of similar import and effect, and whether the said statements are of and concerning the pursuer, and were made by the defender falsely and calumniously, to the loss, injury, and damage of the pursuer?

Counter-issue I. (1) Whether the pursuer was drunk in or near Argyle Street, Glasgow, on or about Saturday, 13th July 1895, and was taken by two policemen to the Central Police Station, Glasgow? (2) Whether the pursuer, on an occasion early in the year 1896, took Mrs Taylor, a woman of loose character, residing at 2 Anderston Quay, Glasgow, into the office in Glasgow of the Shipping Federation, Limited, for immoral purposes, and whether the pursuer, on various other occasions during the years 1896, 1897, and 1898 took the said Mrs Taylor and her two sisters who lived with her, and other women of loose character, one at a time, into the said office for immoral purposes? (3) Whether early in the year 1898 the pursuer was drunk and incapable at the office in James Watt Street, Glasgow, of the Shipping Federation, Limited?

Issue II. Whether about the beginning of December 1898, and prior to the 9th day thereof, the defender despatched from Glasgow to Mr H. Llewelyn Smith or other officer of the Board of Trade a written document containing the statements set forth in Schedule A appended hereto, or statements of similar import and effect, and whether said statements are of and concerning the pursuer, and are false and calumnious, to the pursuer's loss, injury, and damage?

Schedule A was as follows :—"Mr Scott was formerly an inspector in the Partick Police Force, near Glasgow, and that he was called upon to resign his position for misconduct. That when under the influence of drink he brutally assaulted a moulder, and that the case was not brought into Court in consequence of Scott's solicitor paying a sum of money to the man to let the matter drop. That two years ago Mr Scott was found helplessly drunk in Argyle Street, Glasgow, and taken in charge by two policemen to the Central Police Station. That in the early part of this year (1898) Mr Scott and a boarding-house keeper were in a public-house called the 'Edinburgh Castle.' There was present a publican, and an altercation took place between Scott and this man. Scott took up a chair and struck the publican on the head, inflicting a very severe wound. He was under the influence of drink at the time. That in the early part of this year (1898) Scott was drunk and incapable at the Federation Office, 9 James Watt Street, Glasgow, and a cab was brought, and M'Donald, the outside delegate, assisted him into the cab, in which he was driven home."

Counter-issue II. (1) Whether the pursuer, on or about 23rd June 1890, was compelled to resign the office of superintendent in the police force at Partick for misconduct? (2) Whether the pursuer, on or about 18th May 1890, while under the influence of drink, brutally assaulted John Clark, moulder, at 72 Douglas