Friday, May 5.

OUTER HOUSE.

[Lord Low, Ordinary.

ROBERTSON *v.* THE DUKE OF ATHOLL AND OTHERS.

Caution for Expenses — Right-of-Way — Dominus Litis — Preliminary Proof Allowed on Question whether Pursuer Should be Ordained to Find Caution.

In an action of declarator of right-of-way, in which the defender averred (1) that the pursuer was not the true *dominus litis*, but that he was an impecunious person put forward by others in order that they might escape liability for the defender's expenses in case of non-success, and (2) that the District Committee of the Parish Council having inquired into the matter and found that the said right-of-way did not exist, decided to take no further proceedings for its vindication—*held* that the defenders were entitled to a preliminary proof of these averments with a view to determine whether or not the pursuer should be ordained to find caution for expenses.

Jenkins v. *Robertson*, May 20, 1869, 7 Macph. 739, *followed.*

This was an action of declarator of right-of-way raised by Robert Robertson, bootmaker, Dunkeld, against the Duke of Atholl and others, in which the pursuer sought to have it declared that a certain right-of-way existed between Dunkeld and Kirkmichael, passing through the lands of the defenders.

The defenders, *inter alia*, averred that the pursuer "is not in a financial position to carry on this action out of his own resources, and that as a matter of fact he has been put forward by certain other persons to carry on the action on their behalf so that they may escape liability for the defenders' expenses. The said persons have formed themselves into a committee, have raised funds by public subscription, and are the true *domini litis*. They include the Reverend J. W. Hamilton, United Free Church minister, Dunkeld, and John Murray, joiner, Dunkeld."

The defenders further averred that the Parish Council of Dunkeld and Dowally having been interdicted by the Duke of Atholl from erecting guide posts along the alleged right-of-way, requested the District Committee to take proceedings to vindicate the alleged public right, and that the District Committee after taking evidence "found that the said right-of-way did not exist, and accordingly decided not to take proceedings for its vindication."

The defenders pleaded, *inter alia*—"(3) In the circumstances either the said Reverend J. W. Hamilton and John Murray should be sisted as parties to the action or the pursuer ought to be ordained to find caution."

The Lord Ordinary allowed a proof of the above averments, and after dealing with other matters in connection with the case pronounced the following opinion.

Opinion.—. . . . "Now, if these averments by the defenders are true I do not think that it would be just to allow the defenders to be involved in a long and costly litigation of this kind without some security for their expenses in the event of their being successful.

"The case of *Jenkins* v. *Robertson*, 7 Macph. 739, appears to me to be a direct authority for that view. That was also an action for declarator of an alleged right-of-way. The pursuers were three labouring men who, the defenders averred, were in indigent circumstances, and had on that account been put forward as pursuers by certain persons who desired to vindicate the alleged right-of-way with the view to avoid liability for costs. The First Division allowed the defenders a proof of these averments, and, the result being that they were substantially established, ordained the pursuers to find caution.

"In some respects I think that this case is more favourable to the defenders than that of *Jenkins*. By the 42nd section of the Local Government (Scotland) Act 1894 the duty of protecting rights-of-way is laid upon the district committee, and if a parish council represents to the district committee that a public right-of-way has been or is likely to be shut or obstructed, or encroached upon, it is the duty of the district committee, 'if they are satisfied that the representation is well founded, to take such proceedings as may be requisite for the vindication of the right-of-way.'

"I do not think that these enactments render it incompetent for a private individual to bring a declarator of a right-of-way, but they have a material bearing upon the question which I am now considering. If it is the case that the District Committee, whose statutory duty is to vindicate public rights-of-way have come to the conclusion after full inquiry that no public way exists over the line claimed, it seems to me that it would be most unjust to allow the proprietors of the lands over which the alleged way passes to be dragged into Court at the nominal instance of a man of straw put forward by persons who are dissatisfied with the decision of the District Committee without security for expenses.

"I therefore propose to follow the course adopted in the case of *Jenkins*, and to allow the defenders a proof of the averments to which I have referred."

The defenders were allowed a proof of the averments.

Counsel for the Pursuer — Ure, K.C. — Hunter — James Macdonald. Agents — Gordon, Falconer, & Fairweather, W.S.

Counsel for the Defenders — Solicitor-General (Salvesen, K.C.)—Macphail. Agents —Tods, Murray, & Jamieson, W.S.

Tuesday, May 23.

FIRST DIVISION.

[Lord Low, Ordinary

WINDRAM AND OTHERS (OWNERS OF "BUCCLEUCH") *v.* ROBERTSON (OWNER OF "KYANITE").

Ship — Collision — Damages — Liability— Wrong Manœuvre by One Vessel—Fault on the Part of the Other, but not Directly Leading to Wrong Manœuvre—Regulations for Preventing Collisions at Sea.

Owing to the defective lights of a sailing ship a steamer did not see it until there was risk of collision. The steamer did not stop or reverse, as required by the Regulations for preventing collisions at sea, but endeavoured to avoid a collision by starboarding her helm in order to turn away from the sailing ship and continuing to go full speed ahead. A collision took place two or three minutes after the sailing ship had been sighted. *Held* that the steamer was in fault, in respect that in the short interval of time after the sailing ship was sighted she had failed to stop or reverse, as required by article 23 of the Regulations of 1897, and had failed to discharge the onus, which lay on her, of showing that her failure to obey the Regulation was excusable by proving either that non-compliance with the Regulation was the only chance of escaping a collision, or that the risk of collision would have been increased by following the Regulation. The "*Khedive*," 1880, L.R., 5 A.C., 876; the "*Benares*," 1883, L.R., 9 P. Div. 16; the "*Memnon*," 1889, 6 Asp. Mar. Cas. 488; the "*Bywell Castle*," 1879, L.R., 4 P. Div. 219, *commented on* and *explained.*

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), sec. 418 (1), enacts — "Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council make regulations for the prevention of collisions at sea." . . .

The Regulations of 1897, made by Order in Council of 27th November 1896, provide— "Art. 20—When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. Art. 21—Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Art. 22—Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. Art. 23—Every steam vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed or stop or reverse."

On the 19th November 1903 George Windram, 12 Drury Lane, Liverpool, and others, the owners of the sailing ship "Buccleuch," raised an action against William Robertson, 15 Gordon Street, Glasgow, owner of the steamship "Kyanite," in which they sought to recover damages for injuries received by their vessel in a collision with the defenders' vessel. On 4th December 1903 Robertson raised a cross-action. The owners of the "Buccleuch" based their action upon averments (1) that there had been no proper lookout on board the "Kyanite," and (2) that the manœuvre adopted by the "Kyanite" was wrong. The owner of the "Kyanite" based his action upon averments of defective lights on the "Buccleuch." The "Kyanite" was at the time of the collision in charge of the mate, Fife, and the "Buccleuch" was being overhauled on the side away from the "Kyanite" by the steamship "Ness," which was holding the same course as the "Buccleuch." The facts appear in the opinion of the Lord Ordinary.

On 12th July 1904 the Lord Ordinary (Low) issued an interlocutor, wherein he found that the collision was caused by fault on the part of those in charge of both vessels.

Opinion.—"On the evening of the 17th October 1903 the sailing ship 'Buccleuch' and the s.s. 'Kyanite' came into collision in the English Channel between Folkestone and Dover.

"The owners of these ships have brought cross actions of damages, each alleging that the collision was caused by the fault of the other. It is said on the one hand that the lights of the 'Buccleuch' (or at all events her port light) were so defective that they could not be seen by those on board the 'Kyanite' in time to prevent a collision, while upon the other hand it is said that no proper lookout was being kept on board the 'Kyanite,' and that when risk of a collision became serious the manœuvre which she adopted was wrong and unjustifiable.

"I shall first consider the question of the sufficiency of the lights of the 'Buccleuch' —[*His Lordship reviewed the evidence on this question*].

"That, I think, is the whole material evidence in regard to the condition of the 'Buccleuch's' lights, and it is plain that the question whether they were or were not sufficient at the time of the collision is very narrow and perplexing. I have, however, come to the conclusion that in fact they were not sufficient. . . .

"I am therefore of opinion that the 'Buccleuch' was in fault, and the next question is whether the 'Kyanite' was not also in fault.

"It is said that there was no proper watch being kept on board the 'Kyanite.' There is one very strong ground for supposing that that was the case, and that is that the mate and lookout never noticed the lights of the 'Ness.' They frankly admitted that that was the case, and said they could not account for it. The mate was extremely honest in his evidence upon the point, because when it was suggested that the lights of the 'Kyanite' might have been hidden