bad, and as sitting in another Court I would be prepared to suspend the conviction to-morrow, I put it to the Solicitor-General, as the Court has held so strongly as to this person not having a chance to defend himself, whether he would not undertake to recommend the Crown to repay the fine and make a moderate award of expenses.

LORD JUSTICE-CLERK—Your Lordship has expressed the view I entertain most fully, and I have nothing to add.

LORD KINNEAR—I agree.

LORD KYLLACHY—I entirely agree.

LORD KINCAIRNEY—And I agree.

The Court refused the suspension.

Counsel for the Complainer—T. B. Morison. Agents—Elder & Aikman, W.S.

Counsel for the Respondent—Solicitor-General (Salvesen, K.C.)—Young. Agent—Solicitor of Inland Revenue.

COURT OF SESSION

Wednesday, October 25.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

KENNEDY *v.* THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY.

Railway—Agreement—Siding—Agreement "to Maintain and Uphold in Full Efficiency"—Question whether Obligation Confined to Structural Maintenance of Siding or whether it Extended to the Working of the Siding as well.

By agreements dated in 1858 and 1878 between A (the proprietor of an estate) and a railway company, the company undertook "to maintain and uphold in full efficiency in all time coming" a siding of the said railway for the accommodation of A and his tenants.

In 1905 A raised the present action against the company for decree (1) that they were bound to accept delivery at the said siding of all parcels, goods, merchandise, &c., duly tendered by him or his tenants, and (2) that they were bound to do everything necessary to maintain and uphold the said siding in full efficiency, and in particular to supply a sufficient staff of servants, plant, machinery, waggons (including a "sundries" waggon when required), as well as a crane, for use at the said siding.

Held that the agreement referred only to the structural maintenance of the siding and works connected therewith (which were not alleged to be inefficient), and did not extend to the working of the siding or to questions as to facilities for traffic, and action *dismissed*.

Opinion (*per* Lord President) that such an agreement could not be expiscated by *contemporanea expositio*.

Lytton v. *Great Northern Railway Company* (1856), 2 K. & J. 394, *followed*.

Railway—Jurisdiction—Court or Railway Commissioners—Siding—Agreement "to Uphold and Maintain in Full Efficiency"—Construction of Agreement.

Held that the question whether a siding was or was not being maintained in full efficiency in the sense of an agreement was one of construction of the agreement, and so within the jurisdiction of the Court of Session.

Opinions that questions of proper railway facilities were not for the Court but for the Railway Commissioners.

This was an action at the instance of John Campbell Kennedy of Dunure, proprietor of the estate of Dunure, Girvanmains, and others, in the county of Ayr, against the Glasgow and South-Western Railway Company.

The pursuer averred that in connection with the construction of the Maybole and Girvan Railway a minute of agreement was entered into between the then proprietor of the said estate on the one hand and the Maybole and Girvan Railway Company on the other, by which it was, *inter alia*, provided that the company should make and maintain in full efficiency a siding of the said railway for the accommodation of the proprietor of Girvanmains and his tenants.

By a further agreement, dated 2nd and 4th February 1878, between the defenders (who by that time represented the said Maybole and Girvan Railway Company) and the said proprietor, the defenders acquired additional land, and agreed to fulfil the obligation in his favour, as follows:—"The company agree and bind themselves to continue to maintain and uphold in full efficiency in all time coming the foresaid existing siding (*i.e.*, the Bridgemill siding), with a suitable and convenient access thereto from the Kirkoswald turnpike road, but with power to them, if they see fit, to deviate the said siding and access, but so that the deviated access shall join the said Kirkoswald turnpike road at the point where the present access joins that road, and that for the accommodation of the proprietor of the estate of Girvanmains and his tenants, and also the public, if and when the company so incline."

The pursuer further averred that in 1873 the proprietor of Dunure raised a question with the defenders as to their not maintaining the said siding for his tenants in the sense of the first agreement, that ultimately it was agreed that the siding should be worked by the defenders, and that it should be available for the carriage of merchandise, parcels, goods, produce, minerals, and stock belonging to the proprietor and his tenants; that thereafter matters worked smoothly between them until a new stationmaster was appointed to Girvan station, who declined to receive small

parcels of goods from the pursuer's tenants, and threatened to charge extra rates for their carriage; that since then the defenders had declined to furnish a sundries waggon for the despatch of goods, or to accept receipt at the siding of small parcels of goods duly tendered for consignation except upon payment of prohibitive rates, and that they refused to supply a crane for use at the siding.

The pursuer further averred—"(Cond. 6) In order to maintain the said siding in full efficiency in the sense of said agreement, and in accordance with the practice following upon it which prevailed between the pursuer and defenders prior to 1902, it is necessary that a sundries waggon should be made available at least once daily for the purposes of the traffic in small consignments of merchandise. A crane for use in connection with heavy traffic is also essential. Contrary to the said agreement the defenders leave the siding between the hours of 8 and 9 a.m. and 1 and 2 p.m. without anyone present during these hours for the receipt and despatch of traffic, and this has occasioned considerable inconvenience to the pursuer and his tenants. At all sidings on the defenders' system (in common with those of the other railway companies) which are maintained in full efficiency, a sundries waggon is provided at least once daily, and a crane is also set up for convenience in loading and discharging heavy merchandise, and at least one man is present in charge of the siding during the ordinary business hours of each lawful day. In particular, at the defenders' siding of Clune, near Monkton, where the traffic is insignificant compared with that of Bridgemill, an engine and van are sent out from Monkton station at least once daily, and the defenders accept and forward and deliver all goods from the smallest parcels upward. (Cond. 7) As the defenders, in breach of the obligations under the said agreement, and the practice following thereon, refuse to provide a sundries waggon once daily for small parcels, to keep attendants at the siding during ordinary business hours, and to furnish a suitable crane for the siding—these being necessary to the maintenance of the siding in full efficiency—this action has become necessary."

In answer the defenders denied that the siding had not been maintained by them in full efficiency in the sense of the agreement, or that they had failed to attend to the regular working of the traffic at the siding.

They further averred—"(Ans. 6) The defenders have a man at the siding who does all that lies upon them in connection with the siding. He is off from eight to nine in the morning for breakfast, and from one to two in the afternoon for dinner. The attendance of a man at the siding during these hours is not required for the work at the siding. (Ans. 7) None of the provisions mentioned are necessary for the maintenance of the siding in full efficiency within the meaning of the agreement. Further, they are not required for the proper working of the siding—a matter not dealt with in the agreement. Explained that until the raising of the present action the pursuer had made no demand for a crane. Explained that the defenders are willing to provide a sundries waggon once daily at the siding, provided the pursuer guarantees daily traffic, and that such traffic will either amount to a full truckload or will be paid for as such. They are also prepared to keep a man at the siding during the whole day whenever the traffic warrants it. The defenders are also prepared to erect a crane when the traffic warrants it, or to give facilities to any trader for the erection of a crane if they find it necessary to have one."

The conclusions of the action were, *inter alia*, as follows:—"(*First*) that . . . the defenders were bound to maintain and uphold in full efficiency in all time coming the siding known as Bridgemill siding, situated on the defenders' line of railway, and that for the accommodation of the pursuer and his tenants of the lands of Girvanmains; and (*Second*) that the defenders were bound to receive or accept delivery at the said siding of all parcels, goods, merchandise, produce, or stock duly tendered by the pursuer, his tenants, or others acting under his authority, and timeously transmit the same on being paid for the carriage thereof the ordinary rates legally exigible therefor, according to the weight and character of same, and the defenders ought and should be decerned and ordained by decree foresaid to do every act or deed necessary to maintain and uphold the said siding in full efficiency, and in particular to provide a staff of servants or employees reasonably sufficient to arrange for the despatch and receipt of traffic at said siding during the usual business hours on every lawful day, and to supply thereat sufficient plant, machinery, engines, waggons, and whole appliances necessary for this purpose, and without prejudice to said generality the defenders ought and should be decerned and ordained by decree foresaid to supply a sundries waggon when required for the transmission of all parcels of merchandise and goods, and especially of parcels of small size or weight at said siding at least once daily, or at such further or other times as may be determined in the course of the process to follow hereon as may be necessary for the due and reasonable maintenance of the traffic of the pursuer and his said tenants at said siding, to station at least one of their servants at said siding for the receipt and discharge of traffic during the hours from 8 a.m. to 9 a.m., and from 1 p.m. to 2 p.m. on every lawful day, and to erect or provide on a convenient site at said siding a good and sufficient crane, with all the necessary appliances thereof, capable of being used for the discharge of all heavy goods, merchandise, or produce duly consigned to the said siding for the pursuer and his said tenants, or for receipt of such heavy goods, merchandise, or produce duly tendered to the defenders at said siding by the pursuer and his said tenants."

The pursuer pleaded—"(2) In respect it is necessary for the maintenance of said siding in full efficiency in the sense of said agreements that the defenders should work the siding at all reasonable times, that a sundries waggon should be transmitted daily thereto, and that a crane should be erected thereat, the pursuer is entitled to decree of implement in terms of the conclusions of the summons."

The defenders pleaded—"(1) The first declaratory conclusion being unnecessary, and the Court having no jurisdiction to deal with the other conclusions, the action ought to be dismissed. (2) The action as laid is incompetent. . . . (4) The defenders having made and maintained said siding in a state of full efficiency, and any question as to the working of the siding being outside the agreement, the action ought to be dismissed."

On 8th July 1905 the Lord Ordinary (ARDWALL) pronounced the following interlocutor:—"Repels the first and second pleas-in-law for the defenders, and before further answer allows to the parties a proof of their averments, said proof to proceed before the Lord Ordinary on a day to be afterwards fixed, reserving all questions of expenses."

Opinion.—"The principal question which has been argued before me is whether the obligation 'to maintain and uphold in full efficiency in all time coming a siding of the said railway for the accommodation of the proprietor of the estate of Girvanmains and his tenants' undertaken by the defenders in the minute of agreement between the Maybole and Girvan Railway Company and the pursuer's author dated May 1858, and the subsequent agreement between the defenders and the pursuer's author, dated 1878, is an obligation confined to the structural maintenance of the siding and works connected therewith, or whether it extends to and includes the working of the siding in an efficient manner. It was argued for the defenders that it had been decided in the case of *Sir E. B. Lytton* v. *The Great Northern Railway Company*, 2 K. and J. 394 (1856), that the words 'construct and maintain,' as applied to a siding, meant structural maintenance only, and that the addition of the words in the agreement under consideration 'in full efficiency' merely qualified the obligation of structural maintenance, and that accordingly there was nothing in the said agreement applicable to the working of the siding. It was admitted for the pursuer that he had no ground for complaint regarding the structural maintenance of the siding in question, and the result is that if the defenders' construction of the contract is sound the action would fall to be dismissed as irrelevant. I am not prepared to accept the defenders' construction of the agreement. In the case cited no such words occur as 'in full efficiency,' and my opinion is that these words put a meaning on the obligation to maintain and uphold, and show that it includes both structural and working maintenance. The words 'in full efficiency' are, I think, wholly inapplicable to structural maintenance; indeed they are absurd when applied in such a way. Any conveyancer would smile at a draft lease which purported to lay an obligation on a tenant to maintain the farm, houses, and buildings 'in full efficiency,' and the very etymology of the word 'efficiency' shows that it is inapplicable to the mere maintenance of a material structure. I am accordingly of opinion that the obligation under consideration binds the defenders to maintain the siding, both as regards structure and working, in an efficient condition, that is, so as to make it in all respects efficient for the conduct of such goods traffic as is proper to a siding of that description.

"But the defenders further maintained that assuming that what I have above said to be the true construction of the agreement, the question of efficient working of the siding in the particulars concluded for by the pursuer is a question not for this Court but for the Railway Commissioners, on the ground that it is really a question as to what reasonable facilities should be given to traders at that siding by the defenders, and that in such a question the Railway Commissioners have an exclusive jurisdiction. I may say at once that my own view is that the questions presently at issue between the parties are exceedingly suitable for the decision of the Railway Commissioners, but the parties have not chosen to submit these questions for the decision of that tribunal, and I am unable to hold that the jurisdiction of this Court is ousted, or that I am entitled to send the questions at issue in the present case to the Railway Commissioners for their decision. I may refer to the case of the *Barry Railway Company* v. *Taff Vale Railway Company*, L.R. 1895, 1 Ch. D. p. 128, where it was held in a matter similar to the present that the Railway Commissioners had no exclusive jurisdiction, and that the jurisdiction of the ordinary courts of law was not ousted. But further, I have doubts as to the competency of the Railway Commissioners to deal with the present questions, because the pursuer is not here asking as a member of the public for reasonable traffic facilities; he is claiming his rights as an individual under a private agreement with the defenders. Beyond deciding as I have done on the general construction of the agreements I do not think it right to go further at present in deciding upon the relevancy of the action. Without a proof I am not prepared to say that under the said agreements the pursuer is entitled to succeed in the specific demands he makes in the summons. Further, the second of the two agreements above alluded to proceeds on the narrative that the siding mentioned in the first agreement was constructed 'and is now being worked and maintained by the company,' and then the first article provides as follows—'the company (*i.e.*, the defenders) agree and bind themselves to continue to maintain and uphold in full efficiency in all time coming the foresaid existing siding.' I think that considering this clause it is only

right that before deciding further on the relevancy of the action there should be a proof to show (first) what construction the parties themselves put upon the agreements as shown by the past working of the siding, and (second) for what kind of traffic and to what extent it is reasonable that the defenders should provide facilities at the siding in question. To illustrate what I mean I may say that it would appear to be doubtful for instance whether the defenders were bound to provide facilities at the said siding for ordinary parcel traffic, and whether the traffic at the siding was so large as to make it reasonable that the defenders should keep two men constantly at said siding simply to avoid the slight interruption between 8 and 9 a.m. and 1 and 2 p.m. when the single man whose services as a rule would appear to be enough was absent at his breakfast and dinner.

"I accordingly think the proper course is not to deal with the defenders' third plea at present, but to allow a proof before answer."

The defenders reclaimed, and argued—They were not bound to do more than maintain the physical structure of the siding. A proof was unnecessary, for the real question was as to the construction of the agreement. The case of *Lytton* v. *The Great Northern Railway Company*, 1856, 2 K. & J. 394 (cited by the Lord Ordinary), was in favour of the reclaimers. Any inquiry as to the practice was irrelevant. The action should therefore be dismissed. Questions in regard to the working of the siding, or as to the provision of proper facilities for traffic, were for the Railway Commissioners and not for the Court—Railway and Canal Traffic Acts 1854 (17 and 18 Vict. cap. 31), secs. 2 and 3; 1873 (36 and 37 Vict. cap. 48), sec. 6; and 1888 (51 and 52 Vict. cap. 25), sec. 8. [The LORD PRESIDENT referred to the case of *Cowan & Sons, Limited* v. *North British Railway Company*, March 19, 1901, 3 F. 677, 38 S.L.R. 514.]

Argued for the respondent—The agreement referred both to the structure and the working of the siding. It had not been maintained in full efficiency. Evidence as to the working would be competent evidence, in the light of which the Court might construe the agreement. In *Lytton's* case (*ut supra*) proof was allowed. The Lord Ordinary had only allowed a proof before answer and the Court would not readily interfere with a limited allowance of proof. The question as to the efficiency of the siding was one for the Court and not for the Railway Commission—*Darlaston Local Board* v. *London and North Western Railway Company* [1894], 2 Q.B. 694; Brown and Theobald on Railways, p. 112.

At advising—

LORD PRESIDENT—In the year 1858 the Maybole and Girvan Railway Company wished to make a deviation from the precise line which had been authorised by Act of Parliament, and in order to do so they entered into an agreement with the Right Honourable Thomas Francis Kennedy and Primrose William Kennedy, who were at that time infeft proprietors of the estate of Dunure, so as to obtain land for the deviation. The first article of that agreement was in these terms—"The said first party hereby agree to purchase land for and at their own expense to make at the same time that the main line of railway is constructed, and to maintain and uphold in full efficiency in all time coming, a siding of the said railway for the accommodation of the proprietor of the estate of Girvanmains and his tenants, and also, if the first party so incline, and when they so incline, the public to be admitted to the use of the said siding, which siding shall be made conform to the plan thereof signed as relative hereto, and any details as to the execution of the said plan, in the event of difference arising between the parties, are hereby referred to the decision of the arbiters after-mentioned, in the same way as the accommodation works for the said estate of Girvanmains."

In 1878 the Glasgow and South-Western Railway Company, who by this time had become vested in the undertaking of the Maybole and Girvan Railway Company, wishing additional land, entered into an agreement with the Right Honourable Thomas Francis Kennedy of Dunure, who was then heir of entail in possession of that part of the estate called Girvanmains, which agreement recites the old agreement of 1858 and states that in pursuance of the said agreement the siding had been constructed by the company, and this agreement goes on to stipulate in section 1 thereof—"The company agree and bind themselves to continue to maintain and uphold in full efficiency in all time coming the foresaid existing siding, with a suitable and convenient access thereto from the Kirkoswald turnpike road."

The present action is brought by Mr Kennedy of Dunure, who is the present proprietor of the estate and in right of the agreements above mentioned, and it embraces several conclusions directed against the Railway Company. The first conclusion is a mere echo of the words of obligation which I have read, but the further conclusions particularise the various things which the pursuer conceives he is entitled to have the Railway Company decerned to do. Summarising these conclusions in popular language, without reading them, I think they come to this, that the pursuer asks your Lordships to declare that the Railway Company are bound to receive and accept delivery of all goods tendered to them at the said siding, to transmit them at ordinary rates, and to provide a sufficient staff of servants and employees at the siding, which staff should be present at the siding, at least to the extent of one man, during the period from 8 a.m. to 9 p.m.; to arrange that from the siding there should every day be despatched what is called a "sundries" waggon for small parcels, and to provide the siding with a crane.

The Lord Ordinary has allowed parties proof of their averments before answer, and

against that interlocutor the defenders, the Railway Company, have reclaimed, their contention being that the obligation in the agreements upon a proper construction of them is limited to the maintenance of the structural efficiency of the siding, and that as the pursuer does not make any averment that the siding itself is structurally inefficient, the demands made and the conclusions which I have summarised are really irrelevant demands.

Before I come to consider what is the true construction of the obligation, it may be as well to inquire what was the position of parties under the general law of the land in 1858. At that time two statutes had been passed which deal with these matters. There was the Railway Clauses Act of 1845, which in section 69 provides that any person who has lands adjoining a railway company's line may ask for a junction with that line, and an opening through the hedges or boundaries of the railway, in order to put traffic upon the railway. And there was also passed the earliest of the series of Traffic Acts with which your Lordships are familiar, namely, the Act of 1854, which made certain provisions as to the obligations upon railway companies to afford reasonable facilities in favour of the public for forwarding traffic. It therefore becomes apparent that, that being the state of the law, undoubtedly the proprietor of Girvanmains got something under this obligation more than he was entitled to under the general law. That something more he got whichever view of the agreement we take, because upon the narrower view he certainly got this, that whereas under the general law if he wanted a siding he would have to make the siding for himself at his own expense, and would merely be entitled to demand a connection from the Railway Company; under the agreement the whole of the expense of the making and maintenance of the siding falls upon the Railway Company—he in fact being really paid for the land on which the siding itself was to be made. Of course I am not meaning that there may not be a *quid pro quo* in other stipulations of the contract. The result of this examination shows this, that we are just brought back to the question of what is the proper construction of the words used, because I do not think we gather any light from finding what people were entitled to at that time.

Now, when I come to the words, it is the fact, as noticed by the Lord Ordinary, that there was a case decided by the high authority of Lord Hatherley, when he was Vice-Chancellor Sir William Page Wood, reported 2 K. and Johnstone, p. 394—*Lytton* v. *Great Northern Railway Company*. The words of obligation which were there used and upon which the controversy arose were singularly like the words we have here. The words of obligation there were that it was agreed between the parties that the Great Northern Railway Company should make, form, and construct and thereafter maintain a siding connected with their railway, "together with all necessary approaches thereto for public use, for the reception and delivery of goods, wares, merchandise, and other matters and things to and from the surrounding neighbourhood, including tenants and other persons on the estate of the said Sir Edward Bulwer Lytton." The parties quarrelled as to what under that obligation the railway company were bound to do and put up. The railway company said that they did enough if they made an ordinary siding with approaches, but the other party asked that certain things, which he said were the ordinary concomitants of a siding, such as sheds and so on, should be put down, and he also asked for certain personal services in the way of railway servants being provided to work the siding. Lord Hatherley held that the words of obligation dealt with structure and with structure alone, and that the siding meant a siding only and did not include other things such as sheds and a crane and so on, which although very convenient accommodations in connection with a siding, were not generally understood in the use of the word siding itself.

Now, the Lord Ordinary has not attacked the authority of that case, but he distinguishes it from the present case on this ground—In that case there were no words corresponding to the words which we have here, "in full efficiency," and his Lordship's view is that these words really alter the whole situation. His Lordship says—"In the case cited no such words occur as 'in full efficiency,' and my opinion is that these words put a meaning on the obligation to maintain and uphold, and show that it includes both structural and working maintenance. The words 'in full efficiency' are I think wholly inapplicable to structural maintenance; indeed, they are absurd when applied in such a way. Any conveyancer would smile at a draft lease which purported to lay an obligation on a tenant to maintain the farm, houses, and buildings 'in full efficiency,' and the very etymology of the word 'efficiency' shows that it is inapplicable to the mere maintenance of a material structure. I am accordingly of opinion that the obligation under consideration binds the defenders to maintain the siding, both as regards structure and working, in an efficient condition, that is, so as to make it in all respects efficient for the conduct of such goods traffic as is proper to a siding of that description."

I am bound to say that I cannot find myself in accordance with the Lord Ordinary's views upon the precise meaning of the word "efficiency." So far as etymology is concerned, I am not sure that I follow his Lordship. The etymology of "efficiency" is undoubtedly from the latin *efficiens*, which is the present participle of *efficio*, which means to make fit. It is quite true that if we take the first use of the word *efficient* we shall find it used in a philosophical sense as meaning and as applied to efficient cause. But I take it that it is very unlikely that either the representatives of Mr Kennedy or the Maybole and Girvan Railway Company in 1858 were to be ranked among the schoolmen. I think we must come down to rather more

modern times and find out what the ordinary use of "efficiency" in common language is. It is quite true that "efficiency" is mostly used of persons, but it is equally certain that it is very often used of composite entities, such as the army or navy, which include the idea of both man and material, and I cannot help thinking that by an ordinary change it also very often has come to be used of things that are entirely inanimate, no doubt always in the sense of considering whether that inanimate thing is fit for the purposes for which it is made. You can certainly in ordinary language talk, as Lord M'Laren suggested, of an efficient engine, and you can also certainly talk of an efficient weapon, and the meaning of efficient and efficiency in such collocation seems to me to be no more than this, that it is in such a condition as to be able to perform the purposes for which it is intended. Accordingly, when I come to the words of obligation here, and read that this siding is to be maintained "in full efficiency," I think the words are amply satisfied by considering that the words mean that the siding is not to be put up and then left as a derelict structure, but that it is to be put in proper working order, in other words, that its rails are to be so settled and in place that waggons can be put over them without danger of derailment, and that its points should be in such working order that admission can be got to the siding from the main line, and that its signals in the same way should be so workable as to make it matter of ordinary every day business to use the siding if required. That seems to me ample satisfaction of the words used. Accordingly, I confess that I am perfectly willing, *quoad ultra*, to adopt the reasoning of Lord Hatherley in the case I have cited. I agree with him that the use of the word siding means a siding provided with the necessary appurtenances of a siding, but not including many other things which it may be convenient to have in connection with a siding.

As regards the conclusion that we should direct the Railway Company that they were to have one man present at such and such hours, and that they were to have what is called a "sundries waggon" at the siding, I have arrived at the conclusion without much difficulty that these demands of the pursuer are untenable. The only point on which I did have some hesitation was this matter of the crane, because I could imagine that it might have been averred in such a way as at least to admit the pursuer to proof that the crane was really of the essence of a siding just as much as points and rails are. But I am satisfied that no averment of that sort is made. On the contrary, according to the pursuer's own statement, the demand for a crane is only a recent demand, and is based upon the fact that a different class of traffic is now going to the siding. I think when one considers the merits of the matter, apart from the mere question of how the pursuer should frame his pleadings, one comes to the same conclusion, because one can see well enough that the necessity of putting a crane at the siding must really depend on the class of traffic that the siding usually has. In other words, it ranks with other things among the category of facilities. I am therefore not surprised that it has been decided by the Railway Commissioners that undoubtedly a crane is a facility which, upon a proper case being stated to them, they would order the Railway Company to provide.

I confess also that I am fortified in the result which I have reached when I look to what the Lord Ordinary says he expects the proof which he has ordered to do for him. He says he thinks there should be a proof to show (first) what construction the parties themselves put upon the agreements as shown by the past working of the siding, and (second) for what kind of traffic and to what extent it is reasonable that the defenders should provide facilities at the siding in question. I think it is out of the question that an agreement of that kind could be expiscated by the doctrine of *contemporanea expositio*—a doctrine which applies to quite a different kind of case. Supposing your Lordships had proof and were told the various things which in the past the Railway Company had done at this siding, what is there, or could there be, to show to what that has reference? To say that it is necessarily referable to the agreement in question begs the question, because it may be equally referable to the fact that the Railway Company for their own profit would be inclined to encourage traffic and might do whatever they chose for the convenience of the public who use the siding. Then as regards the second point —a question of facilities pure and simple —that is a demand for facilities, and is a demand which I do not say this Court could not make good if provision for it were made in the contract, but which undoubtedly, unless contained in a contract, is dependant on the general law, and that general law as it stands at present has made the proper tribunal for that the Railway Commission.

For these reasons I am of opinion that we should recal the Lord Ordinary's interlocutor and dismiss the action, because I think, on the proper construction of this agreement, the pursuer has got a siding in full efficiency, and that so far as he may not have all proper facilities he cannot make application to the Court unless these facilities are found in a contract, his proper application being to the Railway Commissioners.

LORD ADAM and LORD M'LAREN concurred.

LORD KINNEAR—I am of the same opinion. I think the interlocutor is right in so far as it repels the first and second pleas-in-law for the defenders, because these are pleas to jurisdiction and competency. We have heard nothing at all, so far as I recollect, against the competency of the action, and as to jurisdiction I can see no room for doubt that this Court has jurisdiction to entertain an action for specific implement of the contract between Mr Kennedy and the Railway Company; and indeed, if the

Railway Company proposed to abandon the siding contrary to the contract, it is probably this Court alone that could enforce their obligation to maintain it. But then the defenders have no intention of giving up the siding; on the contrary, they say that they have maintained and are maintaining it, and are now regularly working it according to their own conception of the requirements of their traffic. In these circumstances, it appears to me that the first declaratory conclusion of the summons, although in itself it may be sound enough, is unnecessary, and would be futile unless it could be followed by an operative decree in terms of the remaining conclusions, and therefore that the question comes to be whether the specific demands which are made in the remaining conclusions are or are not within the contract.

It is an action upon contract, and upon contract alone. The contract is to maintain and uphold a siding in full efficiency, and by virtue of this obligation the pursuer maintains that the company are bound to maintain a staff of servants for the dispatch and receipt of traffic during business hours on every lawful day, and that they are bound to supply what is called a "sundries" waggon for the transmission of all parcels of merchandise and goods, and especially all parcels of small size or weight, and that they are bound to station at least one of their servants at the siding for the receipt and discharge of traffic during the hours from 8 a.m. to 9 a.m., and from 1 p.m. to 2 p.m. on every lawful day, and to erect or provide on a convenient site at said siding a good and sufficient crane, with all the necessary appliances thereof, capable of being used for the discharge of all heavy goods. Now, I am of opinion with your Lordship that all these things are outside the obligation of the Railway Company. They are not within the contract. The contract is to maintain and uphold a siding, and I agree with your Lordship in accepting the authority of Lord Hatherley in the case of *Lytton* v. *Great Northern Railway Company*, 1856, 2 K. & J. 394, that under these words of obligation the railway company is to construct and maintain a material thing, and that the words do not go beyond that obligation and bind them to work the siding, nor for the purpose of working it in a particular manner to provide conveniences which may be very useful for expediting traffic, but, which are not parts of the thing to be constructed. I rather think the Lord Ordinary would have held that that case is in point, and would have followed it were it not for the single ground of distinction which he says is implied in the words "in full efficiency." These words, according to his Lordship, imply an obligation not merely to maintain a siding but to work it in all time in an efficient manner, and therefore enable the pursuer to obtain the specific decrees he asks for if he can show that the things he demands are proper and necessary for the working of the siding. I am, with your Lordship, unable to accede to his Lordship's reasoning as to the meaning of the word efficiency. The learned Judge founds mainly upon what he calls the etymology of the word. I rather think that both in legal and literary construction it has been pointed out that etymology is a very misleading guide in interpretation, and it must be so, because derivative words have different meanings from the primary words from which they are derived. I do not much doubt that the Lord Ordinary's suggestion is perfectly right when he seems to say that the primary meaning of the words "efficient" and "efficiency" imply an operative agency of some kind. But still it appears to me that the real force of the words "in full efficiency" in this contract is simply that the railway siding is to be maintained in a perfectly fit condition for its use as a siding. It is the condition of the siding which is the subject of the contract, and not the method of working the siding after it has been constructed and is being maintained. The words in question do not, in my mind, add any new term to the obligation, but simply draw out what is already involved in it, and I am confirmed in my reading of the contract in that respect when I come to consider what it is that the pursuer demands of the Railway Company as a consequence of his construction—that the Railway Company should bind itself to continue in all time to work this siding as part of its lines whether it is for its advantage to do so or not, and further, that it binds itself in all time to allow a single trader to interfere with its discretion in the management of that part of the line. That seems to me so improbable that we could not force such an obligation upon the company unless it were expressed in perfectly clear words. All these things which the pursuer says he desires may be extremely convenient for the use of that siding or they may not, but the provision for what is called a "sundries" waggon and the provision for the constant attendance, even during the meal hours, of railway servants at the siding, the provision of a crane for heavy traffic—all these things are matters of discretion. They may be extremely desirable where there is a great quantity of traffic being handled, but they may be perfectly unnecessary and useless where there is a small quantity of traffic. That is a matter for the discretion of the company managing its own undertaking, and I should not be prepared to hold that it had abandoned that discretion in favour of a single trader unless there were perfectly clear and explicit words in the contract to that effect. I agree with your Lordship that here there is no relevant case to support the operative conclusion of the summons, and that is probably all that is necessary to say upon the matter.

But then we have heard an argument on a different point as to which I shall advert only for the purpose of saying that I think the question raised is entirely outside the question now before us. The question is whether these are or are not reasonable facilities in the sense of the Railway and Canal Traffic Act. That is not a question

for this Court. It may very well be that notwithstanding the judgment which your Lordship proposes the pursuer may be quite entitled to go to the Railway Commissioners and have these or similar facilities provided for his accommodation at this siding, but that will be if he thinks it necessary to make an application under the Railway and Canal Traffic Act. The law as to the jurisdiction of the Railway Commissioners in such a matter is very clearly brought out in the case cited to us at the bar—*Darlaster Local Board* v. *London and North Western Railway Company*, [1894] 2 Q.B. 694, and by Lord Selborne in the Hastings case, 6 Q.B.D. 586—that a railway company is in general under no obligation to establish a station or I presume a siding at any particular place unless it thinks fit to do so, but when a company has in fact opened a siding at a particular place on its railway and used it for the purposes of traffic it is bound to afford at that siding to the best of its powers all reasonable facilities for receiving, forwarding, and delivering goods, and if anybody having a title to complain thinks that such reasonable facilities are not afforded he may go to the Railway Commissioners. Now, the defenders admit that they have a siding at this part of their line; and the pursuer may have a title to maintain that so long as they keep it open for traffic they must provide him with the facilities he claims. But that is not a question which arises for our consideration in this action at all. I cannot agree with the Lord Ordinary in thinking that the case of the *Barry Railway Company*, L.R. 1895, 1 Ch. D. 128, which he cites, is in point on the present matter at all, because that was a decision on the construction of a particular section in a special Act of a railway company, and the decision of the Court was that by the terms of a particular clause in the Act the jurisdiction of the ordinary courts of the country to entertain a suit for injunction and damages was not ousted, even although under another clause in the same Act the party complaining might have gone to the Railway Commissioners as arbitrators. That has nothing to do with the question which is supposed to be involved in this case. Lord Herschell points out that the ground of judgment does not apply to the question whether the jurisdiction of the Commissioners under the Railway and Canal Traffic Act is exclusive or not, because he points out that where a special tribunal has been created for the disposal of matters which may not at the time be proper subjects for the jurisdiction of the ordinary courts of law there may well be exclusive jurisdiction, although in the particular case there was no such exclusive jurisdiction because the question in dispute was one which the ordinary courts of the country in virtue of their general jurisdiction had power to entertain. That case appears to me to have no bearing upon the point now in dispute. But then I think there is no question of the jurisdiction of this Court at all. The pursuer does not ask that these accommodations should be given to him as facilities under the Railway and Canal Traffic Act. This is an action on contract and nothing else, and that we have jurisdiction to dispose of it seems to me beyond all doubt, and it is in exercise of that jurisdiction that we say the pursuer's construction of the contract is wrong and that he has no right under the contract to compel the Railway Company to provide these accommodations. Whether he may go to the Railway Commissioners to obtain the same things or something like them as facilities is a totally different matter with which we have nothing to do. Therefore I agree with your Lordship that the action should be dismissed.

The Court recalled the Lord Ordinary's interlocutor and dismissed the action.

Counsel for Pursuer and Respondent—Lord Advocate (Scott Dickson, K.C.)—T. B. Morison. Agent—F. J. Martin, W.S.

Counsel for Defenders and Reclaimers—Guthrie, K.C.—Hunter. Agents—John C. Brodie & Sons, W.S.

Wednesday, October 25.

FIRST DIVISION.

[Lord Johnston, Ordinary on the Bills.

GLENDAY *v.* JOHNSTON.

Diligence—Meditatio Fugæ Warrant—Aliment—Arrears of Aliment—Debtors (Scotland) Act 1880 (43 *and* 44 *Vict. c.* 34), *sec.* 4 *—Civil Imprisonment (Scotland) Act* 1882 (45 *and* 46 *Vict. c.* 42), *secs.* 3 *and* 4.

A woman who seventeen years before had given birth to an illegitimate child, presented a petition in the Sheriff Court craving warrant for committing to prison a man against whom she was about to raise an action of filiation and aliment. She had not previously taken any steps to enforce her claim for aliment. The *in meditatione fugæ* warrant having been granted, and imprisonment having followed thereon, *held* in a suspension (1) that the debt in question was not a "sum decerned for aliment" excepted from the operation of section 4 of the Debtors (Scotland) Act 1880, which abolishes imprisonment for debt; (2) that by the Civil Imprisonment (Scotland) Act 1882, sec. 3, imprisonment was no longer a competent diligence even for alimentary debts; (3) that imprisonment on an *in meditatione fugæ* warrant, being merely an ancillary diligence, was therefore here incompetent; and (4) that the note should be passed *simpliciter*.

Cain v. *M'Colm*, May 31, 1892, 19 R. 813, 29 S.L.R. 735, *distinguished*.

Diligence—Meditatio Fugæ—Conformity of Warrant for Imprisonment to Prayer.

The prayer of a petition for imprisonment on an *in meditatione fugæ* warrant craved that the defender should be com-