Argued for the pursuers—It was true that the defender had got a proof, but he had failed in it. It was settled that a general award of expenses covered expenses that were reserved as in this case—*Gardiners* v. *Victoria Estates Company, Limited*, October 27, 1885, 13 R. 80 (*per* Lord President Inglis), 23 S.L.R. 55; *Caledonian Railway Company* v. *Chisholm*, March 19, 1889, 16 R. 622, 26 S.L.R. 489; *Macfie* v. *Blair*, December 12, 1884, 22 S.L.R. 224; *Alston & Orr* v. *Allan*, 1910, S.C. 304, 47 S.L.R. 255. The defender was too late in making the objection. He should have raised the question before the Lord Ordinary, or, at latest, in opening the reclaiming note—*Clark* v. *Sutherland*, March 18, 1897, 24 R. 821, 34 S.L.R. 555. This was a substantive ground for reclaiming, with which the Court could not deal unless it was opened on. *Glasgow and South Western Railway Company* v. *Magistrates of Ayr*, December 21, 1910, 48 S.L.R. 211, and *Lauderdale* v. *Wedderburn*, 1911 S.C. 4, 48 S.L.R. 3, were also referred to.

LORD JUSTICE-CLERK—On the question of general interest argued by counsel I do not think it necessary to express an opinion, having heard Mr Cooper on the merits, and being clear that there is no ground for interfering with the Lord Ordinary's interlocutor. Of course this does not interfere with the ordinary powers of the Auditor as to disallowing certain expenses in certain circumstances should he see ground for doing so.

LORD ARDWALL—Having heard counsel on the merits, I am clear that we should not interfere with the Lord Ordinary's interlocutor.

With regard to the question that was argued to us, viz., whether a party reclaiming must necessarily open upon the question of expenses if he challenge the Lord Ordinary's interlocutor upon that point, even if his decision be right on the merits, I express no opinion. It is unnecessary to do so, as the Court is unanimously of opinion that the pursuer has no valid ground for attacking the Lord Ordinary's finding as to expenses, assuming that it is open to him to do so. If that question came up for decision I confess I should like to reconsider the case of *Clark* v. *Sutherland* (1897), 24 R. 821. In the meantime, however, counsel will do well to comply with the rule laid down in that case and open on the question of expenses, unless they intend to attack the Lord Ordinary's judgment on that point even if they should fail in their attack upon it on the merits.

LORD SALVESEN—I concur with your Lordship in the chair. I see no reason however why, notwithstanding our decision, the Auditor should not deal with the pursuers' account of expenses on the footing that he may consider some part of that account was unnecessarily incurred. I shall only add that I think junior counsel should in the meantime follow the rule laid down in *Clark* v. *Sutherland* (24 R. 821), and open on any separate question of expenses.

LORD DUNDAS was absent when the question of expenses was discussed and advised.

The Court adhered, and found the pursuers entitled to additional expenses.

Counsel for the Pursuers (Respondents)—Morison, K.C.—Hon. W. Watson. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender (Reclaimer)—Cooper, K.C.—Smith Clark. Agents—Cowan & Stewart, W.S.

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*Saturday, January 28.*

## SECOND DIVISION.

## THE SUMMERLEE IRON COMPANY, LIMITED *v.* CALEDONIAN RAILWAY COMPANY.

(Reported *ante*, vol. xlvi, p. 383.)

*Process—Amendment—Act of Sederunt of 20th March 1907, sec. 2 (g)—Different Remedy—Competency.*

The Act of Sederunt of 20th March 1907 provides—Section 2 (*g*)—"It shall be competent for the Court or Lord Ordinary to allow any amendment of the summons or other writ which may be necessary for the purpose of determining in the existing action or proceeding the real question in controversy between the parties, notwithstanding that, in consequence of such amendment, a larger or different remedy than that originally concluded for is thereby sought."

The S. Co., Ltd., brought an action against the Caledonian Railway for declarator that the defenders were bound to make and maintain a level-crossing by railroad or cart across their railway where it passed through the pursuers' lands, and for decree ordaining the defenders to construct and maintain such level-crossing. On 5th February 1909 the Second Division found that the defenders were bound to make and maintain a level-crossing for the pursuers' use, and with this finding continued the cause in order that the matter might be laid before the Board of Trade, and the approval of that Board obtained to the construction by the defenders with a view to its use of the level-crossing in question, together with all such catch-points, signals, stock blocks, or other adjuncts or appliances as the Board of Trade might prescribe as necessary to secure the safety of the public and of the traffic on the railway. On 25th March 1910, Y., an official of the Board of Trade, sent the defenders a report in which he stated that as no safety catch-points had been inserted,

and no other works carried out except a reduction of the gradient of the pursuers' mineral line, the use of the crossing would, owing to the incompleteness of the works, be attended with danger to the public using the railway, and that he was unable to recommend the Board of Trade to sanction its use. He also stated that although the work to which he had referred would reduce the danger, it would not thereby be entirely removed; and further, that he was unable to suggest any means whereby the crossing could be made sufficiently safe to justify him in recommending the Board of Trade to authorise its use. In July 1910 the defenders lodged a minute setting forth what had taken place since the interlocutor of the Second Division, craving the Court to find that inasmuch as the Board of Trade were unable to authorise any level-crossing over the railway for the use of the pursuers, the defenders were under no obligation to construct further works, and to dismiss the action. The pursuers tendered a minute of amendment of their summons, in which they asked leave to add an alternative conclusion for damages, based upon the view that, owing to the attitude of the Board of Trade, they might not be able to obtain specific implement. Their proposed amendment also contained averments in support of this alternative conclusion.

*Held* that the amendment was *competent.*

On 12th December 1904 the Summerlee Iron Company, Limited (formerly the Summerlee and Mossend Iron and Steel Company, Limited), *pursuers*, raised an action against the Caledonian Railway Company, *defenders.*

The following *narrative* of the history of the action and the course of proceedings is taken from the opinion of Lord Salvesen—"The summons in this case was signeted as far back as 12th December 1904, but from various causes which it is not necessary to detail the conclusions which it contains have not yet been disposed of. These conclusions were, briefly, for declarator that the defenders were bound to make and maintain at their own expense a level-crossing across their railway where it passes through the pursuers' land, so as to afford the pursuers access from the ground belonging to them on either side of the railway to the other side, and for decree ordaining them to construct such crossing at a given point. On record the defenders professed their willingness to construct the level-crossing; but questions arose as to the nature of the crossing which they had undertaken to make, and as to their liability for the expense of connecting the crossing with the pursuers' line of railway. In June 1905 Lord Low found that the defenders were bound to make and maintain a level-crossing for the pursuers' use, and appointed the defenders to lodge a minute stating what steps they proposed to take for its construction, and at what date they proposed to commence the work of construction. Great delay took place, until the matter came before myself as Lord Ordinary (Lord Low having in the meantime become a Judge of the Second Division) in the beginning of 1908, when I pronounced an interlocutor decerning the defenders to complete the level-crossing, which had by that time been partially constructed, so as to make it available as a connection between the lines of railway constructed by the pursuers on their own lands on each side of the defenders' railway. That interlocutor was brought under review of the Second Division, who on 5th February 1909 recalled it, but reaffirmed the interlocutor of Lord Low, with the additional finding that the defenders were bound to construct such catch-points, signals, stop-blocks, or other adjuncts or appliances as the Board of Trade might prescribe as necessary to secure the safety of the public and of the traffic on the railway, whether such crossing required to be constructed on the defenders' own land or on land belonging to the pursuers. With this finding the case was continued, in order that the matter might be laid by the parties before the Board of Trade and the approval of that Board obtained with all reasonable despatch to the construction by the defenders, with a view to its use, of the level-crossing in question.

"Up to this point parties proceeded on the footing that the Board of Trade's sanction would be obtained provided the appliances which they deemed necessary for the safety of the public were duly constructed.

"Following on this interlocutor, parties proceeded to adjust plans with a view to laying them before the Board of Trade, and a long correspondence followed, with the result that on 25th March 1910 a Mr Marwood on behalf of that body addressed a letter to the defenders enclosing a report made to them by Colonel Yorke, one of their officials, and directing the defenders to postpone the opening of the crossing in question for a period of one calendar month from that date. In the report Colonel Yorke stated that the level-crossing was practically in the same condition as described in the report which he had issued on 28th February 1909; that no safety catch-points had been inserted on the mineral line, and no other works had been carried out except a reduction of the gradient of the pursuers' mineral line, which had been effected at their expense. Accordingly he stated his opinion that owing to the incompleteness of the works the use of the level-crossing would be attended with danger to the public using the railway of which the said level-crossing was a part, and that he was unable to recommend the Board of Trade to sanction its use. So far this new report was on the lines of the previous report referred to. Colonel Yorke, however, added that although the work to which he referred would reduce the danger it would not be

entirely removed, and that he was unable to suggest any means whereby the crossing could be made sufficiently safe to justify him in recommending the Board of Trade to authorise its use.

"It is unfortunate that this suggestion should have been made so late in the day, after much expense had been incurred by both parties in constructing the crossing so as to satisfy the requirements of the Board of Trade; but as that body is quite autocratic and irresponsible the parties recognised the statement of the Board's attitude as introducing a new and serious element into the case. The defenders conceived that it entitled them to have the action dismissed; and they lodged a minute in July 1910 which set forth what had taken place after the date of the interlocutor of the Second Division, and concluded with a crave that the Court should find that the defenders were under no obligation to construct further works, and to dismiss the action. This minute was answered by the pursuers at the time; but when the case was put out for discussion they tendered a minute of amendment of their original summons, in which they asked leave to add an alternative conclusion for damages, based upon the view that owing to the attitude of the Board of Trade they might not be in a position to ask the Court to grant a decree for specific implement. The remainder of the proposed amendment consists of averments in support of this alternative conclusion. Answers were lodged on behalf of the defenders, and the pursuers have amplified their averments in view of these answers. The defenders now maintain that we should refuse to allow the record to be amended in the manner proposed, because (1) such an amendment is incompetent, (2) assuming its competency, the Court in the exercise of their discretion should not in the circumstances allow it to be made, but should dispose of the action as originally framed."

Argued for pursuers—If the defenders took up the position that owing to the action of the Board of Trade they could not make a level-crossing for the pursuers' use, the whole complexion of the case was altered; it would or might be impossible to enforce the decree of specific implement —*Stewart* v. *Kennedy*, February 17, 1890, 17 R. (H.L.) 1 (Lord Chancellor at p. 5 and Lord Watson at p. 10), 27 S.L.R. 469. The pursuers were accordingly entitled to add a conclusion for damages. They could raise a supplementary action, but the Act of Sederunt of 20th March 1907 was passed in order to obviate, *inter alia*, the necessity for bringing supplementary actions. The remedy now sought was undoubtedly different, but section 2 (*g*) of the Act of Sederunt made it competent. The amendment was necessary for the purpose of determining the real question between the parties, which was as to the right of the pursuers to obtain the declarator. The conclusion for specific implement was merely executory thereto.

Argued for defenders—The amendment was incompetent. The pursuers could not convert the action from one of specific implement into an action of damages when they found they were unable to obtain implement. Section 2 (*g*) of the Act of Sederunt of 20th March 1907 (*sup. cit.*) did not help the pursuers. It was not necessary for the determination of the real question—which was whether the pursuers were entitled to get specific implement of an admitted obligation—to have a conclusion for damages. The Act of Sederunt did not allow a party to make a pecuniary action out of one which was not pecuniary. The Act of Sederunt altered well-established procedure. The canon of construction that fell to be applied to it was therefore a strict one.

At advising—

LORD SALVESEN—[*After narrating the facts*]—In my opinion the question whether the amendment is competent depends upon section 2 (sub-section *g*) of the Act of Sederunt of 20th March 1907. It is in these terms—". . . [*quotes, v. sup. in rubric*] . . ." The defenders contend that it is not necessary for the purpose of determining the real question in this case—which they say is whether the pursuers are entitled to get specific implement of an admitted obligation—to have an alternative conclusion for damages based upon the view that specific implement cannot now be obtained. I do not agree with this view. I think the real question in controversy is as to the right of the pursuers to obtain declarator in terms of the first conclusion of the action, to which the other conclusion is merely executory; and that what the pursuers are now seeking is to amend the summons by asking a remedy different from that originally concluded for. It is quite obvious to my mind that if the pursuers had for a moment anticipated that a decree for specific implement could not be granted, they would originally have sought the alternative remedy which they now ask leave to add. But neither the attitude of the defenders at first, nor the attitude of the Board of Trade until the report of 25th March was issued, indicated any ground why a decree for specific implement should not be obtained. One is quite familiar, in other cases, where a decree is asked for implement of a contractual obligation, and where the pursuers recognise that the defenders may have disabled themselves from giving such implement, that conclusions for damages are inserted to provide against such a contingency. On the other hand, there may be cases where the impossibility, or the inexpediency, of the Court granting a decree for specific implement may only emerge during the dependence of the action; and I think it would be unfortunate if we were to construe the section I have quoted as making it incompetent for the pursuers in such a case to amend so as to obtain the only remedy which would then be open. I see nothing in the section which gives any countenance to such a view; on the contrary, the section itself

bears that a different remedy may be concluded for, and that the record may be amended so as to permit the Court to give effect to it. I am, therefore, clearly of opinion that it is within our competence to allow the amendment proposed.

(2) The next question is, whether it is expedient in the circumstances of this case to allow the amendment. I think it is so, in the interests of both parties. At first sight it would seem somewhat late in the day, after six years' litigation, to allow such an amendment, but this would be a very superficial view to take. The case, so far as I can judge, would have taken precisely the same course as it has done although the alternative conclusion now sought to be added to the summons had been there from the first. The pursuers desire specific implement if they can obtain it. The defenders profess their willingness to give specific implement; and all the procedure that has hitherto taken place has been with the view of defining the rights of parties with regard to the obligation on which the declaratory conclusion is founded. The question whether a decree for specific implement can yet be given has not been finally decided; although now for the first time it appears that this may be ultimately impossible should the Board of Trade's adviser adhere to the views expressed in his reports and the Board feel themselves constrained to act upon his advice. I think it would be unfortunate if we thought ourselves compelled to decern the defenders to execute works, at a cost of £800 or thereby, in order merely to see whether the execution of such works might affect the mind of Colonel Yorke, when he has already indicated that it would not do so. On the other hand, it does not in the least follow that the only remedy which the pursuers have is one of specific implement; and if so it is desirable that that question should be determined in the present process, rather than that a new litigation should be started which would inevitably involve much additional delay and expense. I think therefore we should exercise our discretion by allowing the amendment to be added to the record.

[*His Lordship then dealt with a point on which the case is not reported.*]

LORD ARDWALL—I consider the question whether the proposed amendment of the record, including the summons, should be allowed is mainly one of expediency, and I confess I have had difficulty in coming to a conclusion satisfactory to myself upon that matter. At first I was disposed to think that it would be well to get the case for specific implement disposed of by itself, and then the Court would be in a position to judge whether, looking to the causes which rendered specific implement impossible, the pursuers had or had not a good claim of damages against the defenders in a fresh action of damages. On the other hand, however, I recognise that it is perfectly possible that the keeping separate in two actions of the alternative remedies of specific implement and damages, especially if a proof were to be required with regard to each of them, might lead to considerable difficulties in the conduct of the proof, and also to considerable expense.

On the whole matter, therefore, and seeing that after the summons as amended will merely be brought into the shape which it would originally have taken had the pursuers contemplated the impossibility of obtaining specific implement, I am not disposed to differ from your Lordships in the course proposed.

I may add that upon the competency of the amendment I agree with the view taken by my brother Lord Salvesen.

The LORD JUSTICE-CLERK concurred.

LORD DUNDAS was absent.

The Court allowed the record to be amended in terms of the minutes for the parties, and allowed them a proof of their respective averments so far as bearing on the alternative conclusion of damages.

Counsel for Pursuers—Morison, K.C.—Ramsay—Macmillan. Agents—Webster, Will, & Company, W.S.

Counsel for Defenders—Clyde, K.C.—Cooper, K.C. — King. Agents — Hope, Todd, & Kirk, W.S.

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*Friday, February* 10.

## SECOND DIVISION.

[Lord Cullen, Ordinary.

## CALEDONIAN RAILWAY COMPANY *v.* SYMINGTON AND OTHERS.

*Railway—Mines and Minerals—Freestone—Railways Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 33), *sec.* 70.

The lessee of the freestone in an estate through which a railway passed claimed right to work the freestone under the railway line as being excepted from the grant to the company under section 70 of the Railways Clauses Consolidation (Scotland) Act 1845. He averred—(1) "The said freestone rock does not form the substratum of the soil and is not the common rock of the district in which the respondent's quarry is situated. On the contrary, it is a fine red sandstone of exceptional character both in point of evenness of grain and composition. Besides being adapted for the finest kinds of building work, it is specially suitable for use in the form of grindstones and for many other commercial purposes for which ordinary or common sandstone is unsuitable. It is thus of great commercial value." And (2)—"Such rock as that here in question was at that time" (1852, the date when the company acquired the subjects) "universally recognised and admitted in the mining and commercial world and by all