volved (and I say "necessarily" deliberately) the creation of this nuisance, and that in fact the statute has, if not expressly, yet impliedly, authorised the nuisance. I do not think that that is made out in this case, and I do not think there are any grounds whatever by which the respondents can maintain that the operations which I have held to be a nuisance were sanctioned or permitted by their Acts.

The respondents point to the analogy of what is done in other towns, and evidence upon this point seems to have impressed the Lord Ordinary. But I think it is impossible to read the evidence of Mr Young as to what is done in Glasgow, and of Mr Pitcairn as to how the streets are cleared in Edinburgh, without coming to the conclusion that the analogy is entirely against the respondents, and not in their favour. I observe that in Mr Young's evidence he says—"We all knew what to do, and did it." It seems to me that that is exactly what did not take place at Aberdeen. And I observe that Mr Pitcairn says—"We exercise more care now than we used to do." Well, perhaps the experience of the past, and the knowledge of what has been done in Edinburgh, may have a salutary effect in Aberdeen in the future.

Now, the Lord Ordinary and the Inner House seem to have thought that the case might be regarded for this purpose as if the Town Council had been the defenders or respondents. Indeed, the Lord Advocate and his learned junior, Sir Robert Reid, argued before us that the defenders were, in the operations complained of, agents of the Town Council, and that they acted by their authority. Now, I agree generally with the Lord Justice-Clerk's observations as to the amount of latitude and consideration to be shown to a public body entrusted with the duty of clearing the streets. They are entitled to exercise their discretion as to the time, the order, and the means to be employed, and if they are supine in the exercise of their power, that is primarily a question to be considered by those who elect them to act on behalf of the community. But the defenders are not the Town Council, and in my opinion they have wholly failed to show any ground upon which they can shelter themselves under the powers and immunities of that body. I need not refer again to the minutes of the Town Council, or to the correspondence which passed between them and the Tramway Company, which have been referred to by my noble and learned friend opposite (Lord Watson), but the effect left upon my mind is, that so far from acting under the authority of the Town Council, the Town Council, wisely perhaps, left them to fight their own action in the best way they could, and beyond permitting some of their body to give evidence (I should not have thought that permission was wanted to enable persons to speak the truth), I do not see that they interfered at all or intended to make themselves in any way responsible for the defence.

In this state of things, if it were merely a temporary interference with the highway which came to an end with the state of circumstances which occasioned it, and if there were no claim of right to do the acts complained of, your Lordships would not probably think it was a case for granting an interdict, but by their fourth plea-in-law the respondents claim a statutory authority for their operations, and therefore I am of opinion that the appellant is entitled to the interdict he asks for; but as it is quite possible that salt may be used for the purpose of clearing snow from the tramway (which cannot be easily cleared by any other means) without occasioning a nuisance, I think the interdict should be in the qualified form proposed by your Lordships.

Ordered that the interlocutors appealed from be reversed, and that it be found and declared that the appellant (complainer) is entitled to have the respondents, the Aberdeen District Tramways Company, interdicted, prohibited, and discharged from removing snow from their tramway lines in the Great Western Road, Holburn Street, Union Street, and George Street, in the city of Aberdeen, and from scattering salt thereon in the manner hitherto practised by them, to the nuisance of the apellant and of the public using said streets for the purpose of traffic with horses, and that the cause be remitted to the Second Division of the Court to pronounce decree of interdict to the effect foresaid, and to find the appellant (complainer) entitled to the expenses of process hitherto incurred by him in the Court of Session, and that the respondent is liable to the appellant in his costs of this appeal.

Counsel for the Appellant—The Dean of Faculty — Haldane, Q.C. — Abel. Agents —Grahames, Currey, & Spens, for Auld & Macdonald, W.S.

Counsel for the Respondents—The Lord Advocate, Sir Robert Reid, Q.C. — Dove Wilson. Agents — Martin & Leslie, for Morton, Neilson, & Smart, W.S.

Tuesday, December 15.

(Before the Lord Chancellor (Halsbury), Lord Watson, Lord Shand, and Lord Davey.)

M'NAB *v.* ROBERTSON AND OTHERS (CAMPBELL'S TRUSTEES).

(*Ante* March 11, 1896, vol. xxxiii. p. 497, and 23 R. 1098).

River — Lease — Grant of Ponds and "Streams leading thereto"—Water Percolating through Soil—Implied Obligation not to Divert Water.

A lease of a distillery included certain lands and two ponds, "together with the right to the water in the said ponds and in the streams leading thereto."

Held (*affirming* the judgment of the Second Division, the Lord Chancellor *dissenting*) that water percolating

through marshy ground into the ponds was not included in the expression "streams leading thereto," and that, assuming the lessors to be under an implied obligation not to diminish the supply of water in the ponds, the *onus* of proving that a diminution had resulted from operations of the lessors lay upon the lessee, and had not been discharged.

Opinions reserved (by Lord Watson and Lord Davey) whether such an implied obligation could be held to exist where certain sources of supply to the pond are specified and let.

Opinion (by Lord Shand) that such an obligation was to be implied.

The case is reported *ante ut supra.*

The complainers appealed.

At delivering judgment—

LORD WATSON—The first question which it is necessary to consider in this appeal is, whether the spring which the respondents have impounded by means of a tank was at the date of the lease connected with the lower pond by a flow of water constituting a stream or streams within the meaning of the lease? If it were, there would not appear to me to be any room for doubting that the operations of which the appellant complains have encroached upon his legal rights as tenant.

According to my apprehension the word "stream," in its primary and natural sense, denotes a body of water having as such body a continuous flow in one direction. It is frequently used to signify running water at places where its flow is rapid, as distinguished from its sluggish current in other places. I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface, but in my opinion water, whether falling from the sky or escaping from a spring which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata until it issues from them at a lower level through dislocation of the strata or otherwise, cannot with any propriety be described as a stream. And I may add that the insertion of a common rubble or other agricultural drain in these strata, while it tends to accelerate percolation does not constitute a stream as I understand that expression.

The spring in question, which is a very small one, is situated at a short distance from and above the level of the lower pond. There is little evidence, and that neither explicit nor altogether satisfactory, in regard to the condition of the spring and its effluents at and before the granting of the lease in September 1889. Most of the witnesses speak to their condition after the operations of the agricultural tenant, which were subsequent to that date, and before the year 1892. But I am satisfied, upon the proof, that whilst a small proportion of the water escaping from the spring may have gone in another direction, the bulk of its water must have gravitated towards the pond, and that a considerable proportion of it must ultimately have found its way into the pond.

Galbraith, the agricultural tenant, describes the land between the spring and the pond before he commenced his operations, as a marsh which did not come quite close up to the side of the pond. He, in order to dry the soil, put a drain into the marshy part, which he continued, by means of an iron pipe three furlongs, to a tub sunk on the edge of the pond, from which he drew water for domestic use, and the overflow from which went into the pond. Lawson, who was assistant factor for the estate of Garscube at the date of the lease, describes the intervening land as "soft spongy ground," and there are other witnesses who describe the water as "seeping" from the adjacent land into the pond—a Scotch expression equivalent too "oozing—which is an accurate description if applied to the escape of percolating water from the strata through which it has passed, and is to my mind altogether inconsistent with its running in a stream. Boyne, one of the appellant's witnesses, no doubt says that there was a sort of channel formed by the water from the spring, but he is the only person who appears to have detected it, and the bulk of the evidence upon the point, as well as the natural inference to be derived from facts established *aliunde* alike lead me to the conclusion that until the time of Galbraith's operation the water of the spring reached the pond by the natural process of percolation, and that no part of the supply derived from the spring flowed in a body which could with any degree of accuracy be described as a stream.

I therefore differ in opinion from the Lord Ordinary, who came to the conclusion that the spring in question was one of the subjects specifically let to the appellant. Had I been able to arrive at that result, I should not have thought it necessary to consider whether by interfering with the spring the respondents had injured the appellant's water supply. In that case every drop of water which they took from the spring otherwise than in the due exercise of their reserved right in connection with farm purposes would have been an illegal diminution of the supply secured to the appellant by the terms of his lease.

The result of my opinion, so far as hitherto expressed, is, that the waters of the spring in question were not demised to the appellant subject to a reservation permitting a certain user of them to agricultural tenants, but remained with the respondents under their title as proprietors. The appellant, upon that view of the case, maintained alternatively that the respondents are under a contractual obligation to allow as much of the water of the unlet sources from which the pond is fed to continue to enter it as may be equivalent to the average of the water supply derived from these sources at the date of the lease; and in aid of that contention he relied upon the general principle of law that the grantor of a right cannot himself do anything in derogation of his own grant. The applica-

tion of that principle must depend upon the extent of the right which the tenant got under his lease, whether by demise or by contract. I see no reason to doubt that such a contract right as the appellant alternatively claims, seeing it may be the subject of express stipulation, may also be derived by reasonable implication from the terms of the lease. But any such implication is attended with difficulty in cases like the present, where certain sources of supply are specified and let. I am not prepared to affirm that a contract to the effect pleaded is implied in the stipulations of the lease of of 1889; but I am willing, for the purposes of this appeal, to assume its existence. Upon that assumption it is incumbent upon the appellant to establish that the result of the respondent's operations has been to diminish the supply of water now finding its way from the spring into the pond, as compared with the supply which came from the same source at and before the date of the lease.

I think the necessary effect of Galbraith, the agricultural tenant's, operations, which were subsequent to the granting of the lease, was to convey the water of the spring more rapidly and more directly to the pond, and to prevent its dissipation in the soil or its evaporation. If so, their tendency would necessarily be to increase and not to lessen the quantity of water reaching the pond from the spring. The immediate effect of the respondent's operation which followed, was to collect, as soon as they came to the surface, the whole waters issuing from the spring, including a proportion of them which had not previously gravitated towards the pond, and to make them available for transmission in undiminished volume. 'The water collected in the tank serves, in the first place, to supply a pipe, which is not used for agricultural purposes, and the remainder is directly conveyed by another pipe to the tub sunk by Galbraith, through which the water of the spring previously entered the pond. A comparison between the quantity of water which now runs over the tub and that which previously escaped from it must therefore afford the means of ascertaining whether there has been a diminution of the supply since the arrangement made by Galbraith was superseded.

The whole evidence which bears on the alleged diminution in the amount of the spring water which now enters the pond, as well as on the amount which entered it before the lease was granted, is, it may be necessarily, somewhat vague. In considering that evidence, it is, in my opinion, not immaterial to keep in view the fact that in the time of his predecessors the weekly output of the distillery never exceeded 1300 gallons of whisky, whereas during the tenancy of the appellant it was increased to about 1700 gallons, which represents an addition of about 30 per cent. to the quantity of water used for distillery purposes at the date of the lease. I have also to observe that the scarcity of water in such an exceptional season as that of the year 1894 cannot throw much, if any, light upon the average quantity derived from the spring at and before the date of the lease, a question which, in the absence of more reliable *data*, can, in my opinion, best be solved by ascertaining whether or not the overflow from the tub has been sensibly diminished since and by reason of the respondent's operations. Upon that point there is conflicting evidence, but, on the whole, I prefer the testimony which is favourable to the respondents, and, in any view, I have no difficulty in holding that the appellant has failed to prove diminution.

For these reasons I am of opinion that the interlocutor appealed from ought to be affirmed and the appeal dismissed with costs.

LORD SHAND—I am also of opinion that this appeal fails and should be disallowed; and I agree with my noble and learned friend who has first spoken, in thinking that the water of the spring in question, which rises at a comparatively short distance from the pond to which the tenant has a right, was not within the subjects which were let or demised by the lease. At the date of the lease, and before the operations—either of the tenant in making a short drain through the ground, or of the landlord at a later period—that water oozed or trickled from the spring into the ground between it and the pond, and it lay in that marshy and spongy ground which was afterwards by drainage made of some use for agricultural purposes. It did not, I think, flow, in any proper sense of the term, towards the pond. The witnesses, speaking in Scotch terms, talk of it as water which "siped" or "seeped" down towards the pond, and in Jamieson's Dictionary these words are thus described—"Siping or seeping means to ooze or distil very gently, as liquids do through a cask which is not quite tight." It being the fact that the water merely oozed or percolated towards the pond through ground of that character, I turn to the lease to see whether such water was demised or let. The only words which are used in the lease are to be found in the print. What is there demised is the distillery as described, and the two ponds specially mentioned, together with "right to the water in the said ponds and in the streams leading thereto." The subjects of the lease appear to me, therefore, to be distinctly defined as being the water in the ponds and the water in the streams leading thereto. I am of opinion that water of the character I have just described cannot be regarded as water in any stream leading to the pond. I think that the term "streams" necessarily means flowing water, and not water which oozes from a piece of marshy ground, and that unless water flows more or less in a continuous channel, and continuously, it cannot be described as water that flows in "streams" leading to the ponds, and consequently that the water of this particular spring was not included as a subject let to the tenant.

There remains, however, the question whether, although the water is not included

in the grant, there is not from the whole terms of the lease an implied obligation on the landlords that they shall not withdraw water which would naturally find its way into the ponds or streams to an extent which would diminish the supply as it was at the time when the lease was granted, and I am disposed to hold that there is such an obligation implied. In the first place, the purpose of the lease is the working of a distillery, which, of course, without a proper supply of water could not be carried on. In the next place, the ponds and streams are themselves directly leased; and in addition we find, in the print, there is an obligation on the landlord to "maintain the subjects hereby let, with the sluices, water supply, roads, and fences." It appears to me that although the water in question is not directly conveyed, there is an obligation here on the part of the landlords that they will not in any way diminish the water supply.

But assuming such an obligation to exist, this differs very materially in its legal effect from a lease in which the water itself is let. I agree in thinking, as the Lord Ordinary (Lord Low) says, that "if the water of the spring was part of the subjects let to the complainer *prima facie*, the respondents were not entitled to interfere with it in spite of the complainer's remonstrances, and the *onus* lies with them to show that the complainer has not been prejudiced by their operations." But if the water is not so let, the position of the parties is different. It then follows that the tenant is only entitled to complain, and to have a remedy if he is able to prove that the landlords have diminished the water supply. This raises a question of fact for the consideration of the House, and in that question it appears to me that while the *onus* would have been upon the landlords if the case would have been one in which they had demised the water, the *onus* is on the tenant in the case in which he has to found on an obligation not to diminish the water supply. It lies on the tenant to prove that the water supply has been diminished. On that question I agree with my noble and learned friend that the tenant has failed to establish this averment.

I observe that the Lord Ordinary, in the elaborate judgment which he has delivered, has examined with great care, and even minuteness, the evidence upon this subject, and in the result he is unable to say that there was any decrease of the supply of water to the distillery. His Lordship, after going in detail over the statements made by the different witnesses, and expressing his views as to the weight to be attached to them, concludes in these terms—"The question upon the evidence is very narrow, but I have come to the conclusion that the respondents have failed to prove that by interfering with the spring they have not injured the complainers' water supply." He was then looking at the question with the *onus* lying upon the landlords according to his view, and all that he is able to say in the result is, not that there has been any diminution of the water, but that the landlords have failed to prove that by interfering with the spring they had not injured the water supply.

There are several considerations which are material upon the question of fact which I am now considering. In the first place, I think it is to be kept in view that by the recent operations of the landlord which formed the occasion for interdict being applied for, there was a material addition made to the water that was turned towards the pond. From one spring which was close to the pond the water, in so far as it did not remain in the intervening marshy ground, found its way to the pond, but there were smaller springs surrounding it, the water from which certainly did not find its way in that direction, but in a totally different direction—in the direction of the blacksmith's house, which is referred to in the proceedings. I am satisfied upon the evidence that there was a material addition made to the water sent towards the pond by the landlord's operations, for he included the springs to which I now refer. These were caught and enclosed with puddle so as to send the water towards the pond.

There is no doubt a conflict of evidence as to the effect which the tank or cistern and pipe put in by the landlord had, but it appears to me that the weight of this evidence is with the landlords rather than with the tenant; at all events, I am satisfied that there is not proof on the part of the tenant sufficient to show that there was a diminution of the water supply as the effect of the tank and pipe.

I agree with my noble and learned friend in thinking that it is also not unimportant to observe that the operations of the distillery have been largely growing in recent years, requiring therefore a greater supply of water than was previously necessary. That circumstance may have induced some of those who were connected with the distillery to think that the water supply was somewhat diminished, when the truth rather was that it was the distillery demands which were increased. I also agree in thinking that one cannot judge with any safety of the result of these operations from taking a very dry season such as that of 1894, as a test for examination, and on the whole I agree in thinking that the appellant has failed to prove that his water supply, as it was at the date of the lease, has been diminished by the landlord's operations.

LORD DAVEY—I am also of opinion that the interlocutor of the Inner House should be affirmed.

The subjects demised are the distillery of Tambowie, together with certain cottages and lands, and with the two ponds numbered 140 and 134 on the Ordnance map, "together with rights to the water in the said ponds and in the stream leading thereto." The first question is the construction of the lease. It appears that the land between the spring in question in this appeal and the lower pond was land demised to the distillery, and at the date of the lease it was just a marsh through which

the water from the spring soaked and percolated, and some of it no doubt ultimately found its way into the pond. But the water did not flow in any defined or visible channel. The appellant contends that all the sources of supply to the pond, and, if I understand his counsel rightly, all the water which if left to itself would by gravitation find its way into the pond, are within the subjects demised. And the Lord Ordinary by his interlocutor found that the water of the spring was a stream leading into the pond within the meaning of the lease, although the said water did not flow into the pond by any definite or visible channel but by percolation through marshy ground. I find myself unable to agree with the construction put upon the words of the lease by the Lord Ordinary. I think that the word "streams" in the lease is used in its ordinary signification—its dictionary sense—and means a rivulet or course of running water, and that neither the spring nor the water soaking or percolating through the marshy ground can with propriety be termed a "stream." I find no context in this instrument to induce me to put what I consider an unusual and inaccurate meaning upon that word. I agree with the opinion of Lord Trayner on this point.

But the lease contains a clause of warrandice against the facts and deeds of the lessors, and the appellant also relies on the well-known maxim, that a grantor may not derogate from his own grant. Like my noble friend opposite, I have a difficulty in holding that when certain feeders or sources of supply are expressly granted, the operation of the lease can be extended so as to impose an additional burden or servitude on the grantor. But I will assume without deciding that there is in the present case an implied covenant that the lessors will not by their facts and deeds diminish the quantities of water in the streams or ponds, which I think is the most favourable way of stating the case for the appellant. Of course if the spring and the water from it is in the demise it is no defence to say, "We give you other water in compensation and have not on the whole diminished your supply." The lessors in that hypothesis have no right to touch the spring at all. But if the rights of the appellant are in contract or implied covenant the situation is entirely different. The burden is in that case upon him to prove breach of the covenant, or, in other words, to prove that he has suffered a material loss of water by the operations of the respondents. If the Lord Ordinary had thought that the burden of proof was on the appellant I am not sure that he would have found in his favour on this point. But however that may be, I agree with Lord Young in the Court below, and with your Lordships who have already addressed the House, that on the evidence it is not proved that the respondents by their operations have diminished the water in the streams or ponds; and I agree with the interlocutor pronounced in the Inner House, and think the appeal should be dismissed with costs.

The LORD CHANCELLOR—I regret to say I am unable to concur in the opinion which the majority of your Lordships entertain. I agree with the Lord Ordinary that "by the lease two ponds are let to the tenant, 'together with right to the water in said ponds and in the streams leading thereto.'" That the learned Judge says in his opinion "includes as between lessor and lessee all the sources of supply of the ponds," and I am of that opinion. I think that the demise of the pond and all streams leading thereto was intended to convey, and did convey, all sources of supply. Though it be true that the word "stream" in its more usual application does point to a definite stream within defined banks, I do not think it is confined to that meaning. We speak of a stream of tears flowing from the eyes, and we speak of blood streaming from a vein—I think we may well speak of "streams" in the plural as meaning water passing over the superficies of a plane—we may call such a flow of water a stream. I think that the root idea is water in motion from one place to another as distinguished from stagnant water. Each gush of water from this small spring formed a stream whether big or little, and whether under ground or over ground. I cannot think that any sound distinction can be made between the smallest rill which passes over ground or under ground in its being a stream, or a streamlet, or a rill, or other little supply of water coming down, as these sources of supply are alleged to have come down, into the pond. But in this case, in order to get rid of the plural "streams," one has to make two heads of the same stream mean two streams—it is necessary to read the word "streams" in an unnatural sense. There is but one stream in the ordinary sense, and you must read that stream as being two streams, or at least more than one, by taking different parts of the same stream. So far as one can get any light from the nature of the thing, the subject-matter with which the parties were dealing, it appears to me that what the granter intended to convey to the grantee, and what the grantee, who was a distiller, was getting was every source of supply which it was possible to get by general words—it was intended that he should get all the water that could be conveyed to him by any general words.

I confess I think that the pollution by the grantee of the other sources of supply is irrelevant. I think the greater flow of water procured by the granter at other times is irrelevant; and I regret to some extent the decision at which your Lordships have arrived, because I think it will tend to multiply words in every conveyance by the parties in future. If, however, the true construction of the grant be what your Lordships have considered it to be, I should not differ or disagree from what in that case would be the rights of the parties.

Their Lordships dismissed the appeal with costs.

Counsel for the Appellant—The Lord

Advocate—Cozens Hardy, Q.C.—Dundas—Abel. Agents — Flux, Thomson, & Flux, for Gill & Pringle, W.S.

Counsel for the Respondents—Cripps, Q.C. —Macfarlane — C. K. Mackenzie. Agents —Nicholson & Paterson, for Tait & Crichton, W.S.

Thursday, December 17.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Macnaghten, Shand, and Davey.)

THE NORTH BRITISH RAILWAY COMPANY *v.* THE NORTH EASTERN RAILWAY COMPANY.

Railway—Running Powers — Jurisdiction of Railway Commissioners in regard to Regulation of Running Powers.

By article 8 of an agreement between the North Eastern and North British Railway Companies, scheduled to and incorporated with "the North Eastern and Carlisle Amalgamation Act 1862," it is provided:—"For the purpose of maintaining and working in full efficiency in every respect the East Coast route by way of Berwick for all traffic between London and other places in England, and Edinburgh, Leith, Glasgow, and other places in Scotland, the North British Company shall at all times hereafter permit the company (*i.e.* the North Eastern Company), with their engines, carriages, waggons, and trucks, to run over and use the North British Company's railway . . . between Berwick and Edinburgh and Leith, all inclusive . . . subject to the payment by the company to the North British Company for such user, of such tolls, rates, or dues, or such share or proportion of tolls, rates, or dues as have, or has been, or shall from time to time be agreed upon by and between the said companies, or in default of such agreement, as shall be fixed by arbitration in manner hereinafter provided."

The passenger trains upon the East Coast route are made up mainly of carriages which are the joint property of the three companies, and prior to 1869 the North British Company supplied those trains with engines and guards upon its own line. From 1869 to 1894 the engines and guards were provided by the North Eastern Company under an agreement between the companies, terminable on three months' notice, by which a mileage rate for the use of the North Eastern engines was payable by the North British Company.

In 1894 the North British Company raised an action against the North Eastern Company, in which they sought declarator that they were entitled to resume the haulage of the existing service of through trains upon their own line. The defenders maintained that these trains had been run by them as their trains in virtue of their running powers, and that they were not bound to hand them over to the pursuers.

The First Division of the Court of Session *assoilzied* the defenders.

On appeal the House of Lords *reversed* this judgment and *dismissed* the action, holding that neither party had an absolute right to control the through traffic, and that, failing agreement, the regulation of the exercise of the defenders' running powers was a matter for the decision of the Railway Commissioners.

Process—All Parties not Called—Railway—Joint Property.

The railway carriages used upon the East Coast route between London and Edinburgh are the joint property of the three railway companies over whose lines the route passes.

In an action by one of the companies against a second for interdict against the defenders using the carriages for a purpose which the pursuers alleged was inconsistent with the joint ownership—*held* (*affirming* the decision of the First Division) that the action must be dismissed in respect that the third company was not called for their interest.

This was an action at the instance of the North British Railway Company against the North Eastern Railway Company for the purpose of determining the legal rights of the parties under the scheduled agreement cited above in the rubric. The conclusions of the action were as follows:—"(*First*) it ought and should be found and declared, by decree of the Lords of our Council and Session, that the trains from Edinburgh to London, *via* Berwick and York, and to other places south of Berwick, by the railways of the pursuers and defenders and the Great Northern Railway Company, or of the pursuers and defenders, and the trains from London *via* York and Berwick, and from other places south of Berwick, by the said railways, to Edinburgh, have all along hitherto, or otherwise since August 1869, been and are, while on the railway of the pursuers between Edinburgh and Berwick, trains of the pursuers, and not trains run by the defenders in the exercise of the running powers conferred by the articles of agreement made between the defenders and pursuers, of date 14th May 1862, scheduled to and confirmed by the North Eastern and Carlisle Railways Amalgamation Act 1862, or by the agreement made and executed by and between the defenders and pursuers, of date 12th May 1862, or by any Act of Parliament; (*Second*) it ought and should be found and declared, by decree foresaid, that from and after 1st January 1895, or such other date as our said Lords may fix in course of the process to follow hereon, the pursuers are entitled to run between Edinburgh and Berwick, with their own engines and guards, and otherwise as their own trains, the trains shown in the schedule hereto annexed, subject always to such alterations as may from time to time be made by mutual