the summons also concluded to have the ground over which the alleged servitude extended restored to its condition as before the operations of the defenders; and (4) for damages. After the record was closed, the defenders agreed to allow a footpath, and accordingly a remit was made on that point to Mr Wylie, C.E., who reported, and upon whose reports the Court finally proceeded. Issues were then sent to a jury putting the questions whether the pursuer had right to the servitude claimed, and whether the defenders, in the year 1864, had wrongfully interfered with the pursuer's alleged right, and whether they and their contractor, Derrick, had culpably and recklessly blasted rock near the pursuer's property in Tayport, to her loss, injury, and damage.

The jury found for the pursuer on the first issue as to the servitude, assessing the damage at £15 if the interference be continued, and 5s. if the servitude be restored. On the second issue, they found for the pursuer, as against the contractor, and assessed the damage at £20.

On the motion to apply the verdict, various discussions took place, and remits were again made to Mr Wylie.

YOUNG, A. R. CLARK, and GIFFORD for pursuer.

DEAN OF FACULTY (MONCREIFF), N. C. CAMPBELL, and WATSON for defenders.

The LORD PRESIDENT said that the Court were now in a position to dispose finally of the case. The first matter was as to the road claimed by the pursuer, and that formed the subject of the first set of conclusions of the summons of declarator; but, after the record was closed, a minute was lodged for the defenders, to the effect that, with the view of avoiding further litigation as to the road, they were ready to agree that a right of footpath, as in the first conclusion, should be adjusted by the Court. To this the pursuer assented. On this minute and answers a remit was made to Mr Wylie, C.E., how this line should run. He had embodied his opinion in a report which was not quite satisfactory to the pursuer, who accordingly lodged a note of objections. Another remit was made to Mr Wylie, who prepared another report, in which he explained how he thought the footpath should run, and what protection was necessary for those using it. As to the maintenance of the fences, he concluded by saying that he thought the Company should be bound to maintain all the fencing referred to in his report—the gravelling in the slip, and the gangway; but, in respect the public were put in as good a position in regard to the remaining portions of the road as they were before the alteration was made, he did not think the Company could be held liable in their maintenance. There had been no objections to this report, and it seemed to be a very complete and satisfactory disposal of the question as to the road. The result seemed to be, that the arrangement between the parties must be given effect to, and that there should be one road, to be made and completed in terms of Mr Wylie's report. By this arrangement, the pursuer had finally excluded herself from demanding removal of the slip. It was impossible that this road could be executed and maintained without the continuance of the slip; and, therefore, it might be assumed that, whatever remedy the pursuer might otherwise be entitled to as regards the servitude of bleaching, she could not have the slip removed. But, as to the second conclusion of the action, there was the verdict of the jury to deal with, and that must receive effect so far as consistent with the compromise between the parties. Now, as to the important part of the verdict as to the servitude, there was an alternative presented. The jury seemed to have been instructed, or to have supposed, that there was in this summons an alternative conclusion for damages for the loss of this servitude; but this did not seem to be the case. The summons demanded restoration, but the conclusion for damages was not for damages for loss of servitude, but in respect of the operations of the defenders. And the pursuer repudiated the notion of being satisfied with £15, and abandoning her servitude; and, accordingly, in the notice of motion of 18th January last, it was seen what she demanded, and that was complete restoration of the ground, and total removal of the works. For the reasons already stated, that demand could not be complied with to the full extent; but in so far as it could, consistently with the works of the defenders being allowed to remain, judgment ought to be pronounced for the pursuer. He recommended, therefore, as to the second branch of the case, that the ground, so far as not occupied by the works, should be declared, in terms of the verdict, to be subject to the servitude claimed by the pursuer. As to what remained of the case, the verdict against Derrick would be applied, and that would enable the Court to dispose of the whole conclusions of the summons.

The other Judges concurred; and judgment was pronounced accordingly.

Agent for Pursuer—L. Macara, W.S.

Agents for Defenders—J. M. & J. Balfour, W.S.

Friday, June 21.

HAY *v.* NORTH BRITISH RAILWAY COMPANY.

(*Ante* Vol. iii., p. 364.)

Jury Trial—New Trial—Reparation—culpa—*Collision—Malicious Act.* Motion for new trial, on the ground that the verdict was against the evidence, refused. Observations (per Lord President) on defence that the collision was owing to the malicious act of some person or persons unknown.

Athole James Hay, partner of the firm of Bell, Rannie & Co., wine merchants, Leith, sued the North British Railway Company for damages on account of injury sustained by him, on 29th April 1866, in consequence of the train by which he was travelling from Edinburgh to Newcastle coming into collision, a few miles south of Berwick-on-Tweed, with an empty mineral waggon upon the line. The real defenders were the North-Eastern Railway Company, upon whose line the accident happened.

The ground of defence, on the part of the Railway Company, was that the collision in question had not been occasioned, either directly or indirectly, by their fault, or the fault of any one for whom they were responsible. They alleged that the waggon which caused the accident had been removed from the siding in which it had been placed by their servants on the day previous to the accident, intentionally and maliciously, by some person or persons unknown, for whose acts they were not responsible.

The case was tried in April last, before Lord Kinloch and a jury, and a verdict was returned for the pursuer, with £500 damages.

GIFFORD for the defenders moved for a rule on the pursuer to show cause why the verdict should not be set aside (1), because it was contrary to evi-

dence, and (2) because the damages awarded were excessive.

He contended that there was a distinction, in regard to the liability of railway companies, between the carriage of passengers and the carriage of goods, In the former case, the company was not liable, except in the case of proved fault. No fault was proved here. He quoted the following authorities, Hodges on Railways, pp. 529–32; Chitty & Temple, p. 268; Bell's Com., I. 462; *Latch* v. *Romnor Railway Co.*, 13th Jan. 1858, 27 L. J. Ex., 155: *Bird* v. *Great Northern Railway Co.*, 28 L. J. Ex., 3.

The Court granted the rule.

Dean of Faculty (Moncrieff), for the pursuer.

Young for defenders, in reply.

The Court discharged the rule.

The Lord President said that the case was one of some importance, and required an examination of the evidence in order to see whether the verdict was justified. But there were certain preliminary considerations occurring at the outset of the case. In the first place, the issue required, in order to justify a verdict for the pursuer, that the collision was imputable to the fault of the defenders. On the other hand, it was beyond question that the cause of the accident was the presence of a truck on the main line. That raised a presumption against the defenders, and, in the absence of farther evidence, would be conclusive on the question whether the accident was caused by the fault of the defenders. In the absence of explanation on that point, it would be reasonable to impute it to carelessness on the part of the defenders or their servants. Again, if the defenders undertook to prove that the truck was placed there maliciously, it might be that, in the absence of proof of negligence on their part, that might relieve them from responsibility. Whether it would be sufficient for them to prove that it was done maliciously by some person or persons unknown, was a question of difficulty. He was not prepared to say that in certain circumstances this might not be sufficient; but, if they did not connect some person with the malicious act, they must show it to be impossible that it could be done in any other way. That was just the position of the question here. The burden lay on the defenders to show that the waggon could not have run down from the siding except through the wilful and malicious act of some one, unaided by the servants of the defenders, or any for whom they were responsible. But that burden they had not discharged. The fair result of the evidence is that, while the waggon may have been brought through by some malicious person, it is possible that it may have come through by negligence on the part of the servants of the defenders, or of some one for whom they were responsible. Looking to the evidence, it would not be safe to hold that the waggon could only get out by malicious act. It was said, no doubt, that the siding was in such a condition of obstruction that it was impossible for the waggon to get out without overcoming three different obstacles. There was (1) a chock-block; (2) facing-points; and (3) another chock-block. But, then, on further examination of the evidence, it appeared that the first chock-block was not in good working order, but wanted the very thing indispensable to make it available. Then, as to the facing-points—supposing they were in proper order—most of the skilled witnesses seemed to be of opinion that if there was no one to look after them they ought to be locked. And common sense led to the same opinion, for everyone knew how likely facing-points were to get out of order, and what rough means were sometimes adopted by men working them to save themselves trouble. In the absence, therefore, of a superintendent and locks, it could not be held that these points gave a certain obstruction. Then nothing remained but the other chock-block, and it must be held on the evidence that that was not, any more than the first, in proper order. The Railway Company therefore had not shown that it was impossible for this waggon to get out of the siding on to the line. There was a fair question for the jury; and the jury had returned a verdict for the pursuer, which the Court were not entitled to disturb.

The other Judges concurred.

Rule discharged.

Agents for Pursuer—Hunter, Blair, & Cowan, W.S.

Agents for Defenders—Dalmahoy & Cowan, W.S.

Friday, June 21.

SECOND DIVISION.

MACLEAN & HOPE *v.* MUNCK.

Ship—Bill of Lading—Charter Party—Short Shipment—Failure to Deliver—Owner—Relevancy—Act 18 *and* 19 *Vict., c.* 3. Held that a bill of lading is not conclusive evidence of the amount of shipment in a question with the owner; and an action, at the instance of onerous indorsees of the bill of lading, dismissed as irrelevant, in respect there was no averment that there had been an actual shipment of the amount which it was said should have been delivered.

This case came up on a report from the Lord Ordinary on issues. The pursuers made the following statements.

The pursuers, M'Lean & Hope, are bone and manure merchants in Edinburgh. The defender, C J Munck, is a shipowner in Soderkoping, in Sweden, or elsewhere furth of Scotland, and is the registered owner of the brig 'Sophia' or 'Sophie,' of Soderkoping.

In the month of February 1865, the pursuers, through Mr Albert Carosus of Glasgow, the agent of Messrs Mowinckel & Hüffer, of Genoa, purchased from them a cargo of bones, amounting to about 200 tons, which was then in course of shipment at Genoa, or, at all events, was to be shipped there and sent to this country. The terms were 115s. per ton, cost and freight, out-turn guaranteed within 2½ per cent., the cargo to be sent to Leith, and a previous claim to be deducted from the price. These terms are stated in the letters of Mr Carosus and the pursuers, dated 13th February 1865, produced, and referred to.

On 20th January 1865 the said Mowinckel & Hüffer entered into an agreement with Carl Hagström, the master of the said brig 'Sophia' or 'Sophie,' and, as such, acting on behalf of the defender, C J Munck, for chartering the said ship for the conveyance of the said quantity of bones to this country. The said agreement was concluded by a charter party between the said Mowinckel & Hüffer and the said Carl Hagström on behalf of the defender, dated 20th January 1865, and which *inter alia* bears:—'It is this day mutually agreed between Carl Hagström, master of the good brig, ship, or vessel, called the 'Sophia,'