of admittance into which was satisfied by payment of five shillings. This was not so; on the contrary, he would never have gained admittance had the authorities known his character. The defender was only acting in obedience to lawful commands of his superiors when he ejected the pursuer. There was no slander in the words used. They were justifiable and without malice.

At advising—

LORD YOUNG—I do not think this case is attended with any practical difficulty. There is a stateable and argueable point of law in the case, but I think everyone who knows the undoubted facts of the case will feel at once that no other conclusion could be arrived at than that expressed in the Sheriff-Substitute's judgment. The pursuer of the action is a convicted thief. He has been convicted repeatedly of serious thefts. He has suffered penal servitude and a long period of imprisonment, and has been subject to police supervision. It is true that the last conviction was in 1875, and that the police supervision to which he was then subjected expired in 1879, and that the occasion which has given rise to the present action did not occur till 1884. But down to the very date of that occasion he was a suspected character by the Glasgow police, who esteemed him a resetter of stolen goods, and were in the habit of searching his premises in pursuit of stolen property. One detective stated that in 1883 he saw a convicted thief in the pursuer's company in the act of handing a stolen watch to the pursuer, and that on seeing the police the pursuer advised the man to "sling" it and run. The man did so, but was apprehended and convicted. Now, I can hardly take it from such a man that he had turned away from his wickedness, and that he was doing nothing but what was lawful and right in August 1884. He got into the paddock of the racecourse, where he would certainly never have been admitted had it been known who he was and what he was when he applied for admittance. There is nothing to induce the Court to believe that the paddock was a public place to which persons of the pursuer's character were entitled to be admitted upon tendering 5s. The police constables had instructions to preserve order, and had orders from their superiors to turn out of the paddock any bad characters, and not merely those who were detected actually committing crime, but those who were known to be bad characters; and if I wished an illustration of a man who was a bad character, I should say that the pursuer was a very good type of such. I therefore think the instructions to turn out such people were perfectly lawful and entirely proper, and that when the police constable, without malice, but in obedience to quite proper and lawful instructions, turned the pursuer out of the paddock, he acted in accordance with his duty, and would have failed in his duty had he acted otherwise; and when he made the statements that he did he was not guilty of slander any more than of an assault. I am therefore prepared on these grounds to negative the grounds of action of slander and assault. Therefore simply negativing them, I propose that we should assoilzie the defender.

LORD CRAIGHILL and LORD RUTHERFURD-CLARK concurred.

The LORD JUSTICE-CLERK was absent.

The Court pronounced this interlocutor:—

"Find in fact that the defender did not slander the pursuer, and did not assault the pursuer, and in law that he is not liable in damages: Therefore assoilzie the defender from the conclusions of the action: Find him entitled to expenses in this Court," &c.

Counsel for Pursuer (Appellant) — Comrie Thomson—A. S. D. Thomson. Agent—William Officer, S.S.C.

Counsel for Defender (Respondent)—J. P. B. Robertson—A. J. Young. Agent—J. Stewart Gellatly, S.S.C.

HOUSE OF LORDS.

Tuesday, February 24.

(Before Lord Chancellor, Lords Watson, Bramwell, and Fitzgerald).

SIR ROBERT BURNETT, BART. *v.* THE GREAT NORTH OF SCOTLAND RAILWAY COMPANY.

(*Ante*, vol. xxi. p. 246, 11 R. 375—21st Dec. 1883.)

Superior and Vassal—Irritancy—Railway—Private Right to Stop Trains.

The proprietor of land through which a railway was formed feued to the railway company at a nominal feu-duty land on which the company undertook to erect and maintain "a station for passengers and goods travelling by the . . . railway, at which all passenger trains shall regularly stop." An irritant clause provided that in the event of the company discontinuing the use of the station as a regular goods and passenger station, the grant should be null, and the ground and all buildings thereon should revert to the granter. The company erected the station, which was called C, and for a time all passenger trains stopped at it, but there were established after the date of the contract certain trains subsidised in the public service by the Home Office and Post Office, in which ordinary passengers might travel, and which were regularly advertised as conveying passengers in the company's time tables. These trains were not regularly stopped at C. In an action by the proprietor to have it found that the company were bound to stop at C, to take up and set down passengers, all trains not hired by individuals for their exclusive use, and in particular the trains above described—*held* (*rev.* judgment of Second Division) that these trains came within the obligation, and that the company were bound to stop them.

There were also established certain Saturday excursion trains not stopping at C. The tickets for these trains were all return tickets only available to return the same day. *Question*, Whether these trains were passenger trains in the sense of the obligation?

This case is reported in the Court of Session, *ante*, vol. xxi. p. 246, and 11 R. p. 375—21st December 1883.

The pursuer appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—My Lords, the only difficulty with regard to the two classes of trains, which have been called Queen's Messenger trains and Post Office trains, that I have felt in this case since it was opened has arisen entirely from the profound respect which I entertain for those learned Judges in the Court of Session who saw their way to a conclusion of which, I must frankly confess I have great difficulty in understanding the grounds.

The contract with which we have to deal is in general terms. Two acres of land were feued off at a nominal or almost nominal quit-rent, on the evidence very much less than the value of the land, upon the terms of this contract, and one of those terms was that on that land a station with all proper accommodation for passengers should be erected and maintained, and that (because I do not think that what has been called the parenthetical form in which the words occur makes the slightest difference) all passenger trains of the company should regularly stop there. Obviously it would be convenient and beneficial to the owner of the adjoining property, Sir James Burnett, the lord, the person who granted the feu, that there should be the greatest possible facility of travelling from that station by the company's trains. And if the company entered into this contract, why should a court of law feel any adverse disposition to the landowner stipulating for such a provision, which the company were quite able to accept or to reject, according as they thought it to be for their own interest? Why should that be regarded with more disfavour by a court of law than any other contract between parties quite capable of contracting together, which they make when bargaining for their respective interests? There was no compulsion upon either of them; it was perfectly voluntary; there was good consideration given. And if a court of law is not to regard the contract with disfavour, why should it regard with disfavour the claim of the person with whom the contract has been made to have it fulfilled except so far as he may be disposed voluntarily to dispense on any occasion with its fulfilment? I own I have a difficulty in following some observations in the judgments below which may or may not have influenced the conclusions of the learned Judges, but from which I am bound to express my own individual dissent.

Then, my Lords, the case resolves itself simply and solely into a question of the construction of this contract with reference to a given state of facts. Are or are not these trains, which are called Queen's Messenger and Post Office trains, passenger trains within the reasonable meaning of these words? The contract is universal; it says "*all* passenger trains." If they are passenger trains it is quite clear that the company have engaged to stop them unless the holder of this property, the person entitled to the benefit of the agreement, dispenses with it. Now, it seems to me that these trains have every possible characteristic of passenger trains, and no characteristic of any other sort of trains. They are so advertised in the company's time-tables, and with regard to some of them the form of the advertisement is this—they are not only put down to go at certain times and stop at certain stations (in one instance I observe that this very station is one of them) but the classes of passengers to be carried by them are mentioned, first, second, or third, as the case may be, one or all of them. And in the only case in which there is no entry in the column of the time-table containing a mention of the classes of passengers there is this note, "Stop where required to set down passengers off the south train," showing plainly that it is a passenger train, and that passengers are invited and expected to come by it, at all events those arriving from the south. And the limited form of expression with regard to "passengers off the south train" is perfectly well explained by the fact that it would start from Aberdeen in the middle of the night.

Therefore, in truth, these time-tables are the ordinary notice and invitation to all the world that there are such trains, and that passengers may go by them upon the usual and ordinary terms, for there is not the least qualification of the right of a passenger travelling by any one of these trains to be received and put down on the same terms, and with the same advantages, such as carrying luggage and so on, in all respects as ordinary passengers are entitled to. In point of fact the company do carry passengers in that way, and excepting so far as there is mention of "Queen's Special" at the head of two of these trains in the time-table, there is nothing whatever to inform any single passenger of anything distinguishing these from other trains, and the heading "Queen's Special" informs them of nothing more than that this train which is to take passengers also answers some purpose under some special arrangement in which Her Majesty has an interest. But there is no inconsistency whatever between a special arrangement in which the Queen has an interest, or a special arrangement for carrying the mails for the Post Office, and the fulfilment of that special arrangement by means of ordinary passenger trains unless there were something in the terms of the special arrangement to exclude that mode of fulfilling it. There are no such terms in the arrangements here either as to the Queen's Messengers or as to the Post Office bags, and in point of fact the terms are fulfilled by these trains, which are to all practical intents and purposes whatsoever passenger trains. They are passenger trains entirely under the control of the company. They are passenger trains in which by the existing contracts neither the Post Office nor any other authority can forbid the company from carrying passengers. And, my Lords, to say that that train is not a passenger train, which in all other respects is so, because the company may have been led to agree to do something which it can do and does by means of that train, and may have agreed specially to start that train at particular hours, and to keep time in arrival as well as in departure according to a particular table—to say that that makes it less a passenger train is really extravagant, for in every case, so far as the public are concerned, some time has to be fixed. The company may fix their own time ordinarily, and if they agree for a consideration with anybody else to start a train at a particular hour, and that it shall arrive at certain places at particular hours, yet if they use it as a passenger train it cannot

be the less so because the time is fixed by means of some collateral agreement. To me, therefore, it appears that as to these trains there is no intelligible ground whatever for refusing to the appellant the benefit of the contract.

Now, my Lords, with regard to the excursion trains I am disposed to think that there are some material differences. I shall state the way in which they strike me, but I shall do it with less fulness, because I do not understand any serious controversy to be raised by the learned Solicitor-General as to those excursion trains when they are run under special advertisements, and are not advertised as running regularly in the ordinary time-tables.

My view is that there are reasonable grounds for distinguishing these special excursion trains specially advertised from passenger trains in the common popular sense, and the sense in which I think those words should be understood in this contract. A passenger train *primafacie*, I think, is a train advertised to take passengers generally, people travelling from place to place, upon the terms and in the manner ordinarily applicable to such passengers. As an illustration I may refer to the subject of luggage. In the Special Act of Parliament of this particular company, as we were informed, there is a provision that a certain quantity of luggage may be carried by every passenger. I may take another illustration from the practice of issuing season tickets (composition tickets as I see they are called on this record) for passengers by passenger trains. Now, it is quite certain that the right to carry luggage applicable to passengers generally would not be applicable to persons who as a special favour were taken in a luggage or goods train; and we find upon the evidence that with regard to these composition tickets they do not give a pass for these special excursion trains, and no luggage is allowed to be taken by them; besides which, people are not carried upon the ordinary terms either as to payment or otherwise, because every man who goes by such an excursion train must take a return ticket to come back to the starting point, so that he is not a traveller in the ordinary sense of the word, and he cannot claim to get out anywhere except at the place to which he has a pass according to that contract. I am far from saying that arguments of some weight might not be used for the purpose of bringing in even such excursionists as passengers; but upon that point I cannot help observing that it is conceded that there may be exceptions to the words "passenger trains" in the case of persons who do pass by and are conveyed on the railway when they have specially hired a train. It was not disputed that if a large number of persons combined together specially to hire a train they would be in the same situation. Now, these excursionists do not exactly do that; but, I think, taking the whole matter into account together, that it is safe to say that the parties to this contract had in view by the term "passenger trains" something different from this class of excursion trains although they carry passengers.

My Lords, I am not at all disposed to use words in your Lordship's order which would let in unnecessary controversy as to whether or no the general right of the appellant is evaded by the use of the words, when in substance there is no sufficient ground for a distinction or exception. The learned Solicitor-General is not unwilling, as I understand, if your Lordships should think that excursion trains of this kind should be excepted, that they should be excepted by adding these words after the words "exclusive use," "and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company;" and I think it much safer to adopt those words than to use the words "special excursion trains" in a more general form, which might let in questions as to what are such trains. I think that when they are not advertised as running regularly in the ordinary time-tables of the company, they are then broadly distinguished from those trains by which the company undertake to carry passengers in the ordinary manner. I cannot help agreeing with what one of your Lordships intimated in the course of the argument, that it is very undesirable to refer in the declarator to particular trains some of which have been and others may be discontinued, or the times of which may be altered, which would make a reference to them useless; and your Lordships' view of the law applicable to the facts having been sufficiently expressed in the opinions which you may deliver, it will be enough to pronounce a declarator in these words—"That the defenders are bound regularly to stop at the station called 'Crathes' on the line of railway belonging to the defenders between Aberdeen and Ballater, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station for the conveyance of passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company." I propose therefore to your Lordships to reverse the interlocutor appealed from, and to make that declaration, and with that declaration to remit the case to the Court below. The appellant of course will have the costs of the action and of the appeal.

Lord Watson—My Lords, the only doubts which I have entertained in this case have arisen from the view which was taken, first by the Lord Ordinary, and then by the majority of the Second Division of the Court of Session. I cannot help thinking that the conclusion at which their Lordships arrived was to some extent affected by the considerations with which they deal in their judgments,—considerations which in my opinion ought not to influence the construction of the obligation which we have to construe. The Lord Ordinary enters at some length upon a consideration of the question whether, apart from the trains in dispute, there is sufficient train service for the traffic of Crathes and its neighbourhood. One of the learned Judges of the majority in the Inner House expresses doubt as to the validity of the obligation, and expresses himself in no doubtful terms as to the character of the obligation, and entertaining these views it is not matter of wonder that he should have arrived at a conclusion upon the case favourable to the respondents. My Lords, I can only say I see no reason to doubt that this condition has been validly imposed upon the feuar, and will run

with his estate so long as the superior has a legitimate right to enforce it. And I see as little reason to doubt that it must be dealt with as a fair and equitable arrangement made by parties *sui juris* in the year 1863, and that it is not open to any imputation of being an unfair or a one-sided contract.

Then as to the construction of the words of the obligation, I agree with the Lord Chancellor. The Queen's Messenger trains and the Post Office trains, as they have been termed, are simply composite trains, partly for the service of Her Majesty or of the Post Office, and partly for the service of the travelling public; but the fact that they do accommodate the public, carrying them as passengers from station to station, is quite enough to stamp their character as being passenger trains within the meaning of this obligation. And in considering the question of whether they are passenger trains or no, it appears to me to be quite immaterial whether the service of the Post Office was added to a train already running for the accommodation of the public, or carriages for the conveyance of passengers were added to a train started for the purpose of carrying the mails. They are serving the purpose of passenger trains, and so long as they possess that character, although they may have other uses and purposes, and although the motive of starting them may have arisen from some other cause, it appears to me that they are passenger trains within the meaning of the feu-charter.

As to an excursion train as run in the year 1882 and since, I have formed a different opinion. I should not have held the same opinion with reference to that train as it was advertised to the public in October 1882. I am by no means of opinion that every train called an excursion train ceases to be a passenger train within the meaning of this obligation, or every train carrying excursionists; but the circumstances which lead me to think that it is not a passenger train within the meaning of the charter are briefly these. In the first place, there is a special arrangement made with each passenger at Aberdeen, differing in its terms from the ordinary contracts made by the company with the travelling public. And, in the second place, the persons who are admitted to travel in that train are collected at Aberdeen, as I understand the facts of the case, and the accommodation provided is simply sufficient to convey them from that terminus to their several destinations up the Dee and back again on the same day, and is not calculated to afford any accommodation to the travelling public.

I agree, my Lords, in the judgment which has already been proposed by the Lord Chancellor.

Lord Bramwell—My Lords, I am of the same opinion. It seems to me that the defence "before us is so *ex facie* nimious and unreasonable as to excite prejudice against it, and one has to be on his guard to see that the exact legal rights of the parties, however unreasonable, are satisfied."

Now, my Lords, see what the case is. The pursuer in this case, or his predecessor in title whose rights he has, gave land to this company, one may almost say for nothing (that is to say, upon a nominal rent-charge of, I think, five shillings a year), except the benefit of this obligation which the pursuer is now seeking to enforce. I will not say that the defence is a scandalous one, because I have no doubt it is a *bona fide* one. [Lord Fitzgerald—Extravagant.] It is an extravagant one in my opinion I must say. I cannot help thinking that if this question had arisen thirty years ago when the directors who made the bargain with the pursuer's predecessor and the manager then in existence would have had to decide it, it never would have been a question at all. They never would have made such a point as has been made to-day, because I am satisfied in my mind that they must have known that in fairness they ought not to be setting up such a case as the respondents are setting up now. But Mr Moffat, I think, in one of his letters (to do him entire justice) states that he had not seen the feu-charter until after he had made the contention which has resulted in these proceedings taking place, and I daresay that he and his directors have satisfied themselves in some way that it is a defence which they may properly make and a case which they may properly set up.

One of the learned Lords of Session has cited the familiar case of, I suppose one may say, Shylock *v.* Antonio, and intimated that the pursuer here is going for his pound of flesh. Now I am quite certain that I should have decided that case in the way in which fair Portia did, not perhaps entirely upon her reasonings, but upon some of them. The learned Lord of Session says—"The pursuer says it is within the weight of his pound of flesh." Now, the truth is that Shylock never had a pound of flesh which could be called his; it had never been appropriated to him, and he could only get it by the commission of a considerable crime, no less than that of murder. If indeed the pound of flesh had been appropriated to him and was his, and if Antonio had wished to steal an ounce of it, I should have given the whole pound to Shylock. That is a material distinction, and it is not mentioned here for the purpose of making a laugh or a joke, but it is very seriously mentioned by me for a reason which I need not particularly state now. For the purpose of showing that the supposed case of the pound of flesh has nothing to do with the matter, I should like to ask why the learned Lord of Session himself would give a certain number of ounces to the pursuer—that is to say, he would stop certain of the trains—but as to the pound of flesh not only not an ounce but not a drachm ought to have been given.

Now, my Lords, having made these remarks, I will address myself to the particular question before us, although I protest that I have great difficulty in giving any other judgment than this, that a "passenger train" is a passenger train. The words are not words of art; they want no explanation either by railway people or by experts of any sort or kind. The question is whether these are passenger trains. The answer is they are passenger trains, and to my mind they are passenger trains that carry passengers in the ordinary way upon the ordinary terms, except excursion trains, as to which I will say a word or two presently.

How has the difficulty arisen? It seems to me that it has arisen from a mistake—partly, I must say with great respect, as I think from a preju-

dice. Possibly it may be said in return that I am labouring under a prejudice in the opposite direction, and I may be, for aught I know. It seems to have arisen partly from that and partly from a notion that things not specifically within the contemplation of the parties to an agreement ought not to be held to be within the effect of it, which to my mind is a very great mistake—a mistake illustrated by the case I mentioned in the course of the argument, the case of the telephones. They were held to be within an agreement which had been made at a time when telephones were not known,—they were held to come within general words which the prudence of people had put in for the purpose of providing for something which might arise at a future time. That seems to be another origin of what I may call the mistake. Another cause of it (I say it with sincere respect for the learned Lord of Session, Lord Young, who seems to rely upon the point so much) is the notion that because a passenger train comes into existence, if one may so say, under the special circumstances of a bargain either with the Home Office or with the Post Office, therefore that train—I was going to say—although a passenger train, brought into existence under those particular circumstances, is not a passenger train within the agreement. I cannot see the reason of that. I can simply say I do not agree. I do not see why it should be so.

Now, one word with respect to excursion trains. One knows perfectly well what is meant in practice by an excursion train. It is a train, I imagine, which goes from one place to another; it may or may not stop and pick up passengers on the road—I believe it commonly picks them up—but it is a train which goes from one place to another, with a view to people getting to that other place on cheap terms, and very frequently, certainly, upon the condition that the railway company are not to be delayed or inconvenienced by people taking luggage with them. But why is that not a "passenger train?" Passengers go by it, and they go by it from one place to the other in order that they may get to the other place. It is not the less a passenger train because they pay a small fare, nor is it the less a passenger train because by agreement with the company they do not carry luggage with them. It seems to me really that the substance of the thing is that, as I said before, "passenger train" is not a term of art—it is a popular expression,—and these, popularly speaking, are passenger trains, and no reason has been given why the words should have any other than the natural meaning given to them.

LORD FITZGERALD — The judgment of your Lordships' House is invited on the construction of a portion of the feu-charter of 1863, in which the language used is very general. It is open to us, and I should say necessary for a just conclusion, to consider the relation of the parties to each other before the feu-charter was executed, so as to ascertain what the parties had in view and intended, and to limit the general words, if necessary, to what is fit and just.

There was a prior deed of agreement of 1853 made with the pursuer's predecessors which is still in force, and it is observable that the feu-charter of 1863 is made expressly without prejudice to that deed of agreement. By that agreement the company (the defenders) undertake to make certain accommodation works, and, *inter alia*, by clause 9, "A siding shall be made at the level-crossing marked 'number 46 A' on said deposited plans, for the accommodation of the proprietor and tenants of the said estate of Leys, and the said company hereby undertake that any of the passenger trains shall be stopped at said siding, although not appointed by the company's time-bills so to do, on a preconcerted signal, to be arranged by the company with the proprietor of said estate, being shown, so as to take up or set down any passengers proceeding from or to Crathes at said siding." If it was necessary now to interpret that provision, speaking for myself, I would probably say that it applied to each and every train coming within the ordinary description of a passenger train, and that the obligation on the company was to stop each of such trains at the siding on the preconcerted signal. In other words, the Crathes siding was a signal station at which when there were passengers to take up or set down the company was bound on signal to stop each one of its passenger trains. The position of things was probably found to be inconvenient and not free from dangers, and it became desirable to provide a station with all its conveniences in place of an unprotected siding, and relieve all parties from the cumbrous necessity of signalling.

That being the state of things, we have now to look to the feu-charter of 1863, the expressed main object of which, as well as its consideration, was the obligation on the company "to erect and build upon the ground hereby disponed a station of the said railway for passengers and goods, containing the accommodation after mentioned (which station will be of advantage to me and my tenants in the estates of Leys, Crathes, and others, as well as to the public at large)." And the stipulated obligation was that "The said railway company shall be bound, within twelve months from the date of these presents, to erect, at their own expense, on the said piece of ground first above-mentioned, a station for passengers and goods travelling by the said Deeside Railway, at which all passenger trains shall regularly stop, to be called the 'Crathes' station, containing a suitable waiting-room, covered passenger shed, platform, and all proper accommodation for first-class and other passengers, and to maintain such station in all time coming; it being hereby provided and declared that the said railway company shall be bound to have a signal-post erected at the said station, on which a signal visible from Crathes Castle shall be displayed whenever any passenger or parcel for Crathes shall arrive at the station." There are other accommodation provisions, but they are all confined to the requirements of the station.

Then comes the irritancy clause for forfeiture of the right for breach of the feudal contract, but it is unnecessary to advert to it, as it has been disposed of in the course of the argument.

The pursuer contended below, as he has insisted here, that by the stipulation "at which all passenger trains shall regularly stop," there is created an absolute obligation on the company to stop at the Crathes Station each and every of all the passenger trains that pass along the line. The defenders, on the other hand, have always ad-

mitted that they are bound to cause all passenger trains running on their line for the ordinary service and traffic of the district to stop at Crathes.

I have been at some loss to understand the meaning or extent of this admission on the part of the defenders, and rather turn back on the real question, What is a passenger train? It would seem to me that every train of the company over which the company retains its general control and dominion, and by which the company professes or offers to carry for hire such travellers as may take advantage of it on payment of their fares, is in ordinary parlance and within the meaning of the stipulation in controversy a passenger train. It may be a special or it may be an express train; it may carry the mail or a Queen's Messenger, or even excursionists, but it does not follow that it is not also a passenger train.

I am, my Lords, of opinion that in the construction of the obligation in question "all passenger trains" is to be interpreted as meaning "each and every passenger train," and as embracing the trains in controversy, save the special excursion trains which are run subject to special and peculiar conditions, and are not intended for ordinary travellers. It may be that the obligation assumed by the company was not wise or prudent on their part, but that is not for our consideration. It was not illegal or unreasonable on the part of the pursuer to insist on the stipulation for the benefit of himself and his tenants. We have but to interpret and give effect to the plain meaning of the language used. If inconvenience or injury may arise to the company from the enforcement of their contract, they have ample means within their reach to protect themselves.

The House ordered and adjudged that the interlocutor complained of in the said appeal be reversed; and "declared that the defenders (respondents) are bound regularly to stop at the station called 'Crathes' on the line of railway belonging to the defenders (respondents) between Aberdeen and Ballater, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station for the conveyance of passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company; and with this declaration it is ordered that the said cause be and the same is hereby remitted to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment; and it is further ordered that the respondents do pay or cause to be paid to the appellant the costs of the action in the Court of Session; and it is further ordered that the respondents do repay to the appellant the sum of £187, 16s. 4d. paid by him to them on 4th April 1882 in name of costs, and £1, 2s. 4d. paid by him to them on 9th April 1884 in name of dues of extract of the action in the Court of Session; and it is further ordered that the respondents do pay or cause to be paid to the appellant the costs incurred in respect of the said appeal to this House," &c.

Counsel for Pursuer—(Appellant)—Sol.-Gen. Herschell, Q.C.—Sol.-Gen. Asher, Q.C.—R. B. Haldane. Agents—Martin & Leslie—Baxter & Burnett, W.S.

Counsel for Defenders (Respondents) — Lord Advocate Balfour, Q.C. — J. P. B. Robertson. Agents—Dyson & Co.—Gordon, Pringle, Dallas, & Co., W.S.

Thursday, March 5.

(Before Lord Chancellor, Lords Watson, Bramwell, and Fitzgerald.)

A B *v.* C B.

(*Ante*, vol. xxi. p. 598, and 11 R. 1060—4th June 1884.)

Husband and Wife—Constitution of Marriage—Nullity of Marriage—Impotency.

A man of 49 married a woman of 20, and they cohabited for twenty months, occupying the same bed nearly all that time, and then separated finally. During their cohabitation no sexual intercourse took place, though the man had unsuccessfully attempted it during the first two months, and then desisted, owing, as he alleged, to the wife's coldness and lack of affection for him. In an action of declarator of nullity of marriage at her instance, on the ground of his impotency, it was proved that there was no malformation or sign of ill-health in him. No evidence from a physical examination of the wife was available in the circumstances of the case. The House (*aff.* judgment of Second Division) *held* that on a consideration of the proof the whole facts and circumstances showed that the non-consummation of the marriage was due to impotency on the part of the man, and gave decree of nullity of marriage accordingly.

Nullity of Marriage—Presumption—Three Years' Cohabitation.

The doctrine of the Canon law that impotency will be presumed from non-consummation during a cohabitation of three years has not been followed in Scotland. Assuming it to be applicable, it is merely presumptive evidence, and other evidence may be adduced and founded on where there has not been such cohabitation as to raise it.

Personal Bar—Incontinence of Spouse seeking Remedy.

The action before the House was not raised till after the wife had given birth to an illegitimate child, and had been served with an action of divorce, to which it was raised as an answer. *Held* that she was not barred from raising the action, and that there is no doctrine of "sincerity" requiring it to be shewn that the only motive for raising the action is the existence of the impotency complained of.

This case is reported in Court of Session, 4th June 1884, *ante*, vol. xxi. p. 598, and 11 R. 1060.

The defender appealed.

The respondent's counsel was not called on.

At delivering judgment—

Lord Chancellor—My Lords, in this painful case some questions of law which are of importance—in this sense that if they could be established they would be important—have been argued as constituting a bar to the treatment of the question