not take steps to do this, and under the law laid down in the case of *Macrorie* that parish must take the expense of the child's relief until the mother's settlement is found.

LORD SHAND concurred.

LORD PRESIDENT—I concur. The principle of the case of *Macrorie* is clearly applicable here.

The Court therefore found that the parish of Perth was not liable in repayment of the advances made by the City Parish of Edinburgh.

Counsel for Greig (Inspector of Poor of City Parish of Edinburgh)—Dean of Faculty (Fraser) —J. A. Reid. Agent—D. Curror, S.S.C.

Counsel for Young (Inspector of Poor of the Parish of Perth)—Keir. Agents—Tods, Murray, & Jamieson, W.S.

Friday, June 21.

FIRST DIVISION.

[Sheriff of Fife.

DON *v.* THE NORTH BRITISH RAILWAY COMPANY AND OTHERS AND THE NEWPORT RAILWAY COMPANY.

Railway—Interdict — Damages — Railways Clauses Act (8 *and* 9 *Vict. cap.* 33) *sec.* 6—*Lands Clauses Act* (8 *and* 9 *Vict. cap.* 19) *sec.* 17—*Remedy where Lands injuriously Affected by Operations of Railway—Interdict in such a Case.*

Where lands are taken under statutory powers by a railway company, the owner, under the 17th section of the Lands Clauses Act 1845, is entitled to notice from the company, but in a case where the owner is merely able to instruct that his property is injuriously affected by the operations of the company he is not entitled to any notice, nor can he proceed by way of interdict against the company, but his remedy is that of compensation under the 6th section of the Railways Clauses Act 1845.

By Act of Parliament in 1870 (33 and 34 Vict. cap. 153) the Newport Railway Company were empowered to make a line of railway for the purpose of forming a junction with the Tay Bridge Railway. The time for completing this railway was extended by a subsequent Act. The Act of 1870 authorised the construction of the line through a field called the Well Park, then belonging to the Rev. Thomas Just. In November 1871, Mr Just feued a portion of the Well Park to a Mr Don. A feuing plan was at that time exhibited to him, which was referred to in the feu-contract which was entered into between him and Mr Just. On that plan a number of roads were shewn as proposed to be made, and among others a road leading down the centre of said park. On 26th July 1872 the railway company served the usual statutory notice on Mr Just that they were to take possession of that portion of the Well Park over which their railway passed, as shown on the Parliamentary plan. In September 1873, a minute of reference was entered into between Mr Just and the railway company, and under that reference the amount of compensation payable by the railway company was fixed. Mr Don did not begin to build on his feu till 1876 and he thereafter brought this action in the Sheriff Court of Fife against the North British Railway Company and Mr Just's trustees, which was afterwards conjoined with a supplementary action against the Newport Railway Company, who were the parties really interested. In the pursuer's feu-contract the piece of ground feued by Mr Just was disponed to the pursuer, with "free ish and entry thereto by the streets laid down on said plan, but in so far only as the same may be opened and not altered in virtue of the reserved power" therein mentioned. That reserved power was thus expressed—"The said Thomas Just and his foresaids shall have full power and liberty to vary or alter the said plan, streets, or roads delineated thereon, in so far as regards the ground not already feued, in such manner as they shall think fit." The Sheriff was asked to interdict the railway company "from entering upon and building an embankment upon the road or way connecting the turnpike road leading from Newport to Woodhaven with a road known as the Kirk Road, and which road or way is delineated on a feuing plan mentioned in the said condescendence, and leads to, and for part of its extent constitutes the eastern boundary, and forms a portion of the ground or feu belonging to the above-named pursuer, and described in the said condescendence, and from interfering in any manner with the said road or way so as to render the same impassable, or dangerous to passengers or carriages, or so as to prevent the said pursuer, his tenants, or others having their free and unrestricted use of the same; or otherwise, to interdict the defenders from entering upon said road or way and interfering with the same, as aforesaid, aye and until they shall have caused another and sufficient road to be made instead of the said road or way; and to grant interim interdict."

The pursuer maintained that he had by the terms of his feu a right of access which would be interrupted by the execution of the works of the railway company, and pleaded, *inter alia*, accordingly:—"(1) The pursuer having the said right of access by the said road or way to the said lot or piece of ground, is entitled to maintain the same. (2) The said right of access having been interfered with or threatened to be interfered with as aforesaid, the pursuer is entitled to interdict as craved."

The defenders pleaded, *inter alia*—"(3) The defenders being in the course of executing their line of railway and work in terms of their statutory powers, and having acquired the lands in question, as condescended on, and before any streets or roads through the same were opened up or existed, and being besides ready and willing to meet all competent and legal claims or damages or otherwise at the instance of the pursuer, the interim interdict will fall to be recalled, and the petition dismissed with expenses."

A proof was led before the Sheriff-Substitute (BELL), from which it appeared that no road was as yet formed through the Well Park, and the Sheriff (CRICHTON) on appeal adhered, though on a different ground. The latter added this note to his interlocutor:—

"*Note* . . . . The pursuer contended that under his feu-contract and relative plan he had acquired right to the proposed road shown on the said plan, as running down the

centre of Well Park. It appears to the Sheriff, however, that as the railway company are forming the embankment complained of under the powers conferred upon them by Act of Parliament, the pursuer has no right to interdict them from proceeding to carry out their statutory powers, or to have the ground in question reserved for the formation of a road.

If a road had been formed and opened up down to the centre of the Well Park previous to the statutory notice given by the railway company that they were to acquire the ground in question, then the pursuer might have been entitled to an interdict against the railway company from proceeding to interfere with the road till a substitute road was provided. It is clear, however, that no road was formed or opened at the date of the said notice.

"It may be that the pursuer has a claim against the railway company in consequence of his feu being injuriously affected by their works; and the railway company admit that if any damage has been done by them they must make compensation."

The pursuer appealed, and argued that until a notice had been served upon him in terms of the Lands Clauses Act (8 and 9 Vict. cap. 19), sec. 17 which had not been done, the railway company were not entitled to proceed with their works.

At advising—

LORD PRESIDENT—That part of the Wellgate Park which is to be occupied by the line of railway, or through which the line of railway is to be made, is shown on the Parliamentary plan marked 53, and there laid down as a field or inclosure. There is no road shown as passing through it; and in the book of reference it is described as arable ground, of which the owner is Thomas Just, and the tenant or occupier is John Just; and the statute authorises the company to make their line through the plot of ground marked 53. It may be that after the bill was passed there were operations by the proprietor on this field that altered its character. What the effect of that may be as regards the matter of compensation does not, at anyrate directly, affect the question we are now considering, because we are asked to interdict the railway company from doing the very thing which by the statute they are authorised to do. The ground on which we are asked to do that is, that there is no notice given by the railway company till 1872, and in the meantime Mr Don had acquired the feu, and it was proposed to make a street giving access to it. The effect of constructing the railway is to cut through or block up the line of the proposed street. Mr Don accordingly asks us to interdict the railway company from constructing their line. I never could see, I confess, on what ground the complainer put his case until the argument was confined to the question, whether notice had been given.

The only intelligible plea to my mind is—"The pursuer having a common interest or right of property along with the other feuars of said park in said road or way, the defenders, before entering upon the possession of the said road or way, were bound to have served the usual statutory notice upon the petitioner of their intention to take the same for the purposes of their Act, &c.; and not having served any such notice, the petitioner is entitled to interdict as craved." Apart from that I cannot see how the remedy of interdict can be used against a party who has statutory authority to do that which is complained of, and is doing it in the way authorised by the statute. It is said Mr Don has a claim for compensation for damage done by the erection of the embankment, and that the railway company are not entitled to proceed with their works until notice is given to him. The question has been settled, and I think rightly settled, that a landlord, no part of whose land is taken, may have a good claim for damages in respect of damage done to his property by the vicinity of railway works or obstruction of his access, or in some other way.

Here the point arises, Whether the railway company is bound under the 17th section of the Lands Clauses Act to give notice to a person in that position? I am of opinion that this case does not fall under that clause at all. I think that the claim, if it be good, arises under the 6th section of the Railways Clauses Act. That section provides that "the company shall make to the owners and occupiers of, and all other parties interested in any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners, occupiers, and other parties." And the amount of that compensation is directed to be ascertained and settled in the manner provided by the Lands Clauses Act. There is a plain recognition there of the right of all parties whose property is injuriously affected by the construction of the works to have compensation, but there is nothing about notice, and I do not see why persons in this position should receive notice.

The necessity for notice in the case where lands are to be taken is very obvious. It is of great importance that the owner should know the exact extent and the local situation of the property that is to be taken, for two reasons—because, first, notice constitutes a completed personal contract of sale by which the lands mentioned, in so far as the personal contract is concerned, are transferred from the one party to the other; and second, it is of great importance that notice should be given as a preliminary to what is to follow, *i.e.*, a settlement to the amount of compensation.

But in the other case, where no land is taken, any notice given by the railway company would be of no avail. The statute has given the proprietor information of what the work is that is to be constructed. The railway company could give him no further information; they could only intimate to him that they were about to execute the work in the manner authorised by the statute. But the person making the claim for compensation can give the company a great deal of information as to the nature and extent of the damage that their works are expected to do to his property. The duty therefore of initiating matters falls on the party claiming compensation, whereas in the other case the initiative most naturally comes from the party who purposes to buy.

It seems to me, therefore, that Mr Don has mistaken his remedy. He cannot interdict the railway company from executing their works,

but he can send a claim for compensation to the railway company, and if they refuse the application he can go to the Sheriff to have the amount due to him settled.

LORDS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer) Asher—Reid. Agents—Ronald & Ritchie, S.S.C.

Counsel for Defenders (Reclaimers)—Balfour—Pearson. Agent—Adam Johnston, Solicitor.

---

* *Friday, June* 21.

FIRST DIVISION.

[Lord Rutherfurd Clark.

HOME SPEIRS *v.* SPEIRS AND OTHERS (SPEIRS' TRUSTEES)—CULCREUCH ENTAIL.

Entail — Validity of Entail — Where the Irritant Clause did not Extend to Cardinal Prohibitions— "Acts and Deeds" in Irritant Clause.

The prohibitory clause of a deed of entail was as follows:—"Neither A (the institute) nor any of the heirs aforesaid shall dispone, sell, wadsett, or alienate the lands and others before mentioned, or any part of them, or contract debt thereupon, or impignorate, or in any shape burden the same, or to do any act or deed whatsoever whereby the said lands and others before mentioned may be affected, adjudged, or evicted in whole or in part from the succeeding heirs of tailzie." The irritant clause, which was framed on the principle of enumeration, then provided—"In case the said A or any of the heirs hereby called to the succession shall do in the contrary in any of the above particulars, either as to altering the order of succession, possessing upon any other title, allowing the lands to be in non-entry, failing to purge adjudications and other diligences, or selling, contracting debt, alienating or disponing, or doing any other act or deed whereby the estate may be affected, adjudged, or evicted, as already said, then and in all or any of such cases the acts or deeds so done, or that shall happen to follow thereon, shall *ipso facto* be void and null."

It was objected to the validity of the entail (1) that the declarations of nullity did not extend to any of the cardinal prohibitions of the entail; and (2) that the irritant clause, which was framed upon the principle of enumeration, made no reference to "wadsetts, impignorations, or burdens," which were all specially mentioned in the prohibitory clause. *Held* that neither objection could be sustained.

Observed, the words "contracting debt" used in the irritant clause applied to and embraced both voluntary and judicial securities.

Entail—Irritant Clause — Obligation to use Name and Arms.

When a deed of entail was recorded a portion of an irritant clause intended to enforce the obligation of using a certain name and arms was omitted. *Held* that that fact did not affect the validity of the entail.

Entail—Objection to Validity—Where Erasures in Clause Dealing with Children's Provisions.

Held, upon the principles laid down in the case of *Gollan* v. *Gollan*, July 28, 1863, H. of L. 4 Macq. 485, that erasures occurring in the clause applicable to children's provisions in a deed of entail were no good objection to its validity.

Entail—Objection to Validity of Entail where Witness to Deed Obscurely Designated.

In the testing clause of a deed of entail granted by two sisters one of the instrumentary witnesses was designed as "their house-servant," "their" being without any grammatical antecedent. *Held* that as the inaccuracy was merely verbal, and as the meaning was plain from the context, it did not affect the validity of the entail.

This was an action brought by Dame Anne Oliphant Home Speirs, wife of Sir George Home, Baronet, Sheriff-Substitute of Argyleshire, heiress of entail of the entailed lands of Culcreuch and Colquhoun Glins, against the trustees of Alexander Graham Speirs of Culcreuch, for reduction of a trust-disposition executed on 22d March 1877 by him, in which he disponed to these trustees for certain purposes therein named the fee of the above-mentioned estates on the narrative that he had been advised that by reason of defects in the deeds of entail under which he held the lands he was in fact fee-simple proprietor. Mr Speirs had held under a deed of entail dated 13th September 1780, and executed by Alexander Speirs of Elderslie in favour of Peter Speirs, his second son, and a certain series of heirs therein named.

The deed of entail provided that "the said Peter Speirs and the heirs of his body, and the whole other heirs-substitute as above, whether male or female, and the descendants of their bodies, succeeding to the foresaid lands and estate according to the foresaid destination, should be holden and obliged to assume and constantly retain the surname, arms, and designation of 'Speirs of Culcreuch,' as their own proper surname, arms, and designation in all time after my decease."

The prohibitory and irritant clauses were as follows:—"That it shall at no rate be leesome or lawfull to the said Peter Speirs, or to any of the heirs aforesaid, to alter, innovate, or change the destination or order of succession before specified, or to do any other deed, directly or indirectly, whereby the same may be in any shape altered, innovated, or changed; and the said Peter Speirs and the other heirs above specified shall enjoy, bruik, and possess the said lands and estate by virtue of this present right and destination, and by no other right or title whatsoever; and they shall be obliged to obtain themselves timeously entered, infeft, and seased in the said lands and estate, and not to suffer the same to be in non-entry, nor any feu, or other duties or casualties, or public burdens, teind duties or other burdens or prestations payable furth of the said lands and teinds to remain unsatisfied, so as the lands and others foresaid may be apprised, adjudged, or evicted from them, but shall immediately, or at least within six

* Decided June 14.