

[The LORD JUSTICE-CLERK had not been appointed when the case was argued.]

The Court dismissed the appeal and affirmed the judgment of the Sheriff-Substitute.

Counsel for the Appellants—D. F. Mackintosh—Ure. Agents—Dove & Lockhart, S.S.O.

Counsel for the Respondents—Balfour, Q.C.—Jameson. Agents—J. & J. Ross, W.S.

Tuesday, December 18.

SECOND DIVISION.

[Sheriff of Argyll.]

CURRIE v. CAMPBELL'S TRUSTEES.

Property—Feu-Charter—Description by Boundaries Inconsistent with Measurements—Plan.

A feu-charter described the subject by boundaries. It also described it by measurements, and referred to a plan annexed. The measurements and plan agreed, but they were inconsistent with the boundaries specified. In a question as to the extent of the subject, *held* that the boundaries must prevail.

Lord Young *dissented*, on the ground that the intention of parties was that shown by the measurements and plan.

In 1881 Archibald Currie, shoemaker, Tarbert, Argyllshire, applied to the late George Colin Campbell Esq. of Stonefield, for a piece of ground in Tarbert upon which to erect a dwelling-house.

Ground was laid off by Mr Campbell's factor, and buildings erected upon it by Mr Currie. The ground allotted was subsequently enlarged on the south-east and a feu-contract entered into between the parties.

By feu-charter dated 3rd and 6th and recorded 17th February 1882 the whole subjects feued were described as follows:—"All and whole that area or piece of ground situated in the town or village of Tarbert aforesaid, bounded on the west by the public street called Kintyre Street, along which it extends 40 feet 9½ inches or thereby; on the north partly by ground belonging to the said Colin George Campbell, and presently occupied by Finlay Smith and Duncan M'Arthur, along which it extends 41 feet 7 inches or thereby; on the east partly by the house also belonging to the said Colin George Campbell, and presently occupied by Donald Johnston, fisherman, along which it extends 14 feet 9 inches or thereby; and again on the north by the said house, along which it extends 20 feet or thereby; and again on the east, partly by Burnside Lane, along which it extends 26 feet 9½ inches or thereby; and on the south by ground feued to Robert Lyon Dawson, along which it extends to Kintyre Street 62 feet or thereby, as the said area or piece of ground is shown on a plan or sketch thereof annexed and signed by the parties of even date with the said feu-contract as relative thereto, together with the houses and other buildings erected on the said area or piece of ground."

The plan or sketch referred to had the figures mentioned in the feu-charter placed upon the appropriate lines, but it was not drawn to scale and was more of the value of an illustrative sketch

than of a formal plan.

A difficulty subsequently arose as to the boundaries of the feu on the north-east. "The house, . . . occupied by Donald Johnston, fisherman," when the feu-charter was signed, was taken down in 1883, and the site was disposed by the superior to another person. In 1886 Currie began to build a wall upon a part of the site as being within his feu. Mr Campbell obtained an interim interdict against this proceeding, and Currie thereupon brought an action of declarator against Mr Campbell in the Sheriff Court at Campbelltown, to have it declared that his feu was bounded "again on the north by a stone wall erected by the pursuer on the site of said house (Donald Johnston's house) along which it extends 20 feet or thereby."

After protracted proceedings before both the Sheriff-Substitute (RUSSEL BELL) and the Sheriff (FORBES IRVINE), in the course of which Mr Campbell died and his trustees were sisted as parties to the action, the pursuer brought the case by appeal before the Second Division of the Court of Session. It appeared that it was impossible to reconcile the boundaries given in the feu-charter with the measurements therein given and with the plan thereto attached; and it was

Argued for the appellant—The plan and the measurements, which agreed with one another, and supported his contention as to the limits of his feu, must prevail over the boundaries given in the feu-charter, or rather that the plan agreeing with the measurements must prevail over the description by boundaries, which did not so agree. The portion of ground claimed belonged to the respondents, and therefore this was not an error which could not be rectified. Moreover, the respondents' agent had prepared the feu-contract and the plan, and their factor had marked off the ground. They were therefore responsible for any mistake that had been committed, and were not entitled to take advantage of their agent's actings to the detriment of the appellant—*North British Railway Company v. Magistrates of Hawick*, December 19, 1862, 1 Macph. 200; *North British Railway Company v. Moon's Trustees*, February 8, 1879, 6 R. 640. The removal of Johnston's house was in contemplation at the time of the feu-contract.

Argued for the respondents—Although the question at issue was of small money value, they were brought to contest it in the interests of the person to whom the ground built upon by the appellant had been feued. This declarator was the only way of getting the interdict question settled. The boundaries were perfectly distinct, and could not be altered by a rough sketch not drawn to scale, and only intended to illustrate the feu-charter. Their case was the same as if there had been no plan, but if looked at as it was in their favour, for it showed Johnston's house to be outside of the feu altogether. The measurements were demonstrative not taxative. The appellant would not have had a stateable case but for the fact that the ground in dispute belonged to them, and really that made no difference upon the law on the subject. What bounded a feu could not form part of the feu. Besides, in 1882 Donald Johnston's house was standing, and the appellant's boundary could not go through a house which bounded his feu—*Reid v. M'Coll*, October 27, 1879, 7 R. 84.

At advising—

LORD JUSTICE-CLERK—This case is a very unfortunate one. The claim relates to a heritable subject of most trifling value to either party, and covering about 60 square feet. The difficulty arises out of the description in the title of the piece of ground feued by the respondents to the appellant. The feu-charter gives a complete description by the boundaries surrounding the feu, but if the measurements there given are taken to be correct there is certainly a mistake somewhere. The gentleman who drew the feu-charter to show matters more clearly added a description by a plan or sketch. This was a reasonable and sensible thing to do if it had been well done, but there can be no doubt that the adding of this sketch has been the origin of this dispute. If no sketch had been added there could have been no difficulty as to the boundaries at the place in dispute, and these boundaries would have been the boundaries contended for by the respondents. The question therefore is, which is to rule—the sketch or plan attached to the feu-contract, which is without any scale, and with only the figures written upon each side, or the boundaries described by the names of the subjects surrounding the feu?

I have given the matter my best consideration—it is a difficult question as it stands, and would have been a still more difficult one if the plan had been carefully drawn to scale—and the opinion I have come to is that the boundaries as given in the description in the feu-contract must prevail over the sketch, which is to be taken as illustrative only.

The feu at the place in dispute is said to be bounded on the north by Donald Johnston's house. Therefore the line at that place cannot be drawn anywhere within the house occupied by Johnston. Taking all the facts together, I should have been astonished if this case had been brought about this piece of ground if no intervening difficulty had occurred since it was feued off, but it appears that the 60 square feet in question has since been feued to someone else. I think, however, that if there had been anyone in Tarbert to bring these people together this action need never have been here.

LORD YOUNG—I assent to the proposition as generally true that where boundaries and measurements are in conflict in the description of a subject the boundaries must prevail. But that is only a general rule, adopted because experience has taught the Court that it generally leads to the true conclusion as to the intention of the parties. If a field or an estate of considerable extent is conveyed by distinctly specified boundaries the subject conveyed is not to be altered to satisfy the measurements, which may be wrong as regards feet or yards or even acres. That error must just be submitted to, and the intention of the parties given effect to, although the subject conveyed may be somewhat in excess or somewhat short of the measurements. This is not a case of that kind. It is not a case of yards or acres in a large property, but is the case of a feuing stance conveyed to a feuar by the proprietor, the feu-contract being prepared by the proprietor's man of business, and the land being laid off and the drawing made by the proprietor's factor. It happens that the description of the subject by boundaries in

the deed and by measurement do not correspond with the plan. Whether you call it a plan or sketch is immaterial; it is the only kind of plan appropriate here for the purpose in view. It is a plan in which the direction of every line is given, and in which the measurement of each line is given and marked down, and so given and marked down that a surveyor, to whom a remit was made by the Sheriff-Substitute, had no difficulty in applying the plan to the ground. His plan, which is drawn to scale, applies to the ground, and gives the very direction and the very dimensions indicated in the sketch, but it is said it does not answer to the description in the deed. In what respect does it not answer? Only in the matter of boundaries, for the measurements are all in accordance with the measurements in the feu-charter. It is contended for the proprietor, whose man of business framed the deed and whose factor drew the sketch, that there is to be an interpretation of the deed which will give the feuar a different subject both in boundaries and measurements from that laid down in the sketch.

Now, there is a maxim of our law which says, *verba cartarum fortius accipiuntur contra preferentem*, which has been interpreted as meaning that deeds are to be construed most strongly against the granters. Here the proprietor's man of business is responsible for the deed, and his factor on the spot for the sketch, and whether the boundaries or the measurements are to give way, I should give it against the superior's agent and factor rather than against the feuar, who is entirely innocent of the matter.

It is said it is dreadful to disregard the boundary of Johnston's house, but we were told that it was a mere hovel of no more permanence than a haystack. I am not going to sacrifice the measurements to subjects "presently occupied by Donald Johnston," especially in the case of a mere hovel which has since been taken down. Acting, then, upon general rules of law, and giving due weight to the maxim I have quoted, I am not for disregarding all the measurements, but rather for disregarding this boundary of Johnston's house. I am therefore for giving the pursuer the decree he asks.

LORD RUTHERFURD CLARK—The pursuer feued a piece of ground from Mr Campbell of Stonefield, the predecessor of the defenders. Before he obtained his feu-disposition he built a house on part of it. His title was ultimately completed in 1882, and the ground was disposed to him with the buildings erected thereon.

In so far as the pursuer has built on the ground his title cannot be disputed. It appears, however, that a house which belonged to Mr Campbell, and which at the date of the feu-disposition was occupied by Donald Johnston, was pulled down. The pursuer claims a part of the site of this house as being conveyed to him by his feu-disposition. The only question in the case is whether this claim is well founded.

In order to have his right disclosed the pursuer has raised this action. He asks the Court to declare that he has the sole and exclusive right to the area of ground described in the petition. The boundaries therein given are the same as those contained in the feu-disposition with one exception. In the disposition the boundary

with respect to which the dispute arises is this—“On the east partly by the house also belonging to the said Colin G. Campbell, and presently occupied by Donald Johnston, fisherman, along which it extends 14 feet nine inches or thereby, and again on the north by the same house, along which it extends 20 feet or thereby.” In place of this boundary the pursuer introduces into his petition the following words—“And again on the north by a stone wall erected by the pursuer on the site of said house, along which it extends 20 feet or thereby.” The question is, whether the pursuer is entitled to have decree of declarator in terms of the new boundary which he has substituted for the boundary contained in the disposition?

The portion of the south gable of Johnston's house is known and admitted. It is further conceded by the pursuer that his claim in this action involves a claim to a portion of the site of these houses. But he says that his feu was given out according to a plan appended to the disposition, and that the area thereon on the plan, and defined by the measurements contained in the disposition itself, comprehends the ground which he claims in this case.

The defenders, on the other hand, maintain that Johnston's house is the northern boundary of the pursuer's feu, and that no part of that house is comprehended within it.

I take it to be settled law that what is described as the boundary of a feu in the feu-disposition which creates it is by that very fact excluded from the feu. There may be exceptions where the boundary is a river or a road. But with such exceptions we have here nothing to do. The northern boundary of the pursuer's feu is Johnston's house. Hence I think it clear that according to the disposition no part of that house or of its site was included within the pursuer's feu.

Nor is the plan inconsistent with the disposition. It shows, and I think that it was designed to show, that Johnston's house was wholly excluded from the feu given out to the pursuer.

The pursuer relies on the measurements contained in the disposition and also transferred to the plan. And there is no question that according to the view which I take of the case certain of these measurements are wrong. Johnston's house is the boundary partly on the east and partly on the north, cutting out a corner from what would otherwise be a quadrilateral figure. Measuring along Johnston's house on the east, the true length of the east boundary at that part should be 17 feet 9 inches or thereby, instead of 14 feet 9 as given in the disposition, and of course there is a corresponding error in the other portion of the eastern boundary. I cannot, however, adopt these measurements to the effect of giving to the pursuer ground which I think was plainly excluded from his feu. The boundaries given in the feu-disposition must in my opinion prevail. To my mind it is plain, both from the disposition and the plan, that Johnston's house was wholly excluded from the feu, and as the measurements would include a part of it, I must hold that this was wrong. An error of that kind may easily be made. I cannot hold that the measurements are right to the effect of assigning to the pursuer a piece of ground which the disposition expressly declares to be excluded from it.

For these reasons I think that we cannot give declarator in terms of the prayer of the petition, and

therefore that the defenders are entitled to absolvitor. In pronouncing this decree we decide the only question which has been raised, and even if it were desirable to pronounce any other form of decree we have not the means of doing so, inasmuch as the parties when they were before us renounced all further probation.

LORD LEE—My opinion is that the Court in this case is not called on either to make a new plan or a new description, and that we ought not to deal with any point excepting that which was raised by the defenders' objection to those words of the prayer, which substitute a new boundary instead of Donald Johnston's house. On that point I concur with the majority of your Lordships. We can only gather the intention of parties by construing the contract according to the ordinary rules. It appears to me that the one point clearly ascertained by the terms of the title is, that the feu did not include any part of Johnston's house. That house is not only described as a boundary in the feu-contract, but is also shown in the plan or sketch referred to as outside the boundary of the feu. Upon this point there is no conflict between the words of the description and the plan or sketch. There is a slight discrepancy elsewhere in the measurement or in the sketch, but as to such discrepancy my opinion is that the description by boundaries according to the usual rule must prevail.

I therefore think that on the only point in controversy the defenders are entitled to prevail.

The Court pronounced the following interlocutor:—

“Recal the interlocutor of the Sheriff-Substitute of 8th May 1888, and the interlocutor of the Sheriff on 23rd July following: Find that no part of Donald Johnston's house is included in the feu given off by the late Colin George Campbell, author of the defenders, to the pursuer: Therefore assoilzie the defenders from the conclusions of the petition: Find them entitled to expenses in the Inferior Court and in this Court,” &c.

Counsel for the Appellant—Balfour, Q.C.—Crole. Agents—R. R. Simpson & Lawson, W.S.

Counsel for the Respondents—Gloag.—Gillespie. Agents—Tawse & Bonar, W.S.

Friday, November 9.

OUTER HOUSE.

[Lord Wellwood, Ordinary.

CLARK, PETITIONER.

Entail—Disentail—Lands directed to be Entailed—Rutherford Act (11 and 12 Vict. cap. 36), secs. 27 and 28.

A testator by his trust-disposition and settlement, after providing for the payment of his debts, certain small annuities, and a family provision of £6125 in favour of his son and his children, directed his trustees