

has come to a sound conclusion, and considering that the two places are in the same river, the Clyde, and that docks and shipbuilding yards are places of very considerable extent, I hold that two miles is quite within the order of magnitude that the Act contemplates when it says that the one place must be near the other. Although I should not be prepared to affirm all that has been said as to the mode of disposing of the case, I do not dissent from the view that the case may be satisfactorily disposed of by dismissing the appeal.

LORD KINNEAR—I am of the same opinion. I quite agree with what I understand to be the view of Lord M'Laren, that a question which is put to us in terms of fact may really involve a question of law if the true question in dispute be whether the specific case falls within the true construction of words describing conditions of fact on which the statute gives compensation. I should be slow, and I think the Court has hitherto been unwilling, to throw out a case merely because the question put to us, as we read it, looks like a mere question of fact, if upon a fair consideration of all the findings of the Sheriff or arbiter it appears that there is really a question of law or of legal construction involved. But then the question must always be whether that is the result of the Sheriff or arbiter's findings. Now, in this case the Sheriff finds that the respondent was employed as a shipwright by the appellants, who are shipbuilders, and was working on board a ship that they were in the course of building called the "Isomore"; that he was injured while working at this ship by an accident arising out of and in the course of his employment, and that admittedly if this accident had happened in the appellants' shipbuilding yard they would have been liable. But then he says that before the accident happened the ship had been launched from the shipbuilding yard, and had been taken to the Prince's Dock for the purpose of having its internal fittings adjusted and finished, and otherwise for its total completion as a ship, and it was while that part of the work was going on in the Prince's Dock that the accident happened. Now, the 3rd sub-section of the 7th section of the Act undoubtedly extends the ordinary construction of the word "factory" in the previous parts of that section for the purpose of covering the case of a workman who may be injured in the course of his work upon a vessel being constructed by his employers, although that vessel has been removed from their shipbuilding yard into a dock, river, or tidal water, provided such dock, river, or tidal water is near the yard. If the Prince's Dock is in a reasonable sense near the shipbuilding yard of Barclay, Curle, & Co., nobody disputes that they are still liable, although the accident happened when the ship was in the dock and not in their own yard. Then upon that statement the Sheriff finds in fact that the accident occurred when the ship was being finished in a dock near the yard. Now, I quite agree with

your Lordship in the chair that the question whether a dock is near the yard is a question of fact, and that in any particular case it is a question for the Sheriff or arbiter, and not for this Court, and that we cannot interfere with the decision of the Sheriff upon that question of fact, unless it be shown that there is some rule of law, or some sound doctrine of legal construction, which would have prevented him arriving at his conclusion of fact if he had paid attention to it; and therefore the only question seems to me to be whether there is any rule of law or any legal construction of this statute which should compel us to hold that Prince's Dock is not near the shipbuilding yard of Messrs Barclay, Curle, & Company, and I must say I have heard of none, and can imagine none. Mr Wilson says that the rule of law is that nothing is near which is not within a mile and a half of the shipbuilding yard. I must say I should adopt your Lordship's language in describing that proposition, and, at all events, have no hesitation in rejecting it. I come therefore to the conclusion that this is a case upon which we should not interfere with the Sheriff; but I agree with your Lordship that there is no reason why we should not take the course which was taken by Lord Justice Smith in the case cited [1899] 1 Q.B. 1013, and say, firstly, that the Sheriff has decided the question of fact, and, secondly, that we entirely agree with him.

The LORD PRESIDENT was absent.

The Court dismissed the appeal.

Counsel for the Appellants—D. F. Asher, Q.C.—J. Wilson. Agents—Morton, Smart, & Macdonald, W.S.

Counsel for the Respondent—Salvesen, Q.C.—R. M. Smith. Agent—William Balfour, S.S.C.

Tuesday, November 14.

SECOND DIVISION.

[Lord Kincairney, Ordinary.]

CALEDONIAN RAILWAY COMPANY v. JAMIESON.

Property—Title to Land—Identification of Lands Excepted from Conveyance—Plan not Made Part of Disposition.

A railway company acquired land for the purpose of constructing a line, but obtained no disposition and made up no title thereto. Their authors then disposed the land intersected by the line, and granted a disposition "excepting always . . . the parts and portions . . . sold to" the railway company, ". . . and now occupied by said branch line." In an action for interdict against the owner of the land from encroaching on a part of the land which the railway company averred was included in the portion

acquired by them, held that while it was competent to identify by proof the portion of the land excepted from the respondents' conveyance, the complainant had failed to show by evidence of possession or otherwise that what they claimed was so excepted.

In 1848 the Glasgow Barrhead Railway Company acquired land from the Nitshill Coal Company for the purpose of constructing the line known as the Victoria Branch. This line intersects land now belonging to the respondent, and which was purchased by him from the Nitshill Coal Company in 1882. No disposition was granted to the Barrhead company of the land referred to, and no infettment in it was taken by them or their successors. The line was constructed and has been in use since that time. By the disposition granted to the respondent the disponents "sell, alienate, and dispose to" him "all and whole that piece of ground at Nitshill, . . . excepting always from said piece of ground the following parts and portions thereof, viz. :— First, a piece of ground sold to the Glasgow, Barrhead, and Neilston Direct Railway Company for the purposes of a branch from their main line to the Victoria pit, and now occupied by said branch line." In 1849 the Caledonian Railway Company acquired a lease for 999 years of the Barrhead railways, including the Victoria Branch.

The following description of the question at issue in this case is taken from the note appended to the Lord Ordinary's interlocutor :—"The question relates to the property of a strip of ground about 150 feet in length and of an average breadth of 6 feet or thereby, and so situated as to be of very little use to either party. The respondent is proprietor of six or seven acres of ground near the village of Nitshill, which includes cottages known as the Railway Row, and which is intersected by a branch mineral railway called the Victoria Branch, constructed by the Barrhead Railway Company on ground said to have been purchased by the Barrhead Company from the Nitshill Coal Company in or about 1848, and the ground in dispute lies along the north or north-west side of that railway. . . . The property of the Barrhead Railway Company became, by a series of statutes, vested in the complainants the Caledonian Railway Company and the Glasgow and South-Western Railway Company as joint owners.

"The question between the parties arose in this way. Prior to 1897 the traffic of the Victoria Branch had been worked by horses, and the railway was unfenced; but in 1897 the complainants made arrangements with the proprietors of the neighbouring colliery to work it by locomotives, and they say that it then became necessary for the safety of the public that it should be fenced, and in November 1897 they erected a sleeper fence along the north-west side of the railway, where the railway intersects the respondent's property, and immediately behind the respondent's cottages. The

respondent says that this fence was put up without notice to him, and that he considers it an encroachment on his property, and injurious to the tenants of his cottages; he therefore removed it and put up another fence on a line nearer to the railway rails, which he conceived to be the boundary between his property and that of the Railway Company's—the space between the lines of these two fences being the subject in dispute. On 26th November the complainants removed the fence which the respondent had erected and re-erected the sleeper fence. The complainants say that the fence is absolutely necessary for the safe working of the Victoria Branch; but they have not said that the respondent's fence would not have served that purpose as well.

"The complainants feared lest the respondent should remove this new fence, and therefore brought the present proceedings, in which they pray that the respondent should be interdicted (1) from entering on the complainants' lands 'comprehended within the fences erected by the complainants or their predecessors for separating the land taken for said branch railways from the adjoining land not taken'; and (2) from interfering with the fences on either side thereof."

The complainants averred that the strip of ground in dispute was comprised in the land acquired by the Barrhead Company, and stated—"The complainants have been in peaceable and undisputed possession of the ground at Nitshill whereon the said branch railway is constructed, and whereon the original fences and renewals thereof have been erected, and two feet or thereby beyond the said fences, for 50 years; and no one has hitherto sought to disturb them in their possession of the same. In the respondent's title there is an express exclusion of the ground which has been possessed as aforesaid by the complainants and their predecessors in title."

The respondent averred—"The sleeper fence which the complainants have erected has been erected on ground belonging to the respondent, which he and his authors have possessed in virtue of *ex facie* irredeemable titles, duly recorded in the appropriate register of sasines for more than the space of 20 years, continually and together, peaceably and without interruption. Prior to the erection of the fence in question no person ever disputed the right of the respondent or his authors to the ground on which the fence has been erected, and the complainants made no claim to it, and have no right or valid title thereto."

The complainants pleaded—" (1) The complainants being proprietors of the said Victoria Branch, and having been in possession for upwards of 40 years, *et separatim* for upwards of seven years, of the land on which the said branch is formed, and of the land for two feet beyond the fences of the said land, are entitled to interdict in terms of the first conclusion of the prayer."

The respondent pleaded—" (1) No title to sue. (2) The complainants averments being

irrelevant, the present note should be dismissed."

The Lord Ordinary (KINCAIRNEY) allowed both parties a proof of their averments. At the proof the complainers produced the Barrhead Railway Land Plan and an Ordnance Survey District Plan prepared in 1858, and the respondent produced his disposition.

Thereafter he pronounced the following interlocutor:—"Finds (1) That the respondent has produced a disposition in his favour which *prima facie* includes the land now in dispute, on which the complainers have erected a fence; (2) that the complainers have failed to instruct any right to said land, or any right to erect a fence thereon: Therefore repels the pleas-in-law for the complainers: Refuses the prayer of the note, and decerns."

Note.—[After the narrative above quoted]—"The proof does not, in my opinion, disclose any adequate motive for raising this action. I confess I do not see any important use to which the complainers can put the strip of ground in dispute; but the parties have thought proper to lead a long proof, and the case has been fought with great anxiety and keenness. At first it appeared to be somewhat complicated, but when the proof and productions are carefully examined the apparent difficulty disappears. The proof has been to a large extent about possession, and I think it is necessarily inconclusive for the reason that little or no use of the strip could be made by either party. It really comes to little more than this, that there has been about as much use and possession by the one party as by the other. I do not intend to examine it, because, in my view, the question does not depend on possession. Each party has also led evidence of the existence of a fence or boundary which they say defines their properties. The evidence of the complainers relates to a sleeper fence which they say stood in former times on the line on which they have placed their present fence; and the evidence for the respondent relates to a dry stone dyke on or near the line on which he says that he placed his fence. But I do not think that the question as to these boundaries is of primary consequence either.

"The first question is as to the respondent's title. That stands on a disposition by the trustees for the Nitshill and Lesmahagow Coal Company, registered in the General Register of Sasines 15th February 1882. By this deed certain portions of ground are disposed, and among them a piece of ground at Nitshill, laid down on a feuing plan dated 29th July 1840, extending to more than six acres, as therein specially mentioned and described. From this disposition there is excepted 'a piece of ground sold to the Glasgow, Barrhead, and Neilston Direct Railway Company for the purpose of a branch from their main line to the Victoria pit, and now occupied by said branch line.' What I understand to be contended by the complainers is that the land in question is within this exception. If it is not, it is within the disposi-

tion to the respondent; and it falls on the complainers to prove that it is within the exception. The disposition admittedly covers the Railway Row of cottages.

"The precise manner in which this exception is expressed deserves particular attention, and the question is, What is its true construction? What is excepted is not land disposed to the Railway Company, but land sold—and in fact it has never been disposed—and it is not said to be possessed by the Railway Company, but to be occupied by the railway. It is to be assumed that both parties had a clear idea about the land they were selling and buying. It was certainly not intended to dispose lands the exact limits of which could not be ascertained without a proof of possession, nor lands which could not be defined without an examination of the private plans of the Railway Company, but land which could be definitely and precisely ascertained by the visible occupation of it. It was the land which could be seen to be occupied by the railway. It is a description as precise as an exception of land occupied by a road would have been. One is not referred to possession by the Railway Company nor to their plans, but only to occupation by the railway in 1882. I understand the complainers to contend that by the words the lands sold to the Railway Company the burden was thrown on the respondent of ascertaining what lands the company had purchased, although they had not got a disposition, and referred to the plans of the company as shewing these lands. I do not think that any such reference to the plans of the company can be legitimately or competently introduced into the disposition, much less exchanged for the actual reference to occupation. The first question therefore is, What was the land occupied by the railway in 1882? . . .

[After referring to the evidence his Lordship proceeded]—"There was therefore at that date nothing to indicate the property of the Railway Company or occupation by it beyond the ground occupied by the rails, the roadway, and the slopes of the cutting, and it appears to me that the space between the ridges of the two slopes, and nothing beyond that, answers to the description of 'ground occupied by the branch railway in 1882.' That is the march claimed by the respondent, and I am of opinion that it corresponds with his title. It is not a defective title, and does not require to be fortified by prescriptive possession. No reference was made on either side to the feuing-plan mentioned in the respondent's disposition, from which I infer that no assistance on either side can be got from it, probably because the Victoria Branch Railway was not in existence at its date (1840).

"The complainers, however, contend, that the property acquired by them extended beyond the boundary, which the respondent concedes, to the line on which they have erected their fence, being, as they contend, the line of the old sleeper fence. I understand that the complainers put their case alternatively. They say that they can show a good right to the land, or

otherwise they can show that it was within the exception in the respondent's title.

"If the complainers had had a disposition, a case of competing titles might have arisen, but what is certain is that the complainers have no disposition under the Lands Clauses Act or otherwise, and no infettment. If they bought the land, they neglected to make up a title to it, and the respondent maintains that that is conclusive against their claim, and that no prescriptive possession, however long or clear, is of any avail without a feudalised title.

"The complainers' argument on this point—which was, perhaps, rather more ingenious than intelligible—was, I think, of this nature. It was argued that when the Victoria Branch was formed, the strip of ground was within their limits of deviation, which is no doubt true, and true also of the cottages. That shows that the Barrhead Railway Company might have acquired the strip of ground, but not that they did acquire it.

"Then the complainers proved from excerpts from their books that in or about 1848 the Barrhead Company purchased land from the Nitshill Company, and paid for it. But these excerpts do not show the position or extent of the land. That, they say, is shown on what they call their land plans, and they refer in particular to a tracing of a plan made between 1855 and 1859, in which their property is shown to be bounded in accordance with their contention. In fact the fence was put up from the plan. Then reference was made to the Glasgow and Barrhead Railway Lease Act 1849, by which the Barrhead Railway, with all the property and effects of the Railway Company, was leased for 999 years by the Caledonian Railway Company, and to the Caledonian and Glasgow and South Western Railways (Kilmarnock Joint Line) Act 1869, whereby (sec. 4) all the estates, property, rights, privileges, powers, and authorities held by the Caledonian Railway Company in connection with the Barrhead Railway were vested in the two companies jointly. It was maintained, as I understood, that the combined effect of the plans and the Act of 1869 was to confer on the plans a sort of statutory imprimatur, and on the complainers what was called a parliamentary or statutory title to the lands laid down on the plans. I am unable to adopt this argument, and am not aware of any legal principle on which such an equivalent for a disposition and sasine can be supported.

"Alternatively, it was maintained that these plans should be held to interpret the disposition to the defender in 1882, and to show that the lands sold to the Railway Company, and hereby excepted, were the lands shown on the complainers' plans. I am unable, as already indicated, to adopt that view either, or to hold the phrase 'occupied by the railway,' as equivalent to 'laid down on the railway company's plans.'

"The complainers referred to *The North British Railway Company v. Hutton*, Feb. 19, 1896, 23 R. 522, in which it was held that a party could not prescribe a right to a portion of land expressly excepted from his

title. It was a case in reference to the effect of a bounding charter defined by a reference to a previous disposition, in which the lands were described by measurement and by an annexed plan, and it might have had some bearing had it been possible to hold that the disposition to the respondent bore reference to the complainers' plans, but as that is not so the case appears to be inapplicable.

"Neither does the case of *Aitkens v. Rawyards Colliery Company*, December 19, 1894, 23 R. 201, seem to me to apply. It was referred to as affording an illustration of a statutory title to lands without disposition or infettment, which may of course be if the statute is sufficiently explicit. But I think there is nothing of that kind in the statutes referred to in this case.

"I think the complainers are truly in the position of asserting a right to lands without a written title, and cannot succeed either by force of direct right or by reason of the exception in the respondent's title.

"The complainers maintain that their right is completed by possession. If they could put their case so high as to be able to say that in 1882 their possession was so clear as to warrant the view that it might be held that the ground so possessed was occupied by the railway, there might have been room for argument, but short of that I think the complainers' reference to possession irrelevant for want of a written title. . . .

"I am therefore of opinion on the whole case that the complainers have failed to show that their fence was erected on their own lands, and also that the respondent has instructed a sufficient title to the strip of land in dispute.

"It was argued for the respondent that the complainers could not in any view, and whatever they proved, have succeeded in this case; that at the very best their right was so obscure that it was necessary to clear it by a declarator, and that a suspension and interdict was wholly incompetent. In support of this contention he referred to *Mackay's Practice*, 462, and to *Cruickshank v. Irving*, December 23, 1854, 17 D. 286, in which an interdict was refused because of the confused state of the complainers' title. In the view I have taken of the respondent's title I do not require to decide this point, but I doubt whether any general question of law is decided by that case, and I should hesitate to say that the complainers could not competently protect their fence by an interdict even although they failed in establishing their own title if they could have shown that the respondent had not a title.

"But as I hold that the complainers have failed in displacing the respondent's *prima facie* title, and also failed in establishing their own, the prayer of the note must be refused."

The complainers reclaimed.

At advising—

LORD TRAYNER—The complainers in this case claim to be the owners of a small strip of ground which adjoins their railway. On it they have erected a fence, which they apprehend the respondent will remove, and

they seek to have him interdicted from doing so. The respondent maintains that the strip of ground is his property, and that the complainers in erecting the fence in question have been guilty of an act of trespass. On considering the proof led by the parties in support of their several contentions the Lord Ordinary has decided in favour of the respondent, and I think he is right. The rule of our law is, "No sasine, no land." The complainers have no sasine in the strip of ground in question, nor have they any conveyance or title of any kind upon which sasine could follow. The only evidence on which the complainers rely as supporting their claim to the piece of land in question is a land plan prepared by themselves in or about the year 1857, in conformity with which they say they have had exclusive possession for much longer than the prescriptive period. But the land-plan is no title, and exclusive possession will not prove or establish a right unless it follows upon a habile title. The complainers do not possess—at all events, they neither allege nor produce—any such title. Further, I am of opinion with the Lord Ordinary that the complainers have failed to prove that they have had exclusive possession. On the other hand, the respondent has a title, and is infest therein, which covers or may cover the piece of ground in question. From the conveyance in favour of the respondent there is excepted "a piece of ground sold to" the complainers' authors. What that piece of ground is, what its situation, or what its extent is not specified, further than that it is "now occupied by said branch line." The branch line does not now and has never "occupied" the piece of ground in question. The complainers, in my view, have entirely failed to identify the piece of ground in question as the piece of ground, or part of that piece of ground, excepted from respondent's conveyance. The result is that the complainers have failed to show that they have any right to erect their fence where they have erected it, and that the respondent cannot be interdicted from removing a fence unwarrantably erected on his property.

The complainers cannot obtain a possessory judgment in their favour. It is they who have recently inverted the possession, and the fence which the complainers seek to have protected has only existed for some months, and not for seven years.

The LORD JUSTICE-CLERK and LORD MONCREIFF concurred.

LORD YOUNG was absent.

The Court adhered to the Lord Ordinary's interlocutor.

Counsel for the Complainers—Cooper. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondent—Dundas, Q.C.—Craigie. Agents—George Inglis & Orr, S.S.C.

Thursday, November 9.

FIRST DIVISION.

DOUGLAS AND OTHERS (MORTON'S TRUSTEES) v. THE AGED CHRISTIAN FRIEND SOCIETY OF SCOTLAND.

Contract—Promise of Subscriptions to Charity—Liability of Representatives—Offer and Acceptance—Jus quaesitum tertio.

M wrote to a member of a committee for the formation of a charitable society offering, if a society was formed to answer a description given by him, and on certain conditions as to details, to subscribe £1000, payable in ten annual subscriptions of £100. The society was formed, and M's conditions complied with. After the formation of the society M wrote to the secretary offering to become "personally responsible for the pensions of fifty life pensioners of £6 each," on certain conditions. This offer was accepted and its conditions complied with, and a pension scheme was started, which was subsequently extended by further offers on M's part. M paid £100 annually to the society, and also the funds necessary for the payment of the pensions granted, until his death, when two of the annual subscriptions of £100 remained unpaid. In a special case presented by M's trustees and the society, held that the trustees were bound to pay the remaining subscriptions of £100, and such sums annually as were necessary for the payment of pensions to pensioners elected prior to M's death.

Observed that the offer of ten subscriptions of £100 and its acceptance constituted a contract containing an express stipulation in favour of a third party—the society—and an agreement between the parties to the contract that that stipulation should be performed with the third party, who consequently had a right to adopt the contract and sue upon it.

This was a special case presented by the trustees of the late Mr John Thomas Morton, first parties, and the office-bearers of the Aged Christian Friend Society of Scotland, second parties, in the following circumstances:—Mr Morton, who died in September 1897, took a prominent part in the formation of the Aged Christian Friend Society, which was established in 1889. By letters written before the Society was established to the Rev. Mr Lowe, a member of a provisional committee sitting in Edinburgh which promoted the Society, Mr Morton offered, on certain conditions relative to the formation and establishment of the Society, to subscribe to its funds a sum of £1000, payable in ten annual subscriptions of £100 each. This offer was accepted by the committee, and the Society was formed with Mr Mor-