Argued for the fourth party—The fourth party was born before the eldest child of either class attained majority. Having therefore been in life before the respective periods of distribution arrived, he was entitled to share in both funds.

LORD JUSTICE-CLERK—I think that this case must be decided in accordance with the views maintained by the second parties. The question might have been one of some difficulty if it had not been clearly and distinctly decided by authority. There may be some hardship in holding that *post nati* in the same position as children who are already born should not share. It is difficult to believe that that could have been the intention of the testator. But the only way in which the matter can be worked out is by holding that the class of beneficiaries is to be determined at the time when the first payment comes to be made. The *post natus* here must come in, because he was born before that period was reached. We must hold in answer to the first question that the children entitled to share are those alive at the period when the eldest of the class attained majority, and in answer to the second question that the beneficiaries are entitled to payment of their shares as they respectively attain twenty-one, or in the case of females, marry before attaining that age.

LORD LOW—If this case had not been covered by authority I should have had some difficulty, but it is a typical case for the application of the rule of construction which was laid down in the case of *Wood* v. *Wood* (23 D. 338), and which has been repeatedly recognised since that decision. I accordingly agree that the questions should be answered in the way proposed by your Lordship.

LORD ARDWALL—I also concur, and in particular I agree that the question in this case has been decided by authority. The three cases of *Wood* (23 D. 338), *Buchanan's Trustees* (4 R. 754), and *Ross* v. *Dunlop* (5 R. 833) seem to me to settle conclusively that the children entitled to share are those in existence at the date when the eldest child attains majority.

The Court answered heads (*b*) in the first and third questions, and the second and fourth questions, in the affirmative.

Counsel for the First Parties—Pitman. Agents—M'Neill & Sime, S.S.C.

Counsel for the Second and Third Parties—Graham Stewart, K.C.—Lyon Mackenzie. Agents—Rusk & Miller, W.S.

Counsel for the Fourth Party—Chree—Spens. Agents—R. C. Bell, W.S.

Thursday, May 13.

FIRST DIVISION.

[Sheriff Court at Perth.

CALEDONIAN RAILWAY COMPANY *v.* M'GREGOR.

Complaint — Instance — Railway Prosecution—Concurrence of Procurator-Fiscal—Trespassing upon Railway—Caledonian Railway Act 1898 (61 *and* 62 *Vict. cap. clxxxviii*), *sec.* 36.

Where a prosecution is not for a crime at common law, but merely for a statutory offence, no question arises as to the concurrence or non-concurrence of the public prosecutor; the only question is as to who has the title to prosecute, and that depends on the statute which creates the offence; such title may be conferred by the statute upon a private party expressly or by inference.

The Caledonian Railway Company has a title to prosecute for the offence of trespassing upon the railway created by section 36 of the Caledonian Railway Act 1898.

Railway—Trespass—Complaint—Relevancy — Locus — Provision in Statute as to Notices — Caledonian Railway Act 1898 (61 *and* 62 *Vict. cap. clxxxviii*), *sec.* 36.

A complaint charged a contravention of section 36 of the Caledonian Railway Act 1898 in so far as the accused did on a date named "trespass upon the railway belonging to the complainers in the parish of Tibbermore and county of Perth at a point one mile or thereby to the north of Perth General Station . . ." It was objected that the complaint was irrelevant in respect (1) that the *locus* was not sufficiently specified, and (2) that it was not stated that notices warning persons not to trespass had been erected—the section providing that no penalty should be recoverable unless "the company shall prove to the satisfaction of the Sheriff . . . that they have painted or fixed up" such notices.

Held that the complaint was relevant, inasmuch as (1) the specification of the *locus* could leave no doubt or confusion in the accused's mind, and (2) the proviso in the statute dealt merely with procedure at the trial.

The Caledonian Railway Act 1898 (61 and 62 Vict. cap. clxxxviii), section 36, enacts—". . . Any person who shall trespass upon any of the railways, stations, works, lands, and property belonging to or worked by the company shall, without having received any personal or other warning than as hereinafter mentioned, forfeit and pay by way of penalty any sum not exceeding forty shillings for every such offence: Provided that no person shall be subject to any penalty under this enactment unless the company shall prove to the satisfaction of the Sheriff or Justices before whom

complaint is laid that they have painted or fixed up on boards, or printed, painted, or enamelled on iron or any other material public notice warning persons not to trespass upon their railways, stations, works, lands, and property, and that one or more of such notices has been affixed at their station on the railway and at the public road level-crossing nearest to the spot where such trespass is alleged to have been committed, and the company shall renew such notices as often as the same shall be obliterated or destroyed, and no penalty shall be recoverable unless such notice is so placed and renewed. . . ."

On 21st December 1908 James M'Gregor, lorryman, 217 High Street, Perth, was cited to appear before the Sheriff Court at Perth on a complaint under the Summary Jurisdiction Acts 1864 and 1881.

The complaint, which bore to be "The complaint of the Caledonian Railway Company, incorporated by the Caledonian Railway Act 1845," set forth that the accused did, on a date therein specified, "trespass upon the railway belonging to the complainers, in the parish of Tibbermore and county of Perth, at a point one mile or thereby to the north of Perth General Station, by being or passing upon the said railway, and not for the purpose of lawfully crossing the same at a level-crossing thereof, contrary to the 36th section of the Caledonian Railway Act 1898 (61 and 62 Vict. cap. 188), whereby the said James M'Gregor is liable to forfeit and pay by way of penalty a sum not exceeding forty shillings, together with the expenses of prosecution and conviction recoverable by arrestment, poinding, and sale, and in default of payment or recovery is liable to imprisonment for a period not exceeding one month, unless such penalty or forfeiture and expenses are sooner paid and satisfied."

The accused objected to the competency of the complaint, in respect that the consent and concurrence of the procurator-fiscal had not been obtained.

On 19th January 1909 the Sheriff-Substitute (SYM) sustained the objection and dismissed the complaint.

The complainers obtained a case.

The case stated—"As to the first point, the instance of the complaint, it was maintained that the Caledonian Railway Company was a corporation, and was a private prosecutor; that no person was joined with the company in the instance of the complaint, and that it was necessary that the private prosecutor in such a complaint as the present should have the concurrence of the procurator-fiscal.

"After consideration, I, on 19th January, sustained the objection that in this case the Caledonian Railway Company required the concurrence of the procurator-fiscal.

"My opinion was that the Caledonian Railway Company was a private prosecutor; that if an Act provide a penalty for breach thereof, and if no power to prosecute be conferred upon an official of the body having an interest to enforce it, then the concurrence of the public prosecutor is required. No such power is given by section 36 of the Caledonian Railway Act 1898, or by section 137, as amended, of the Railways Clauses Act.

"On the other hand, my opinion was that a private prosecutor may proceed without the concurrence of the public prosecutor when special power is given by statute so to do, as is illustrated (*a*) by the Food and Drugs Acts, and (*b*) by section 146 of said Railways Clauses Act, which, dealing with the case of 'transient offenders,' empowers an official of the company to apprehend and bring immediately before a magistrate persons found in the act of transgressing against the prohibitions there mentioned.

"I found in law that the Caledonian Railway Company prosecuting this complaint without the concurrence of the procurator-fiscal had not a sufficient instance stated therein, and I dismissed the complaint, finding M'Gregor entitled to £1, 1s. of modified expenses."

The question of law was—"Did this complaint require the concurrence of the procurator-fiscal?"

Argued for appellants—The consent of the procurator-fiscal was unnecessary. That followed from the terms of section 37 of the Caledonian Railway Act of 1893 (56 and 57 Vict. cap. clxxix) and section 36 of the Caledonian Railway Act of 1898 (61 and 62 Vict. cap. clxxxviii), which impliedly gave the company a title to prosecute in trespass cases without such consent. Moreover, such cases had *de facto* been allowed to proceed without consent—*Caledonian Railway Company* v. *Ramsay*, March 12, 1897, 24 R. (J.) 48, 34 S.L.R. 526; *Thomson* v. *Great North of Scotland Railway*, December 20, 1899, 2 F. (J.) 22, 37 S.L.R, 242; *Hamilton* v. *Girvan*, June 15, 1867, 5 Irv. 439, 4 S.L.R. 104; *Kennedy* v. *Cadenhead*, December 24, 1867, 5 Irv. 539, 5 S.L.R. 138. In *Great North of Scotland Railway Company* v. *Anderson*, October 28, 1897, 25 R. (J.) 14, 35 S.L.R. 40, opinions were expressed that such consent was unnecessary where, as here, the company sued for its own protection.

Argued for respondent—(1) The consent of the procurator-fiscal was necessary. That was the usual practice, and it was for the public protection that the ordinary practice should be adhered to. There was no valid ground for distinguishing between different forms of criminal prosecution in regard to this matter. (2) The complaint was irrelevant (*a*) for want of specification as to the *locus*, and (*b*) because it failed to state that notices had been put up warning people not to trespass. Knowledge was an essential element of the offence. Reference was made to *Whillans* v. *Stevenson*, December 10, 1902, 5 F. (J.) 11, 40 S.L.R. 278.

At advising—

LORD PRESIDENT—This is an appeal upon a case stated from the Sheriff-Substitute at Perth. The proceeding originated with a complaint lodged by the Caledonian Railway Company against James M'Gregor charging him with trespass upon their railway and setting forth that he had

thereby become liable to a penalty under the provisions of the 36th section of the Caledonian Railway Act of 1898.

The first objection which was taken before the learned Sheriff-Substitute was that the proceeding was incompetent in respect that the complaint had not received the concurrence of the procurator-fiscal. That objection was upheld by the learned Sheriff-Substitute, and a case was stated by him raising that question of law. There was also stated before him an objection to the relevancy, but as he held the proceeding was bad on the plea of competency, he did not proceed to give any opinion upon the question of relevancy.

Upon the case stated coming before your Lordships an objection was taken by the respondent that the appeal to your Lordship's Court was incompetent upon the ground that the appeal ought to have been taken to the Justiciary Court and not to the Court of Session. This admittedly turns upon the provisions of the 28th section of the Act of 1864. I am glad to think that this is the last case of this sort that can ever occur, because, certainly, it is a most useless exercise of legal ingenuity to have to decide, as has been the case in the past, very difficult and complicated questions solely upon the point of whether the appeal, which is undoubtedly meant to be given, ought to be to the one Court or the other. All that is now settled, I am glad to say, by the Act of 1908, under which, in future, all appeals on cases stated from summary convictions will come before the Court of Justiciary and the Justiciary Court alone. But none the less we have got to decide the question in this case. It loses its interest, however, in the circumstances I have set forth, and I do not think very much need be said about it.

I have come clearly to be of opinion that the appeal here was rightly taken to this Court. It seems to me that the position of affairs was this—The Act of 1898, under which the prosecution is brought, only comes in place of an older Act—in fact, I suppose the genesis of the power may go back a long way. The beginning of it is that there is a power of prosecution (of which I shall say more in a moment) for a penalty for trespassing upon a railway line and the penalty affixed is a fine and nothing more. Well, under the law as it stood, of course, if the fine was not paid the person could be imprisoned. And as the law thus stood there could be no question as to which side of the line the case fell under the criterion assigned by the 28th section of the Summary Procedure Act of 1864, because what that section says is that proceedings shall be held to be criminal where there is a power of imprisonment in the court and civil where there is none. I am glossing the words, but that is the practical result of the section. Well, here there was no power of imprisonment, and therefore it was civil. Then came the Act which abolished imprisonment for debt, and of course if that had been left to stand alone it is quite evident that the law would have been in an unsatisfactory state, because the person who was told to pay the penalty might snap his fingers and decline to pay it, and if he was a person who did not possess property which could be easily affected by poinding he got off scot free. Therefore, not unnaturally, there was a change made in the law by the Summary Procedure Act of 1881, and that provided that "where, subject to the provisions of section 6 (which has to do with the durations of imprisonment), in a proceeding under the Summary Jurisdiction Act where a warrant of poinding and sale is competent, a warrant of imprisonment in default of recovery of sufficient goods shall likewise be competent"—and then there is the exceedingly pungent addition—"for a period not exceeding three months, and the Court shall specify the term of imprisonment in the warrant." But of course that did not restore the law to the condition in which it stood before, for whereas under the former law you could imprison and keep the debtor in prison until he paid his debt or surrendered his estate, under this provision imprisonment is given for a certain specified period.

Now, it seems to me exceedingly unlikely that there was any intention in the Legislature in making this provision to alter proceedings which had been civil before and make them criminal. It seems to me that the criminality, so to speak, of a particular offence remains exactly where it was. That is to say, the test is still, is the matter complained of one which may be punished by the Court by imprisonment *in pœnam*, or is it not? Imprisonment in default of payment is not imprisonment *in pœnam;* it is imprisonment because the fine has not been paid. Accordingly I come to the conclusion, really without difficulty, that this appeal is quite properly taken. And I may say again that it is greatly to our advantage that we shall not be troubled with this sort of case in future.

Well, now, having held that the appeal is competent, the next question is, was the judgment of the Sheriff-Substitute right? I think it was wrong. I think that there has crept into the discussion to some extent a confusion between two things, and that confusion, I think, must also have misled the learned Sheriff-Substitute. When you have a common law crime, there is, of course, no title in anyone as a mere member of the public to prosecute, the title being in the public prosecutor—the Lord Advocate. But if a private individual can show that he himself has suffered injury by that crime, then there is a title in that private individual. But he is, by our practice, subjected to the necessity of getting the concurrence of the public prosecutor, which may be withheld, and then he is powerless to prosecute unless he comes to the Court of Justiciary and gets a dispensation from them. But then where you have to deal with a prosecution in which the offence charged is not a crime at all but is merely a statutory offence, then I do not think any question of concurrence or no concurrence comes in. The question is, who has got the title to prosecute?

And that is regulated by the statute which creates the offence.

In many statutes, of course, the thing is specifically dealt with and the title to prosecute is given to a certain person. There are countless instances and I need not go through them. But it is also quite clear that a title to prosecute may be inferred from the clauses of a statute without being given in so many words. Well, when it is ascertained that there is a title to prosecute under the statute, I do not think any question of concurrence can arise. On the other hand, if a title to prosecute is not given to any private person, *i.e.*, any person other than the public prosecutor, then *cadit quæstio*. Therefore I think that really the Sheriff-Substitute addressed his mind to the wrong question when he proceeded to consider whether there ought or ought not to be concurrence by the public prosecutor. What he had to consider was whether the Caledonian Railway Company had a title to prosecute. Upon that question, which is the question for our decision, I am clearly of opinion that the company has a title.

We are, of course, perfectly entitled to look back to the former Acts, as the provision in the present Act merely replaces another provision in the earlier Act; and if one looks back to the earlier Act, I think the matter comes out perfectly clearly. The provision creating a penalty is put in for the purpose of keeping the railway line and the railway company's premises free from trespass, and I think it would really have been absurd to have put the prosecution for such an offence in the hands of the public authorities. I am, therefore, clearly of opinion that the Railway Company had a perfectly good right to prosecute, and that being so, that they did not need the concurrence of the procurator-fiscal.

Now I mentioned that the question of relevancy was raised, and the respondent here asked that we should consider it, and that, I think, is a reasonable request. The learned Sheriff-Substitute, seeing that he thought the complaint ought to be dismissed on competency, was perfectly justified in not going on to consider the question of relevancy. But, at the same time, it would be no use to send it back to him to dispose of relevancy with the result, perhaps, of there having to be another appeal.

The complaint is said to be irrelevant, first, because there is not sufficient specification of the *locus*. The specification is that the place on which the respondent trespassed was "the railway belonging to the complainers, in the parish of Tibbermore and county of Perth, at a point one mile or thereby to the north of Perth General Station." That seems to me quite sufficient, because I do not think that description of the *locus* can leave the slightest doubt in the respondent's mind as to the place at which it is said that he did trespass. During the argument there was a general hint that there might be more lines than one. I do not think hints of that kind will do. It would require to be shown that the fact that there were more lines than one at the place introduced some element of confusion, and that has not been shown to us.

Then the other point is that the complaint is irrelevant, because it does not say that the Railway Company had put up certain notice boards. Now, it appears to me that that is not a good objection either, because I do not think that the putting up of notice boards enters into what I might call the gist of the offence. The matter of the notice boards only arises in virtue of a proviso in the section. The section enacts that any person who trespasses upon the railways or property of the company shall be liable to pay a penalty for every such offence; and then it proceeds "provided that no person shall be subject to any penalty under this enactment unless the company shall prove to the satisfaction of the Sheriff or Justices before whom complaint is laid that they have painted or fixed up on boards . . . public notice warning persons not to trespass upon their railways, stations, works, lands, and property, and that one or more of such notices has been affixed at the station on their railway, and at the public road level-crossing nearest to the spot where such trespass is alleged to have been committed, . . . and no penalty shall be recoverable unless such notice is so placed. . . ." That seems to me to be a provision merely as to the procedure at the trial, and to have nothing to do with the actual nature of the offence itself, and I think therefore that the objection falls. Upon the whole matter, I think that the case ought to go back to the learned Sheriff-Substitute in order that he may proceed with it as accords.

LORD KINNEAR—I agree with your Lordship upon all the points.

LORD PEARSON—I also agree.

LORD M'LAREN was absent.

The Court answered the question of law in the negative.

Counsel for Appellants—Morison, K.C.—Wark. Agents—Hope, Todd, & Kirk, W.S.

Counsel for Respondent—Constable, K.C.—Jameson. Agent—J. Campbell Irons, S.S.C.