

in making this application, and though I am doubtful if our authority is required, I think that the prayer of the petition as amended ought to be granted.

LORD CRAIGHILL concurred.

The Lords recalled the Lord Ordinary's interlocutor and granted the prayer of the petition as amended.

Counsel for Petitioner—Trayner—W. C. Smith.
Agent—A. Morison, S.S.C.

Counsel for Respondents—Scott. Agents—
J. & J. Galletly, S.S.C.

Wednesday, June 22.

SECOND DIVISION.

[Lord Rutherford-Clark,
Ordinary.]

STIRLING CRAWFURD v. THE CLYDE NAVIGATION TRUSTEES.

*Property—Ferry—Powers of Statutory Trustees—
Interdict—Trespass.*

Statutory harbour trustees having obtained from a riparian proprietor a strip of ground on the bank of the river under their care for the purposes of their Act, and having thereafter obtained a right of ferry at and near the place at which that ground was situated, established a ferry and landed and embarked passengers at a part of the bank so acquired, between which and any public place the lands of the said proprietor intervened. The proprietor having brought an interdict to have the trustees prevented from landing and embarking passengers at the point in question—*held* that the interdict was wrongly directed against the trustees, and that his true remedy was an interdict against persons found crossing his lands—*diss.* Lord Justice-Clerk, who held (1) that the trustees by their actings were violating the conditions under which they had acquired the complainer's ground; and (2) that they had no right to establish a ferry unless where they could communicate directly with some public place.

By the Act of Parliament 9 and 10 Vict. c. 23 (18th June 1816) and preceding Acts, the Parliamentary Trustees on the river Clyde and Harbour of Glasgow, afterwards called the Clyde Navigation Trustees, were empowered, *inter alia*, to purchase lands for the extension of the harbour of Glasgow and the erection of a new wet-dock at Stobcross. In 1857 William Stuart Stirling Crawford of Milton, under the powers contained in a Private Act of Parliament, and on the narrative of that Act and of the Act 9 and 10 Vict. c. 23, entered into a feu-contract with the trustees whereby he sold to them two portions, ascertained by specific measurement and by reference to a plan, of the lands known as Merklands, part of the entailed estate of Milton. These two pieces of land thus sold to the trustees together formed a narrow strip of land running along the north bank of the Clyde, and the feu-disposition was granted "always with and under the following provi-

sions, declarations, and others, viz., that the said second parties and their foresaids shall be bound to appropriate the said two pieces of ground wholly and exclusively to the widening and straightening of the river Clyde, and also shall be bound to erect a substantial embanking or retaining wall along the new brink of the river as delineated on said plan, and uphold and maintain the same at their expense, and shall form and maintain two watering-places, one at the east and another at the west end of said ground disposed in the second place, besides steps at convenient distances in said embanking wall for access to the river, and shall also plant a thorn hedge in lieu of the one partly taken away by the second parties' operations and partly still remaining, and that at such a distance from and parallel with the said retaining wall as may be pointed out by the said first party or his managers, and shall protect said hedge by stob and rail in the usual manner; also declaring that the foresaid ground is hereby disposed to the said second parties for the sole purposes contained in the foresaid Act, 9th Victoria, chapter 23d, and the Acts therein recited, and that no buildings shall be erected thereon of the nature of public works, stores, warehouses, or dwelling-houses."

By the Clyde Navigation Consolidation Act 1858 (9 and 10 Vict. c. 23), whereby the Act of 8 and 9 Vict. c. 23, was, along with other Acts relating to the Clyde navigation dated previously to 1858, repealed, the undertaking of the Trustees of the Clyde Navigation is defined (section 76) to consist of, *inter alia*, "the forming and erecting on both sides of the river of such jetties, banks, walls, sluices, and works, and such fences for making, securing, confining, and maintaining the channel of the river within proper bounds as the trustees shall think necessary . . . the erection, construction, and mooring of such beacons and buoys as may be necessary or expedient for the use and guidance of vessels in the harbour and in the river." By section 114 of the same Act it is provided that the "trustees" (the respondents) "shall be entitled to provide one or more ferry-boats for the convenience of persons passing from one side of the river to another to the east of Marlinford, and to levy such reasonable rates for the use of such boats, and the tear and wear of the works of the trustees, as they shall consider reasonable, not exceeding one halfpenny for each passenger." Merklands lies to the east of Marlinford.

In 1881 Mr Stirling Crawford presented a note of suspension and interdict against the Clyde Trustees, in which he craved the Court to "interdict, prohibit, and discharge the said respondents, and all others acting under their orders or authority, from ferrying passengers on the river Clyde to and from the complainer's lands of Merklands, on the north bank of the said river, and landing passengers thereon, or embarking them therefrom, and from establishing or using a ferry on the said river at any point *ex adverso* of the said lands, and from erecting any landing stage, ferry steps, or other accessories for the above purposes upon or *ex adverso* of said lands; and to ordain the said respondents to remove any such landing stage or others which they may have already erected on or *ex adverso* of the said lands." He averred that the respondents had recently without his knowledge or consent erected

a landing stage, ferry steps, gas lamps, &c., and established and put in use a ferry across the river to the ferry steps, by means of which ferry they were conveying to and from the complainer's lands across the river numerous persons who had no other access to or from the steps than by trespassing on his lands. He averred that a lamp, certain posts, and part of the steps connected with the ferry were on his lands. He also maintained that the respondents had no right by establishing a ferry to bring crowds of persons upon the complainer's lands, who trespassed over his fields in going and returning from the steps, to the great damage of his property.

The respondents denied that any part of their works were on the complainer's property. Further, they referred to sec. 114 of the Act of 1858 above cited, and alleged that the persons conveyed by them, who were for the most part workmen employed at the shipbuilding yards on the north bank of the Clyde, were so conveyed in discharge of the Trustees' right under that section from steps erected on their own ground. They averred that there was a public footpath along the complainer's land past the steps complained of, and that numbers of persons came to the ferry by means of that path. The complainer denied that there was any public right-of-way along the river.

The complainer, *inter alia*, pleaded—“(1) The complainer being proprietor of the said lands, and the respondents having no right to ferry passengers to or from said lands, or to land passengers thereon, or embark them therefrom, or to establish or use a ferry at any point *ex adverso* thereof, the complainer is entitled to interdict as craved. (2) The complainer is entitled to have the respondents prohibited from erecting on or *ex adverso* of his said lands any ferry steps or other accessories for the purpose of ferrying and landing or embarking passengers, and to have them ordained to remove any such works which they may already have erected. (3) The public not having any right-of-way upon the complainer's lands, the respondents are not entitled to maintain a ferry for their convenience at the place in question.”

The respondents pleaded—“(2) The respondents have by their titles and statutes right to maintain a ferry across the Clyde at the place in question. (3) No part of the ferry works on the north side of the river being erected on the complainer's property, but only on the river wall, which is vested in the respondents, the complainer is not entitled to interdict. (4) The public being, in point of fact, in the use and enjoyment of the footpath along the river bank, the respondents are entitled to maintain a ferry for their convenience at the place in question.”

The Lord Ordinary, after a proof, repelled the reasons of suspension and refused interdict.

He added this note:—“In 1851 the respondents acquired in feu from the complainer a strip of ground on the north side of the Clyde, being a part of lands of Merklands. The purpose of this acquisition was to enable them to widen the river. This was done, and a retaining-wall was erected on the north margin. On the top of this retaining-wall the respondents have erected a gas lamp and certain posts, &c., in connection with a ferry which they have recently established at that point over the Clyde. The first question is, whether

these things have been erected on their own property or on the property of the complainer?

“For the complainer it is contended that the boundary of the respondents is the line occupied by the summit of the inclined front of the retaining-wall, and it follows from this contention that the retaining-wall belongs partly to the respondents and partly to the complainer. The Lord Ordinary cannot adopt this view of the feu-contract. The ground given off is defined by a plan annexed to the feu-contract, and is described as amounting to a certain number of square yards. The north boundary is thus given in the feu-contract:—“On the north by the other parts of the lands of Merklands belonging to the said William Stuart Stirling Crawford, along which it extends from C to E on said plan 2035 feet on the line to be occupied by the summit of the inclined front of the retaining-wall to be erected along the new north margin of the river.” This line is not given as the boundary; but as the line along which the measurement is to be made, and having regard to the fact the north boundary is the lands of Merklands, the Lord Ordinary cannot hold that any part of the retaining-wall erected by the respondents is beyond the limits of their feu.

“The respondents adduced evidence from certain plans to show that they had not encroached on the complainer's property. The Lord Ordinary has doubts whether this evidence is legitimate, and he does not proceed upon it.

“A more important question is, whether the respondents are entitled to maintain their ferry? Apart from the consideration which the Lord Ordinary has already noticed, the complainer contends that the use of the ferry brings on his lands a great number of persons who have no right to be there, inasmuch as there is no public road on the north side of the river, and therefore no access to or from the ferry. But it was proved that for a number of years past the public have been in use to use the north side of the Clyde as a public road. It seems to the Lord Ordinary that the respondents cannot be required to try with the complainer whether this right does or does not exist; and that so long as the public use continues the respondents cannot be prohibited from continuing their ferry. They do not directly invade any right of the complainer, inasmuch as all the passengers are taken and landed on ground belonging to them.”

The complainer reclaimed, and argued—The evidence showed that part of the ferry works in question was on his land, and the trustees were therefore trespassers thereon. But assuming that this had not been proved, the trustees having acquired these strips of land for the special purpose of widening and straightening the river Clyde, their right of fee was a qualified one, and they could not lawfully use it for any other purpose to the prejudice of their author—*Bostock v. N. Staffordshire Roy. Coy.*, May 25, 1852, 5 D. G. & S. 584; *Norton v. London & N.-W. Roy. Coy.*, July 15, 1878, L. R. 9 Chan. Div. 623. The trustees were using their ferry right in violation of their powers by statute and under the feu-contract by so landing passengers that they could not leave the steps except to go upon the complainer's private ground—*Colquhoun v. Paton & Ors.*, June 20, 1859, 21 D. 996; *Duke of Montrose*, March 10, 1848, 10 D. 896. The action was properly di-

rected against the trustees, who were the most substantial, though not the only invaders of the complainer's right. The public would sustain no injury by any decree pronounced in this action.

The respondents replied—The Lord Ordinary had rightly held that the ferry-works were erected on their own ground. The public were *de facto* in use to walk along the footpath on the complainer's land, and the trustees could not be called upon, in a question with him, to decide as to the existence of a right-of-way thereon. The trustees did nothing more than ferry passengers across the river in discharge of a statutory duty, and had no concern with their subsequent destination.

At advising—

Lord Young—In this case Mr Stirling Crawford seeks to interdict the Clyde Trustees from landing or embarking passengers at a certain place *ex adverso*, as he describes it, of his property.

He states as one and the material ground for his application for interdict—that ground which the Lord Ordinary deals with first—that to a certain extent the landing appliances are erected upon his own property. He says that a gas-lamp and also certain posts erected by the respondents are still within the southern boundary line of the complainer's lands; and he also avers that the topmost step of the stair leading up from the river level encroaches to the extent of a few inches upon his ground.

To dispose of that matter first, I may say I am of opinion with the Lord Ordinary that this ground fails upon the fact, for I am of opinion that in point of fact the lamp-post and the step in question are wholly upon the property of the Clyde Trustees. But it was observed in the course of the discussion—and I repeat it because I think it a sound observation—that the case substantially, and so far as it is really of any interest or importance, would be the same although these erections had to the extent alleged been encroachments upon the pursuer's property. No doubt it would have been necessary to take them down, but the question of landing or embarking there would have remained all the same.

Now, the next ground upon which he asks to interdict the respondents is, that by landing or embarking passengers on their own property there they are violating the condition of the title upon which they hold the subjects that had been disposed to them some years ago. That title was granted under certain provisions and declarations, one of which was—“The said second parties and their foresaids shall be bound to appropriate the said two pieces of ground wholly and exclusively to the widening and straightening of the river Clyde, and also shall be bound to erect a substantial embanking or retaining wall along the new brink of the river as delineated on said plan, and uphold and maintain the same at their expense; and shall form and maintain two watering-places, one at the east and another at the west end of said ground disposed in the second place, besides steps at convenient distances in said embanking wall for access to the river; and shall also plant a thorn hedge in lieu of the one partly taken away by the second parties' operations and partly still remaining, and that at such a distance from and parallel with the said retaining-wall as may be pointed

out by the said first party or his managers, and shall protect said hedge by stob and rail in the usual manner.”

The only other declaration of any importance is that which follows immediately thereafter—“Declaring that the foreshaid ground is hereby disposed to the said second parties for the sole purpose contained in the foreshaid Act, 9th Victoria, chapter 23d, and the Acts therein recited, and that no buildings shall be erected thereon of the nature of public works, stores, warehouses, or dwelling-houses.”

Now, the Clyde Trustees are the conservators of the navigation of the Clyde, it being their duty to take such measures as may be necessary for deepening and widening the river, and to act generally as the guardians of the navigation, and they purchased the little bit of ground to which these clauses refer from the complainer in that character. It is provided by a subsequent statute, no doubt—and that may be kept in view—that they shall be entitled to acquire rights of ferry across the river, not for any purpose of profit of course—for the Clyde Trustees are not a body instituted for the purpose of making profit; they exist to promote and guard the interests of navigation in the Clyde, and all the dues they collect are to be expended upon these purposes. But the authority granted to them, possibly *ob majorem cautelam*, by Parliament to acquire rights of ferry is clearly in their character of river guardians. It is not that they may carry on the business of ferrying to profit, but that they may have the command of this great water highway, and that others having proprietary rights of ferry may not interfere—that is to say, use their rights so that they might interfere—with the purposes of navigation.

Therefore I regard their position as having rights of ferry as altogether cognate to their position as trustees of the river, and as such guardians of the navigation.

Now, the place where they so land and embark, as the complainer alleges, is within the limits of the ferry which was acquired, and acquired after the acquisition of this piece of ground of the complainers. It was not a ferry station, so to speak. The subject of ferry-right was naturally introduced into the argument here, and has been frequently referred to, although in my view of the matter it really does not materially affect the question which we have to consider. A ferry, as it naturally exists, is a right and a duty to convey passengers across a river or narrow estuary between two places, and the right is generally exercised and the duty performed between two stated places, commonly thus continuing a highway which ends on each side of the river or estuary. That, I think, is the common illustration of a ferry. It is that which most frequently occurs, and with which therefore we are most familiar; but that, although the most common illustration of what a ferry is, does not exhaust the notion of a right of ferry. The right which is thus exercised, with the corresponding duty, has very extensive limits. The ferry here has considerable limits up and down the river where it exists, and nobody else is entitled to convey passengers for hire across the water within these limits; but the ferryman is—not that he is entitled to encroach upon private ground anywhere, but that his right of ferry to carry across the

river exists within these limits. If he proposes to exercise that right or perform that duty anyhow, in a manner that will invade the legal rights of others existing within the limits of his ferry, he will be stopped. But his right of ferry exists within the limits of the ferry for all that, with this only restraint upon the use of it—a restraint of a character joined to the exercise or use of all rights—that you must so use the right as not to invade the rights of others; and of course if a ferryman use his right so as to invade private property anywhere within the limits of his property he must be stopped.

Now, the particular *species facti* here, beyond what I have already stated, is this:—The banks of the river at this place, like the river itself, have gone very extensively into business of recent years. There are large shipbuilding-yards on both sides of the river, and the workmen in these shipbuilding-yards require accommodation on the other side of the river—the other side from where they work—where I suppose they can get it more cheaply and more conveniently. Accordingly, they pass from the north side, where their work is, in the case of some of those shipbuilding-yards, to the south side, where their houses are, for the night, and I suppose also for their meals. They have been doing that in increasing numbers for years, just as the business on the banks of the river was increasing. The trade on the banks of this great river is increasing very much; and it has been admitted on both sides that in point of fact workmen to the number of hundreds, and latterly in thousands, have gone upon the banks of the Clyde here, and embarked where they could get a boat to take them to their houses upon the south side of the river for meals and for the night. The Clyde Trustees had the sole right to carry them across for hire, although, if consistent with the interests of the navigation of which they were the guardians, they might have allowed others to carry passengers across. Possibly that was done to a large extent. But the trustees in any case had the matter in their own hands, being the proprietors of the right of ferry. That was the very purpose of their being in that position—as I have already pointed out—the purpose, namely, of controlling and regulating the passage of the river. And thus, when the workmen came and presented themselves on the bank here (where they had a strip of property of their own) in hundreds, and latterly in thousands, they considered it to be according to their right, if not according to their duty, to afford those large numbers of the public the accommodation of their ferryboat across the river, and they did so within the limits of their ferry.

The question is, whether they could afford that accommodation to those hundreds and thousands without invading any private right?

Now, they took the people on board their boats where they presented themselves—namely, upon the property of the Clyde Trustees themselves—on the banks of the river; and they landed them there again when they were returning to or from work. But the pursuer says—“The strip of ground immediately beyond that, and between them and their workplaces, is my private property, which they had no right to cross, and which they could not cross without trespassing.” In reply to that the trustees say—“Well, that is not our affair. The public present themselves in great

numbers upon the river bank, demanding to be carried across, and we carry them across; whether they were trespassing before they came there or not is not our affair. If they were upon your ground, you should stop them. But don't come to us about that, or ask to interdict us from taking them across the river upon the assumption that they were trespassing. We are not the parties to try that question with you. These workmen have been doing what they are doing now for the last eleven years. Only they have very much increased in numbers of recent years. Formerly, and before we accommodated them as we have been doing at this point, they only trespassed more, as you say, along the bank which is your property. We are taking them up at a point nearer to their work—within a few yards of their work. But if they are trespassing over these few yards, pray establish that in a question with them, and stop them; and if they don't come there to demand passage across the river we won't take them. We have no desire to do so. We cannot assume that they are trespassing, because you are permitting them to come, and it is not to the purpose to say that you will incur some obloquy if you raise the question and try to stop them. They are the proper parties—the proper contradictors—in such a question as you mean to raise; and you are not to stop me upon an assumption against me in a question in which I am not the natural contradictor. I am not the proper party to try that question with. You are not to stop me, on an assumption adverse to the public, from carrying the public across the river when they present themselves there.”

Now, I have stated the position of the respondents in the way it presents itself to me. That is the view which the Lord Ordinary has taken, and I think it is the right view.

Now, I have put a certain illustration more than once in this case. I put that illustration—I am afraid more than once—as illustrative of my view that the right of ferry here was a mere accidental circumstance in the case, and not materially involved in the consideration of it. The illustration I put was this:—Suppose the river Clyde instead of being a waterway had been a landway or highway, that instead of being traversed by boats had been traversed by tramways and omnibuses. A number of the public present themselves on the highway—for this river bank, so far as the property of the Clyde Trustees is concerned, is part of their highway. It may be put under water by them when and how they please. It is part of the highway put under their charge at this moment; it is the margin of it. I say the public present themselves on this part of the highway. They may or may not have trespassed in getting there; but they present themselves there. Are they not to be taken into the tramway cars or into the omnibuses; or is the proprietor who alleges they have trespassed over this ground to come and say, “You are not to take these people across, because they have trespassed over my ground; and if you dispute that, the presumption in the meantime is against you that they were trespassing, for it is my private property, and it is not established that they had a right. To be sure, you are not the proper party to try the question whether they had a right or not, and I will not incur the obloquy of trying it with them; but it shall be assumed against you

that they have not the right, and therefore you shall be interdicted from taking them into the car or omnibus."

I cannot assent to that. I think the action is directed against the wrong party. If the pursuer means to try the question whether he is entitled to stop the public from doing what they have been doing without any interference or interruption on his part for years past, he must bring his action against them—against those who are committing the trespass—and establish his proposition against them, and stop them from doing what admittedly they have been doing for many years. It is not the embarkation into a boat on the river that is the point at this stage of the controversy. They did embark from the bank. And I should say that anybody who is entitled to be on the bank without trespass is entitled to go into a boat from the bank, or out of a boat on to the bank. And if he means to establish, or thinks he can establish, this proposition about the right of people to go on that ground which has been so long used by the public, and is not hindered by considerations of prudence or otherwise from bringing an action for that purpose, he must bring his action against those who, according to his allegation, commit the trespass. Whether the boat belongs to a person having a right of ferry, or belongs to anybody having a right to ply it upon the river Clyde, I think the boat-owner is entitled to say—"I take up that passenger on the margin of the river, where he is not trespassing, and I put him down again upon that place where he commits no trespass by having his foot there. He assures me that he will find his own way from that place where I put him down or take him up to the place of his work; and he will maintain his right to find his way from it against anybody who disputes it. I am not to be interdicted and told, 'Oh, but I don't like to try the question with him. I would rather try it with you;' for in a process of that sort I am not the natural party to try the question with."

I do not think that is the correct position to put such a matter into. The complainer begins his interdict at the very point where all attempt at trespass on his property ceases, or at the place where it does not begin. I am not going to assume that there was a trespass before, and I am not going to assume that there will be a trespass after—before in the case of embarking passengers, or after in the case of landing passengers. I say I am not going to assume that. The question is not here, and is not to be tried in this process. The public have been trespassing, as Mr Crawford calls it, in hundreds and in thousands for some considerable time. I do not say it is too late to stop them if they have been invading any right, but, as I have indicated, it is not for those who have been doing no wrong in carrying people across the Clyde to try such a question with the aggrieved party. It is for the aggressors or trespassers.

Upon these grounds, and without determining anything in favour of or against the public, I am of opinion that the Lord Ordinary is right in holding that the question is not one for the Clyde Trustees to try, and that they are entitled to take these passengers across the Clyde. I do not know that the case would have been very materially different—that is to say, I am not sure that I would not have arrived at the same conclu-

sion—although there might have been other considerations to be taken into account had the Clyde Trustees possessed any property here, or had the owner of the boat which took the people across any property at all. I have not yet heard any satisfactory answer to the question which I ventured to put yesterday. Suppose a private property or private grounds, descending to the banks of a river such as the Thames, with a private ornamental stair leading down to the river. The proprietor of these grounds can certainly prevent any trespass upon them. He could prevent anybody using his steps, upon the assumption that I am now making. But if a crowd of people presented themselves there, with whom he was not interfering, and I took them into my boat, which was lawfully upon the river Thames, or upon the river which passed the property, I would not invade his right in any way—I would commit no trespass upon him. I do not deny his right, or violate his right, or do anything actionable against him. The trustees commit nothing actionable against this complainer—give him no ground for an action for damages or otherwise—by carrying people across the river Clyde. People who trespass over his ground are committing an actionable wrong, assuming that there is a trespass. But there is no wrong done by the man who carries these same people on the river—I mean no wrong done to the complainer. The right of ferry is really not in question, for that is a mere franchise—a right to prohibit other people from carrying passengers for hire there. There would be no actionable wrong committed by the proprietor of a boat who took up people from the private stair I have supposed, or who landed people on the private stair—no such wrong on the grounds I am stating. They may be the party's own servants out without leave. But whoever they may be, you must take your remedy against those who are doing you the injury, withholding your right, or denying your right, or disobeying your authority. But you have nothing to do with those who may carry them after they get on to a public road or a public river.

In every view, therefore, and without determining that Mr Crawford is not in a position to exclude all the world from this ground behind the river bank at the point in question, and still less indicating an opinion that he is in a position to do that, I am of opinion that the judgment of the Lord Ordinary is right, and that upon the grounds which he has stated in his note, and which I have only perhaps unnecessarily amplified and illustrated.

LORD CRAIGHILL—I am of the same opinion as that which has been expressed by Lord Young and by the Lord Ordinary.

The question which has been decided by the Lord Ordinary, and which we have now to determine, is one undoubtedly of very great interest. I have listened to the argument with great attention, and confess the question is one of some nicety. But in the end, and on grounds that have appeared to me to be perfectly satisfactory, and without very much hesitation, I have arrived at the conclusion that the judgment of the Lord Ordinary is right.

In dealing with this matter it is necessary to keep in view two portions of the prayer for interdict. The first part of it asks that the Clyde

Trustees, "and all others acting under their authority," be interdicted "from ferrying passengers on the river Clyde to and from the complainer's lands of Merklands, on the north bank of the said river." The second part of the prayer asks that they be interdicted "from landing passengers thereon, or embarking them therefrom, and from establishing or using a ferry on the said river at any point *ex adverso* of the said lands, and from erecting any landing stage, ferry steps, or other accessories for the above purposes upon or *ex adverso* of the said lands," &c.

Now, I think the decision in regard to the one part of the prayer need not necessarily be the decision as regards the other. If the trustees are not able without going on the complainer's lands to take in and put out passengers, it may quite well be the complainer has an enforceable right against them. But it is an entirely different affair to say, that if the Clyde Trustees have a landing place of their own not on the complainer's lands of Merklands, not even touching them, and they are taking passengers there in virtue of the right to ferry them which they possess, yet the complainer, for the grounds he has set forth, is to be entitled to an interdict by which the use of this ferry should be stopped.

Upon this last question it appears to me that it must be determined pretty much on the terms of the statute of 1858, and I think the complainer in insisting on his remedy against the Clyde Trustees has overlooked entirely, or at least to a very large extent, the provisions of that statute which are set forth upon the record.

In the first place, and with reference to the first point which the Lord Ordinary has decided, I am clearly of opinion that all to the south of the north edge of the coping is the property of the Clyde Trustees, and that everything that is part and parcel of their landing place is upon their own ground. In taking in passengers from the shore, or landing them again, they do not use one bit of ground which belongs to anybody else.

That being so, what is the other consideration upon which it is said that interdict ought to be granted? It is, that to allow a ferry to be established here would be contrary to the good faith of the contract by which in 1851 the grounds in question were acquired by the Clyde Trustees from the complainer.

Now, it is perfectly possible that the Clyde Trustees might have sought to put the ground to a purpose inconsistent with the good faith of the contract, and if that had been shown to have been the case, very probably Mr Crawford would have had a good cause of complaint, and the trustees might have been prevented from making such a misappropriation or misuse of the ground acquired by them for certain purposes.

But what was the purpose it was acquired for? The purpose was that it should all be used for the purpose of widening and straightening the river Clyde, which then was and long had been an important navigable river. Is it not the case that all the ground embraced in lot No. 1, as well as in lot No. 2, has been used for this purpose by the absorption of this ground, so to speak, into the *alveus* of the river. The river has certainly been widened, and it has also been straightened; and these two purposes of widening and straightening having been served, if ground at the foot

of the wall, or if the face of the wall can, consistently with anything to be found in the feu-contract, be used as an access to or from the river, it does not appear to me that such use involves any contravention of any condition, express or implied, in the contract.

But the fact of the matter is, as I have already said, that all that is done in the way of embarking or landing passengers is done within the boundaries of the trust. The steps themselves are part and parcel of the wall. The erection of these steps is not contrary to anything that is to be found in the contract. On the contrary, the complainer, if he had been so minded, might have caused the erection of these steps for his own convenience. But the steps were erected by the respondents without any necessity being imposed upon them to do so; and after having been constructed for a purpose which was obviously one of the purposes for which such steps or cope was to be put up, they are only using them now for a perfectly legitimate purpose.

All that being so, the question comes to be, on what ground is it that the complainer is to be granted interdict? It must be upon this ground, that there being no right of public way over the lands of Merklands, of which he is proprietor, all who reach the landing station at the ferry going across these lands must be held to be persons who are not within the purview of the Act of Parliament of 1858, by which authority was granted to the Clyde Trustees to place a ferry-boat or ferry at any point where the public might be conveniently served to the east of the lands of Marlinford. Now, it humbly appears to me that that is not a matter with reference to which the trustees are entitled to interfere. It is not a matter certainly upon which they are bound to interfere. The thing the Act of Parliament provides is this, that the Clyde Trustees are to be "entitled to provide one or more ferry-boats for the convenience of persons passing from one side of the river to another to the east of Marlinford, and to levy such reasonable rates for the use of such boats, and the tear and wear of the works of the trustees, as they shall consider reasonable, not exceeding one-half-penny for each passenger." This is their right, and who are the persons to be served? They are persons who may desire to pass from one side to the other. But these persons are landed on ground belonging to the Clyde Trustees. The Clyde Trustees' ferry-boat lands them upon their own ground; and in the use of the ferry-boat there is no encroachment whatever on the right of property belonging to the complainer.

But it is said that the persons seeking to cross must be divided into two classes. One class are supposed to be, or must be presumed to be, trespassers. Another class are those who in one way or another have come to the landing place, and have a right, or are supposed to have a right, which may be exercised, and which therefore involves no trespass on the property of anybody. But this is not a matter for the trustees to take up and deal with. Their duty in regard to the matter is this:—If they establish a ferry at any place for the convenience of the public, the public may resort to the ferry station, which is their own, and the use of which involves no encroachment on the property of another. Having put a boat there, I think they are entitled to take these persons, without inquiring where they came

from or what rights they had exercised in reaching the station, and ferry them across. It would be a very extraordinary thing were it otherwise. The trustees are not the persons themselves by whom the encroachment was made. They only take those who come to them and desire that they shall be ferried across. If there has been a wrong done, it has been a wrong done before the passengers reached the ground from which they embark. Is this complainer to be heard when he complains that the Clyde Trustees take passengers across who come to them desiring to be ferried to the other side, when he is doing nothing meanwhile to prevent the use of his ground by the people who come? Surely not. It is by the use of his grounds that they are enabled to present themselves. Surely, the first thing to be done is to prevent these people using his ground. If he can prevent them using his ground, he ought to do so, and then the annoyance will, so far at least, be put a stop to also. If he has made the attempt to prevent them, and has not succeeded because of the violence of those who desire to be the passengers in the ferry boat, it might be—I do not say it would be—that the trustees in taking up, so to speak, those who are guilty of the violence by which an illegal trespass was constituted, might be held as having participated in the wrongdoing. Whether that would be the case, looking to the terms of the Act of Parliament, or indeed apart from the Act altogether, it is not necessary to inquire. But when the fact is not only that the complainer does nothing to prevent persons, who he says are trespassers, reaching the landing or embarking place, but on the contrary permits them to reach that spot, he cannot be heard to say that the Clyde Trustees in the exercise of a lawful right shall not ferry passengers from one side of the river to the other, because somehow or other those whom they carry reach the ferry in consequence of a trespass. Trespass or no trespass is not a question with which the Clyde Trustees have anything to do. They only look at the persons who are at their landing place seeking to go from one side to the other; and according to my view, however these persons have reached that place, so far as appears from the terms of the Act of Parliament, the Clyde Trustees are entitled to carry them across. That being their right, they cannot be subjected to the interdict craved.

Upon these general grounds I am of opinion that the Lord Ordinary is right.

LORD JUSTICE-CLERK—It is my misfortune, and I consider it a great misfortune, to differ from your Lordships as to the result of this case. Being conscious that the Lord Ordinary's view has been adopted by your Lordships, it is perhaps not desirable that I should express much in the way of dissent. Nor do I desire to do so. At the same time, it is only fair to the parties, that entertaining as I do a very clear opinion in the opposite direction, I should express the grounds of it. And I should express my opinion with more modification and reluctance were it not that I am not surprised at our differing, seeing that we differ mainly upon the question we have to try. I do not imagine the question we have to try is, Who has to prove the right or non-existence of a right-of-way on the part of the public over this ground on the top of the em-

bankment. I do not think that question is in the case at all.

The proprietor of the ground here (Mr Stirling Crawford) complains that, contrary to the good faith of an expressed contract with him, the Clyde Trustees have established a ferry station at the margin of the river upon ground that he conveyed to them by express disposition, and that without the means of connecting it with any public road or way except what they acquire by trespass. The Trustees say, It is none of our business whether these persons, who come to us seeking to be ferried across have trespassed or not. And I should in some circumstances have thought there was great weight in that contention. But the Lord Ordinary seems to think that the real ground on which the action should be dismissed is, that it is directed against the wrong person. It is clearly directed against the right parties, if there is a good ground of action, and no other parties could possibly have been the defenders in this case. And I shall state very shortly my impression on the whole of this matter.

The ground in question belonged to the complainer Mr Crawford. The public had no right to the ground that was disposed of by him. It is not said that they had; but it appeared for the public interest that an embankment, and a widening of the stream should take place at that point, and it being private property, the Clyde Navigation Trustees made a specific bargain with Mr Crawford for the acquisition of the ground, but on certain terms, which I imagine to be as clearly enforceable now as when they were originally granted. It is expressly set out—and this truly is the foundation of the whole of this matter, and excludes therefore nine-tenths at least of the matters that were argued from the bar—that the feu-disposition was granted with and under the following provisions—that the said second parties and their foresaids shall be bound to appropriate the said two pieces of ground wholly and exclusively to the widening and the straightening of the river Clyde, and shall be liable to maintain a substantial embankment. They are not entitled to do anything else with the ground, and the question is, whether they have not done something else with it?

But that is not all. There is a provision about planting a thorn-hedge in lieu of the one taken away, and protecting it by stobs and rails, which means nothing but this, that the ground on the other side of the hedge was the private property of the disponent. It can mean nothing else, and does mean nothing else. And then the deed says—“Also declaring that the foreshaid ground is hereby disposed to the said second parties for the sole purposes contained in the foreshaid Act, 9th Victoria, chapter 23d, and the Acts therein recited, and that no buildings shall be erected thereon of the nature of public works, stores, warehouses, or dwelling-houses.” It seems to be thought by my brother Lord Craighill that that is modified or overridden by the Act of 1858. I am entirely of a different opinion. At the date of this disposition to the Clyde Trustees they had no right of ferry whatever. They acquired a right of ferry in 1858, and had previously acquired a right of specific ferry from the opposite side to a point not far from the place in question, and they propose now, and did propose

three years ago, to put down a ferry-station at the foot of the embankment which they made under this conveyance. The question which the complainer has to try is, whether they could do that under the terms of their conveyance and looking to the nature of the rights of parties in that ground? How anybody else but the trustees could be defender in such an action I cannot conceive; nor how it can be imagined for a moment that the Clyde Trustees could enter into a proof to establish a public right-of-way with other parties with whom they had no concern I am unable to understand. In short, I think a false issue has been presented by the respondents here from the very first, and that that question has really nothing to do with the true matter we have to solve. And my solution of it may be given on two grounds. In the first place, I am of opinion that after having this conveyance granted to them, if they had acquired a right of ferry, and had proposed to set a ferry-station down there, it was a direct violation of the provisions of this contract. It is in vain to say it is for the accommodation of the public. They acquired the ground under conditions that they are bound to fulfil. No doubt the stations which the Act of 1858 authorised them to put down were stations along the banks, but that that Act authorised them to violate the conditions on which for the public good they had obtained this piece of ground, is to my mind a position that is wholly untenable. Even as regards stations put down under the authority of the Act of Parliament, they required in the first place to have acquired a private right to the landing-place, and in the second place to connect it with some public road or way.

Therefore the ground on which the Lord Ordinary has gone wrong is this, that this putting down of a station at such a point as that in question is a use of the ground acquired that is prohibited by the very terms of that Act itself.

But observe what the effect of it is. This staircase that was to be made for the benefit of the complainer is now to be handed over to the public. It becomes a public way and nothing else. Those who communicate to this place a right of ferry induce people to come to it, and they acquire a right over it—at all events, if they use it for the prescriptive period; and certainly the proprietor never intended to grant any such right as that. Nor did he ever contemplate that the staircase—a bargain made for his own convenience—was to be altered in such a way by this Act.

But the second view I take—and I hold it very strongly—is, that they were not entitled to put down any station here under their right of ferry unless they could communicate directly with some public way. They admit and cannot deny that the ground upon which they discharge their passengers from their ferry, or right of ferry, is private ground; but they also say that the public are allowed to come here. Well, if the ground had been acquired in the ordinary way without limitation, there might be a question as to how far there was a presumption that the people who came there were entitled to be there; but when I find that the ground was given for a totally different purpose, and that the trustees unquestionably induced the people to come by putting down this ferry-station contrary to their title, that I think raises an entirely different question.

I am of opinion that they were not entitled to do that. And I may say further, that I think all illustrations taken from persons unconnected with the proprietor of the ground, who derived no title from him, are wholly apart from and outside of the real merits of this question.

I have said enough to indicate the view I take.

The Court adhered.

Counsel for Complainer—D.-F. Kinnear, Q.C.—Dundas. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—Trayner—Lorimer. Agents—Webster, Will, & Ritchie, S.S.C.

Wednesday, June 22.

FIRST DIVISION.

YEOMAN v. M'INTOSH BROTHERS.

Excise—23 and 24 Vict. cap. 114, secs. 170–88—
“Grogging.”

In balancing the stock books of a spirit dealer under the provisions of the 23d and 24th Vict. c. 114, the Excise officers disregarded certain entries of “grog” and samples of spirits, in respect that these entries did not, as required by the statute, contain any number of permit or certificate, nor the name of any person or firm from whom or of what place the “grog” and samples were received. By disregarding these entries the officers found in possession of the dealer an excess of spirits over the quantity correctly entered in their stock, whereas by taking these entries into account there would have been no excess. *Held* that the entries of “grog” were rightly disregarded, but that those applicable to samples should have been taken into account.

This was a Case arising upon an information prosecuted on behalf of Her Majesty, and by order of the Commissioners of Inland Revenue, at the instance of the appellant against the respondents, claiming certain penalties in respect of alleged contraventions by the respondents of the Statute 23 and 24 Vict. cap. 114.

The information was first brought before a Petty Sessions of the Peace for the County of Edinburgh, held at Edinburgh on 27th April 1880. The respondents pleaded not guilty. Several adjournments were thereafter made. Proof was led on 10th June and 14th October 1880, and on the latter date counsel and agent for the parties were heard. The Court of Petty Sessions made *avizandum* with the case. They gave judgment on 26th October 1880, finding the respondents not guilty of any of the offences charged.

An appeal was thereupon taken, at the instance of the complainer, to the Court of General Quarter Sessions of the Peace, to be holden next after the expiration of twenty days from the date of the judgment. The said Court of Quarter Sessions was held on 1st March 1881. On the appeal being called, the appellant asked leave to withdraw all the counts of the information save the first, which was granted. The Court, after hearing the appeal on the 1st count of the information, resolved, before pronouncing judgment, to state the facts of the case