

The Court approved of the Auditor's report of the account of expenses, and decerned.

Counsel for Defenders—Graham Murray.  
Agent—R. Ainslie Brown, S.S.C.

Thursday, March 14.

FIRST DIVISION.

[Lord Kinnear, Ordinary.]

THE CALEDONIAN RAILWAY COMPANY v.  
ALEXANDER CROSS & SONS.

*Railway—Undue Preference—Difference of Rates over Same Line of Railway—Railway Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 83—Relevancy.*

In an action at the instance of a railway company for rates charged for the carriage of goods, held that averments were relevant to entitle the defenders to a proof that the pursuers had charged other traders lower rates for goods of the same description conveyed or propelled by carriages or engines passing only over the same portion of the lines of the pursuers' railway.

*Railway—Undue Preference—The Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), sec. 23—Process—Railway Commissioners—The Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25), sec. 58.*

The Railway and Canal Traffic Act 1854 provides that no railway company is to give an undue preference to any person, company, or description of traffic.

Held (following the case of *Murray v. The Glasgow and South-Western Railway Company*, November 29, 1883, 11 R. 205) that interdict is the only remedy in a claim against a railway company for violation of the Statute of 1854; that the defenders' averments that the railway company had granted undue preferences to other traders in violation of the statute were irrelevant; and a motion by the defenders that the case be transferred to the Railway Commissioners refused.

Observed that any proceeding before the Commissioners to interrupt the illegal practice of which the defenders complained must be in the form of a complaint to stop illegal proceedings, and not in the form of a claim for payment of money.

This was an action by the Caledonian Railway Company against Alexander Cross & Sons, seed merchants and manure manufacturers, Hope Street, Glasgow, concluding for payment of £1635, being the balance of an account of £3481, which the pursuers alleged that the defenders had incurred to them for the carriage of goods between August 1886 and February 1888.

The action was raised in November 1888. The Railway and Canal Traffic Act 1888 came into operation on 1st January 1889, and judgment in the cause was given in March 1889.

The defenders averred in answer 2 as amended that they "conduct a large business in the manufacture and sale of chemical manures, which contain

from 10 per cent. to 50 per cent. of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless the pursuers have conceded to various oil companies, and amongst others to Young's Paraffin Light and Mineral Oil Company, Limited, mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the said oil companies. The pursuers carry goods for the said oil companies and other traders between the following Glasgow stations, viz., Port Dundas, Stobeross, Buchanan Street, Sighthill, and London Road on the one hand, and the following stations on the other hand, viz., Auchterarder, Bridge of Allan, Brechin, Coatbridge, Cumbernauld, Crieff, Stirling, Balerno, Edinburgh, Midcaldor, Biggar, and Lanark. The pursuers carry goods for the defenders between the same stations. For carriage of the same description of goods the pursuers have in the account sued for charged to the defenders between these stations, or some of them, higher rates than they have charged to the said oil companies and other traders. In like manner the pursuers have in the account sued for charged higher rates to the defenders than to the said oil companies and other traders as regards carriage of goods between the following Glasgow stations, viz., Eglinton Street and General Terminus on the one hand, and Bishopton, Port Glasgow, Kilmarnock, and Stewarton on the other hand. A statement of the said mileage rates, showing the differences between the rates charged to the defenders and those charged to the said oil companies for carriage from Glasgow to various places in Scotland is herewith produced and referred to. The defenders have applied to the pursuers for more precise information as to the mileage rates charged by them for goods of the same description as those sent for carriage by the defenders, but the information has been refused. Explained further, that the defenders deal largely in nitrate of soda, which is a substance of the same description and used for the same purposes as sulphate of ammonia. And similarly the defenders have been charged in the accounts sued on for the carriage of nitrate of soda, rates largely in excess of those charged to the said oil companies and other traders for the carriage of sulphate of ammonia. In particular, between Glasgow and Coatbridge, the pursuers have charged to Messrs Baird & Company, ironmasters, a mileage rate for the carriage of sulphate of ammonia very much lower than the rates charged in the accounts sued on for the carriage of nitrate of soda. Further, the defenders deal largely in sulphuric acid, which is conveyed by rail in tank waggons. Oil and coal tar are carried in a similar way, and are goods of the same description, in so far as relates to carriage. But the value of oil is about £12 per ton, and of sulphuric acid about £1, 10s. Nevertheless the pursuers carry oil and coal tar for the said oil companies at a mileage rate much lower per mile than they carry sulphuric acid for the defenders, and charge in said accounts." They also alleged — "If the mileage rates charged by the pursuers to the said oil companies and other traders be

applied to the said accounts, then the payments already made by the defenders are sufficient to discharge the same. The defenders refer to the Railway and Canal Traffic Act 1854, and particularly section 2 thereof, the Railways Clauses Consolidation (Scotland) Act 1845, and particularly section 83 thereof, and to the other statutes applicable to railway rates."

The following is the statement referred to by the defenders:—

"STATEMENT of Mileage Rates referred to in Defenders' Statement.

From Glasgow to	Miles.	Rates charged to Defenders.	Rates charged to Oil Companies.
Auchterarder	49	10/	6/3
Bridge of Allan	33	7/1	4/8
Brechin	115	15/	11/9
Cumbernauld	13	3/4	2/1
Orieff	56	10/	6/10
Stirling	30	6/6	4/3
Balerno	41	6/8	5/1
Edinburgh	47	6/	6/1
Midcalder	37	6/8	5/1
Bishopton	12	3/	2/
Port Glasgow	19	3/10	2/11
Kilmarnock	24	6/	3/6
Stewarton	18	5/8	2/9
Biggar	41	8/4	5/7
Lanark	30	6/8	4/3

"The mileage rates charged by pursuers for carriage of sulphate of ammonia are as follows—2d. per ton per mile for the first 12 miles; 1½d. per ton per mile for the next 28 miles; and 1d. per ton per mile for the miles beyond 40."

On 11th December 1888 the Lord Ordinary (KINNEAR) pronounced this interlocutor:—"Having heard counsel on the amended record, in respect it is admitted that the averment added by the defenders to their answer to the second article of the condescendence applies only to a portion of the account sued for, Appoints them to lodge in process, within eight days, a statement specifying the particular items of the said account as to which they allege that the rates thereby charged are higher than those charged to other traders for the same description of goods passing over the same portion of line only, stating in each case the point of departure and arrival between which the goods have been carried."

The defenders lodged this minute—"In obedience to the interlocutor of the Lord Ordinary, dated the 11th December 1888, the defenders state that their objection to the charges in the account sued for, on the ground that the rates charged to them are higher than the rates charged to other traders for the same description of goods passing over the same portions of line only, applies to all the items in the said account," &c.

The defenders pleaded, *inter alia*—" (1) The rates charged by the pursuers in the accounts sued on being such as to constitute an undue and illegal preference in favour of other traders, and to the prejudice of the defenders, are not recoverable. (3) The defenders having already paid the whole rates and charges which the pursuers are legally entitled to impose in respect of the carriage of the said goods, are entitled to absolver, with expenses."

On 21st January 1889 the Lord Ordinary

pronounced the following interlocutor—"Allows the defenders a proof of their averment that the pursuers have charged lower rates to other traders than the rates charged to the defenders for goods of the same description conveyed or propelled by carriages or engines passing only over the same portion of the lines of the pursuers' railway, and to the pursuers a conjunct probation; and appoints the proof to be taken before the Lord Ordinary on a day to be fixed.

"*Note.*—As the record was originally framed the defenders' averments appeared to me to be irrelevant. It was decided in *Murray v. The Glasgow and South-Western Railway Company*, 11 R. 205, first, that in order to bring the enactment of 1845, upon which the defenders rely, into operation it was necessary that the traffic carried for different parties should be conveyed for the same distance over the same portion of the line; and secondly, that a complaint under the statute of 1854 is not competent before this Court. The pursuers maintain that the amendment does not remove the defects of the original averment on record. But I think it may be read as meaning that goods for other traders were carried for lower rates between the same points of arrival and departure, and this is the meaning which the defenders' counsel stated that it was intended to convey. The statement lodged in obedience to the last interlocutor is not a satisfactory compliance with the order, but I am satisfied by the explanation at the bar that the defenders ought not to be considered in default, and that it would be too strict a construction of their averments as now amended to hold them irrelevant on the ground suggested.

"The defenders moved that the case should be transferred to the Railway Commissioners under the 58th section of the Railway and Canal Traffic Act 1888. The pursuers maintain that the action is not one of those to which that section applies, and that if it were, the transfer, which is not imperative, ought not to be made. It appears to me that it would be inexpedient to decide either of these questions until it has been finally determined whether the defence is irrelevant, and to what extent."

The Railways Clauses Consolidation Act 1845 (8 and 9 Vict. cap. 33), sec. 83, provides—"And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties, it shall be lawful, therefore, for the company, subject to the provisions and limitations herein, and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorised to be taken, either upon the whole or upon any particular portions of the railway as they shall think fit, provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway, under the same circumstances, and no reduction or advance

in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

The Railway and Canal Traffic Act 1854 (17 and 18 Vict. cap. 31), sec. 2, provides that no railway company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . . Section 3 provides—"It shall be lawful for any company or person complaining against any such companies or company, of anything done, or of any omission made, in violation or contravention of this Act, to apply in a summary way by motion or summons in England to Her Majesty's Court of Common Pleas at Westminster, . . . or in Scotland to the Court of Session in Scotland, as the case may be, or to any judge of any such court, . . . and if it be made to appear to such court . . . that anything has been done or omission made in violation or contravention of this Act by such company, . . . it shall be lawful for such court or judge to issue a writ of injunction or interdict restraining such company . . . from further continuing such violation or contravention of this Act, and enjoining obedience to the same; and in case of disobedience of any such writ of injunction or interdict it shall be lawful for such court or judge to order that a writ or writs of attachment, or any other process of such court incident or applicable to writs of injunction or interdict shall issue, . . . and such judge or court may also, if they or he shall think fit, make an order directing the payment by any one or more of such companies, of such sum of money as such court or judge shall determine, not exceeding for each company the sum of £200 for every day after a day to be named in the order that such company or companies shall fail to obey such injunction or interdict. . . ."

The Railway and Canal Traffic Act 1888 (51 and 52 Vict. cap. 25), sec. 12, provides—"When the Commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which but for this Act such party would have had by reason of the matter of complaint, provided that such damages shall not be awarded unless complaint has been made to the Commissioners within one year from the discovery by the party aggrieved of the matter complained of." . . . Section 58 provides—"Every action or proceeding which might have been brought before the Railway Commissioners if this Act had been in force at the time when such action or proceeding was begun, and is at the commencement of this Act pending before any superior court, may, upon the application of either party, be transferred by any judge of such superior court to the Railway and Canal Commissioners under this Act, and may thereupon be continued and

concluded in all respects as if such action or proceeding had been originally instituted before that Commission, provided that no such transfer nor anything herein contained shall vary or affect the rights or liabilities of any party to such action or proceeding."

The defenders reclaimed, and argued—The question between the parties being truly whether the pursuers had or had not given an undue preference in the way of rates to rival traders of the defenders was one specially suited for being sent to the Railway Commissioners in terms of the Railway and Canal Traffic Act 1888, section 58. This Act conferred valuable privileges on the Commissioners who could now award damages and deal with overcharges, while the only obstacle in a trader's way which could prevent him getting redress was if he delayed more than a year to make his application. The Commissioners formed a tribunal which had power not only to investigate, but also to give redress, while if the case was sent to trial before the courts of law the defenders would immediately institute proceedings before the Commissioners, and there could thus be parallel cases going on before two tribunals dealing with the same matter. It was impossible for the pursuers to maintain that their "rights or liabilities" would in any way be affected by the transfer, because these were specially reserved to them; and, as a matter of expediency, it was most desirable that this transfer should take place. In the event of there being a proof the findings of the Commissioners would be applied to the proof. Two questions were raised by the present case, one under the Railways Clauses Consolidation (Scotland) Act 1845, which could competently be tried in a court of law; the other a question under the Railway and Canal Traffic Act 1854, which could only be dealt with by the Commissioners, who had a privative jurisdiction. Upon these grounds the motion should be granted.

Argued for the respondents—No sufficient cause had been shown why this case should be transferred to the Commissioners. As to the powers of the Court in dealing with motions to transfer, it was permissive, and not binding upon the Court to make this transfer. The matter was thus in the discretion of the Court, who would not order such a transfer when, as in the present case, it would be attended with injustice to one of the parties. The matter was in Court, and could be speedily and simply disposed of, whereas the Commissioners were an uncertain body, and it was impossible to say when they would sit in Scotland, and would be ready to deal with such a matter as the present. The whole question was one of simple accounting and evidence, and required no railway skill to determine it. On the ground of expediency and justice to the pursuers it was desirable that a question like the present should not be remitted to the Commissioners.

At advising—

LORD PRESIDENT—This is an action at the instance of the Caledonian Railway Company against Cross & Sons for the sums due for the carriage of goods belonging to the defenders upon the pursuers' railway. I do not know whether there is any serious dispute as to the fact that the goods were carried, and part of the

defence stated is that the amount charged is just enough. However, that matter can go to probation if it is disputed, but the answer which the defenders make to this claim is substantially contained in the answer to the second article of the condescendence.

The first averment there is "that the defenders conduct a large business in the manufacture and sale of chemical manures which contain from 10 to 50 per cent. of sulphate of ammonia. The value of these manures is from £2 to £7 per ton. The value of sulphate of ammonia is £12 per ton. Nevertheless, the pursuers have conceded to various oil companies, and amongst others to Young's Paraffin Light and Mineral Oil Company (Limited), mileage rates for the carriage of sulphate of ammonia which they refuse to concede to the defenders for the carriage of their chemical manures, although the goods are of the same description. The rates charged to the defenders are very much higher than the mileage rates charged to the said oil companies." Now, these averments do not comprehend the averment that the goods of the two parties are carried under the same circumstances and over precisely the same line of railway, or anything else that would bring it within the operation of the 83rd section of the Act of 1845, and therefore it must be held to apply to the provisions of the Act of 1854 against undue preferences. It is quite settled, I think, by the case of *Murray*, that no claim can be brought in this Court against a railway company for the violation of the Act of 1854. The only remedy provided by that Act—the only remedy up to the present date, so far as I know—is that the company which violates that provision shall be restrained from doing so by interdict, and shall also be subjected to a penalty of so much per day. Therefore I think that part of the averment by the defenders is entirely irrelevant. If the party who makes that averment could not in an action in this Court enforce any claim against the railway company, just as little can it be pleaded in defence against an otherwise just claim of the railway company.

But there is another part of the averment which the Lord Ordinary has held to be relevant, and has admitted to probation, and that is the averment founded on the Act of 1845, and we must hold therefore in the form of the Lord Ordinary's interlocutor that what he has done is to refuse a proof of the first part of that averment as being irrelevant, and allow a proof of the second part. The Lord Ordinary has had some doubt, I think, as to whether the averment under the Act of 1845 is quite satisfactory or complete, but that has not been raised before us on any argument. Therefore I see no reason for doubting the propriety of the Lord Ordinary's appointment of the proof in this case, unless we are to deal with the motion of the defenders in this case that it should be sent to the Railway Commissioners under the Act of last year. Now, it does not appear to me what benefit the defenders could very well have by this transference of the case to the Railway Commissioners, because their complaint under the Act of 1854 cannot be made the subject of an action, and just as little can it be made the subject of a claim for money to meet the claim of the pursuers. The question would arise in the same way before the Railway Commissioners, and this averment under

the Act of 1854 would be just as irrelevant and just as much regarded so by the Railway Commissioners as it is by this Court, in so far as it is made the foundation of a money claim. It is quite open of course to the defenders to bring some proceeding before the Railway Commissioners for the purpose of preventing the continuance of an illegal practice of which they complain, and whether it is precisely the same under the Act of 1888 as under the Act of 1854 or under the Act of 1873 it is needless to inquire, but it must be in the form of a complaint to stop illegal proceedings, and not in the form of a claim for payment of money. Therefore I am for refusing that motion and adhering to the Lord Ordinary's interlocutor.

LORD RUTHERFURD CLARK and LORD ADAM concurred.

LORD MURE and LORD SHAND were absent from illness.

The Court adhered.

Counsel for the Pursuer—Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Counsel for the Defenders—Asher, Q.C.—Ure. Agents—Dove & Lockhart, S.S.C.

Friday, March 15.

## SECOND DIVISION.

[Lord M'Laren, Ordinary.]

MACKINTOSH v. ROSE AND OTHERS.

*Entail — Disentail — Expectancy — Surplus — Agreement — Payment in Error.*

In a petition for disentail of an estate the heir of entail in possession and the three next heirs agreed that the interests of the latter parties should be valued. In terms of the actuary's report the parties agreed by minute that the surplus funds remaining after valuation should be distributed proportionately to the several interests as already valued, and the surplus was distributed accordingly.

The Court, after remit to a man of business, approved of the proceedings, and disentailed the estate.

Four years thereafter the former heir in possession sued the three next heirs for repayment of the surplus funds, on the ground that the payment had been made in error, and that he had not been properly represented, as the same agent acted for all the parties.

*Held* that as the payments had been made under an agreement approved of by the Court, and that as the pursuer at the time of the transaction was *sui juris*, and had enjoyed independent advice, the action was incompetent, and the defenders *assolvièd*.

On 10th January 1880 Francis Henry Pottinger Mackintosh succeeded as heir of entail in possession to the estate of Farr, Inverness-shire. The next heirs of entail were Major Rose of Kilravock, and his sons Hugh and John.

In July 1882 Mr Mackintosh communicated