

articles of roup the purchaser could have no redress, even if the existence of the encumbrance were discovered before the completion of the transaction by payment of the price. But as the existence of this encumbrance was of necessity known to the seller, any attempt on his part to take advantage of the stipulations in the articles would be a manifest and transparent fraud, and in such a case it would be impossible to hold a purchaser to his bargain if he took proper measures for avoiding the contract. I cannot regard this as a case of the sale of a subject with all faults. The very peculiar stipulation in the articles of roup ought perhaps to have aroused the suspicion of the professional advisers of the purchaser, and in any case it was their plain duty to take their client's instructions as to whether he desired to have a search for encumbrances.

On these grounds I agree with your Lordships in thinking that the Lord Ordinary's interlocutor should be affirmed.

LORD KINNEAR concurred.

The Court refused the reclaiming-note and adhered to the interlocutor of the Lord Ordinary with additional expenses.

Counsel for the Pursuer and Respondent—W. Campbell—Wilson. Agent—R. C. Gray, S.S.C.

Counsel for the Defenders and Reclaimers—C. S. Dickson—Cook. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, January 26.

SECOND DIVISION.

[Lord Low, Ordinary.]

MACGREGOR v. NORTH BRITISH RAILWAY COMPANY.

Act of Parliament—Construction of Statute—Servitude—Lands Clauses Consolidation Act 1845 (8 Vict. cap. 19), secs. 17, 83, and 84—Notice—Compensation.

A proprietor of certain subjects *ex adverso* of East Princes Street Gardens, Edinburgh, held them under a feu-right granted in 1779 by the Corporation of Edinburgh, in which it was stipulated that these gardens should "be kept and preserved in perpetuity as pleasure ground."

In 1844 the North British Railway Company, with the authority of Parliament, constructed a railway through the valley between the Old and New Town of Edinburgh, and in 1891, being desirous of widening their line they obtained an Act of Parliament for that purpose. By that Act they were authorised to take a limited and defined portion of the gardens from the Corporation for the purposes of their railway. The Act contained the following proviso—"Nothing contained in this Act shall prejudice or affect the rights

of servitude, or other rights of the Corporation, or of the vassals of the Corporation, in virtue of their title-deeds."

Held (1) that this proviso did not prohibit the railway company from exercising any of the powers conferred by their Act if in the exercise thereof the foresaid rights of servitude were in any way prejudiced, but that it was to be read as preserving all the rights of the Corporation and the vassals, in so far as these had not been expressly affected by the Act; and (2) that no notice, in terms of the Lands Clauses Consolidation Act 1845, section 17, required to be given, or compensation in terms of section 83 and 84 of that Act required to be paid to the proprietor of the dominant tenement by the railway company before entering upon the portion of the gardens which the Act authorised them to take.

By feu-charter dated 24th March 1779 the Magistrates and Council of Edinburgh feued to Alexander Reid, mason, in Edinburgh, a piece of ground bounded on the south by Princes Street—"Declaring always that the ground lying to the south, betwixt Princes Street and the lake called the North Loch, is and shall remain in all time coming as is directed by the decreet-arbitral pronounced by Mr David Rae, advocate, dated the 19th, and registered on the Books of Council and Session the 20th days of March 1776." By his decree-arbitral Mr Rae found (1) that what are now known as the East Princes Street Gardens should, down to the verge of the North Loch, "be kept and preserved in perpetuity as pleasure-ground," and "remain in all time thereafter as pleasure-ground for the benefits of the inhabitants;" (2) "that the foresaid space or piece of ground so to be kept as pleasure-ground, shall be dressed up at the expense of the Town Council as soon as may be, . . . and in the dressing of the ground that the Magistrates and Town Council . . . shall be liable to no further expenses than what may necessarily arise from humouring the natural lying and situation;" and (3) that "the ground formerly occupied by the North Loch should be dressed up by forming a canal and making up the banks in a decent manner."

The restriction thus placed on the use, by the Magistrates, of East Princes Street Gardens was recognised and enforced by various Acts of Parliament, dating from 1816 to 1889. By these Acts it was declared that it should not be competent to the Magistrates or any other person, without the sanction of an Act of Parliament obtained for the express purpose, to erect buildings opposite Princes Street eastward of the Mound, or to discharge any restrictions regarding buildings contained in any feu-right, and that unless such sanction was obtained, the whole of the ground should be used as an ornamental area in all time coming. It was further enacted, *inter alia*, "any one or other of the proprietors or householders within the bounds of police of the said city for the time being"

should be entitled to enforce the above declarations and restrictions.

In 1844 the Edinburgh and Glasgow Railway Company, now represented by the North British Railway Company, built what is now known as the Waverley Station, and with the authority of Parliament constructed a line which ran through the valley between the Old and New Town of Edinburgh on the site of what was formerly the North Loch.

In 1877 the ground feued in 1779 to Alexander Reid was acquired by Donald Macgregor, who built the Royal Hotel partly on that ground.

By the North British Railway (Waverley Station, &c.) Act 1891 (54 and 55 Vict. c. 192), obtained by the railway company for the purpose of improving the Waverley Station and improving part of their line, they were authorised to acquire a limited and defined portion of the East Princes Street Gardens from the Corporation of Edinburgh for the purposes of their railway.

By section 35 of said Act, containing thirty-five sub-sections, it is enacted that "For the protection of the said Provost, Magistrates, and Council of the City and Royal Burgh of Edinburgh (hereinafter called the Corporation), the following provisions shall have effect and be binding on the company." The section then provides for the height and width of bridges, for the interference by the company with the surface of any street, road, or public path, for tunnel faces, retaining walls, and fences in Princes Street Gardens, for interference with sewers and drains, and for matters of a like nature. . . . In regard to the East Gardens, sub-section 15 provides—"The company shall not take, acquire, or use any part of East Princes Gardens except the portions hatched in red by Sir Julian Goldsmid, Baronet, the Chairman of the Committee of the House of Commons, . . . with such additional width as may be required for the walls enclosing the land acquired, the dimensions of which shall be agreed between the company and the Corporation, or failing agreement, as may be settled by arbitration." Sub-section 17 provides—"Any land in the East Princes Street Gardens or West Princes Street Gardens which the company may under the powers of this Act acquire from the Corporation shall be subject to the existing restrictions applicable to the ground in the said gardens formerly acquired from the Corporation, whether imposed by Act of Parliament or by agreement, and shall, subject to these restrictions, be used in the same manner as the ground between the Waverley Bridge and the Mound now held by the company may be used." By sub-section 20 it is provided that "the Incorporation may embank and plant the said East and West Princes Street Gardens in such a manner as to effectually screen the railways of the company from observation, and the company shall pay to the Corporation all reasonable expenses which the Corporation may from time to time incur for the purpose of restoring the disturbed ground in East and

West Princes Street Gardens, and for embanking and planting the railway as aforesaid." Sub-section 21 provides that, "except as hereinafter provided, the power of compulsory acquisition of land and of extinction of rights of way or passage, conferred by the Act, shall not extend to the North Bridge," but the company may make such alterations on the bridge as may previously be approved by the Corporation in writing. Sub-section 22 provides—"Nothing contained in this Act shall prejudice or affect the rights of servitude or other rights of the Corporation, or of the vassals of the Corporation, in virtue of their title-deeds." Sub-section 25 provides—"All the prohibitions, limitations, and restrictions applicable to the lands to be acquired within the city of Edinburgh shall apply to any company using or entitled to use the railway constructed on such lands;" and sub-section 38—"Nothing in this Act shall prejudice or affect the provisions, prohibitions, limitations, and restrictions contained in any prior Act, or in any agreements entered into by and with the company affecting the lands or property acquired or to be acquired by the company from the Corporation, or the use of such lands or property."

On the railway company proceeding to enter on and use for their works the portion of the gardens granted them by the Act, Donald Macgregor presented a note of suspension and interdict against the railway company, in which he asked that the respondents should be interdicted "from entering upon East Princes Street Gardens, and, in particular, that part thereof lying immediately to the north of the existing line of railway belonging to the respondents, or of the retaining-wall between the said line and the said gardens, and from in any way destroying or interfering with the trees or shrubs thereon, and from in any way using the same for railway purposes, or otherwise than as pleasure-ground, or contrary to the terms of the decret-arbitral pronounced by Mr David Rae, advocate, dated 19th, and recorded in the Books of Council and Session 20th March 1776, or from altering the present state or condition thereof."

The complainer sought interdict on three grounds—(1) He maintained that the respondents' proceedings were unauthorised by their Act of 1891. (2) He maintained that the respondents should have given him notice in terms of sections 17, 18, 83, and 84 of the Lands Clauses Consolidation Act 1845 (8 Vict. c. 19). These sections enact that when the promoters of an undertaking require to purchase land they must "give notice thereof to all the parties interested in such land," and that the promoters must before entering on such lands either have paid or deposited in bank the purchase-money or compensation agreed or awarded to be paid "to every party having any interest in such lands." (3) He maintained that the lands were of the nature of a common, and that the procedure prescribed by sections 93 to 98 of the Lands Clauses Consolidation Act 1845, viz., the convening of a meeting "of the parties entitled to

any rights of property, or servitude, or other rights in or over such lands," and the appointment of a committee to treat with the promoters of the undertaking for the compensation to be paid for the extinction of such rights, must be followed before the respondents were entitled to take possession of any part of the gardens.

The complainer pleaded—“(1) The respondents having no power or right to deal with the said East Princes Street Gardens in contravention of the complainer's rights therein, and being about to do so, interdict should be granted as craved. (2) The respondents' proceedings being contrary to the terms of the said decret-arbitral and statutes, interdict should be granted as craved. (3) The respondents' proceedings being contrary to the terms of the said decret-arbitral and statutes, and to the serious loss and damage of the complainer, interdict should be granted as craved. (4) The respondents' proceedings being unauthorised by the statute of 1891 founded on, interdict should be granted as craved. (5) The respondents not having taken the necessary steps to acquire or extinguish the complainer's rights, if it were otherwise competent for them to do so, interdict should be granted as craved.”

On 4th November 1892 the Lord Ordinary (Low) repelled the reasons of suspension, and refused the prayer of the note.

“*Note.*—[His Lordship set forth the pursuer's title]—Therefore by virtue of his title there is a binding restriction or servitude in favour of the complainer's property over East Princes Street Gardens. He has also, under the Acts of Parliament to which I have referred, a title as a householder of Edinburgh to enforce the restriction over the gardens, but I apprehend that his right to obtain the interdict which he now asks is rested entirely upon the servitude right. . . .

“Although the only interdict asked by the complainer in the note is an absolute and perpetual interdict, he maintained, alternatively, that he was entitled to interdict the respondents from taking possession of the lands unless and until they compensated him for the injury which his property will sustain through the execution of the works.

“In support of his claim for absolute interdict the complainer founds upon section 35 of the Act of 1891, sub-sections 17, 22, 25, and 38. The most important of these sub-sections is No. 22. If the complainer is not entitled to success upon that sub-section I think that it is clear that none of the others will aid him.

“Sub-section 22 is in the following terms—‘Nothing contained in this Act shall prejudice or affect the rights of servitude or other rights of the Corporation, or of the vassals of the Corporation, in virtue of their title-deeds.’

“The complainer contends that although the respondents are authorised to take part of East Princes Street Gardens for their works, the sub-section which I have quoted makes it illegal for them to do so, because they cannot execute their works without

extinguishing the servitude in favour of his property as regards the ground taken. In short, the complainer maintains that he and some other feuars in Princes Street in the same position are empowered absolutely to veto the undertaking authorised by the Act. It is extremely unlikely that the Legislature intended to give the complainer or any other person such a power; but as the enactment in the sub-section does not bear to be limited in any way, it is necessary to consider the context and the purpose of the 35th section in order to see whether the construction put upon it by the complainer is the true one—{His Lordship read parts of section 35 already quoted}.

“It is thus evident that the 35th section is not a part of the Act which confers powers upon the railway company, but that, on the contrary, it is intended to enforce certain restrictions upon the company in favour of the Corporation. I therefore cannot agree with the complainer that sub-section 22 falls to be construed strictly and as rather against than in favour of the company. The argument might be quite well founded if the enabling sections of the statute were under construction, but does not, in my judgment, apply to the 35th section, which, as the counsel for the respondents put it, is truly an Act obtained by and in favour of the Magistrates incorporated in the Act obtained by the company.

“If the provisions of sub-section 22 of section 35 are to be read in the sense contended for by the complainer, then that sub-section is not only repugnant to the purpose of, and the express powers conferred by other sections of the Act, but is also repugnant to the other provisions of the same section. For example, the limitation contained in sub-section 15, of the extent of the ground which the company are to be entitled to take in the gardens necessarily implies that they have power to take land there; and the provision in sub-section 20, that the power of compulsory acquisition of land shall not apply to the North Bridge, necessarily implies that they are to apply to the other lands delineated on the deposited plans, and described in the books of reference.

“The case therefore stands thus—Power is given in the usual terms to the company to take land in Princes Street Gardens; but, for the protection of the Corporation, it is provided in the 35th section that they are not to take above a certain amount. Then, according to the complainer's contention, the company are absolutely prohibited from affecting certain rights of servitude, although they cannot use one foot of the ground which they are authorised to take in the gardens without to a certain extent affecting these rights of servitudes. Such a result would be so inconsistent with the whole scope and purpose, as well as with the express provisions of the statute, that effect cannot, in my judgment, be given to it if the words of the sub-section relied on are fairly susceptible of a different interpretation.

“In my opinion, not only are the words susceptible of a different interpretation, but the expressed object of the 35th section, and the character of the provisions which its various sub-sections contain, demonstrate to my mind that the enactment in the 22nd sub-section is subject to, and operates only in so far as not inconsistent with the previous provisions of the Act.

“I am therefore of opinion that the complainer is not entitled absolutely to prevent the respondents taking any part of East Princes Street Gardens.

“The complainer next maintained that he was at all events entitled to interdict the respondents from entering upon the lands unless and until they had settled his claim for compensation for the injury which their works will inflict upon his property. His contention is mainly founded upon sections 17, 18, 83, and 84 of the Lands Clauses Consolidation Act of 1845.

“I am of opinion that it is settled that these sections do not apply to a person in the position of the complainer—*Don v. The North British Railway Company*, 5 R. 972; *Hammersmith, &c., Railway Company v. Brand, L.R.*, 4 H.L. 171, and especially Lord Colonsay's opinion, 206, *et seq.* They apply only to persons whose lands are taken, or who have an interest in the lands which are taken which the company must purchase. No part of the complainer's lands are taken, or sought to be taken, nor has he any interest in the lands which the company must purchase. The only interest which he can claim is that he is proprietor of a tenement in favour of which a negative servitude exists over the lands taken. When the company acquire these lands (which they have compulsory powers to do) the servitude is extinguished. They do not require—probably they are not entitled—to purchase the lands, and also to purchase freedom from the servitude. The owner of a dominant tenement has not an interest in the servient tenement within the meaning of the sections of the Lands Clauses Act referred to. His interest is in the dominant tenement, which the respondents do not propose and have not the power to take. Any injury which the complainer may suffer by the execution of the works is not by reason of any interest which he has in the servient tenement being taken away, but by reason of the value of the dominant tenement being depreciated. Very likely the complainer's property has been injuriously affected, and I do not suggest that he is not entitled to compensation. All that I decide is that he is not in the position contemplated by the sections of the Lands Clauses Act upon which he founds. He was not, in my judgment, entitled to notice under these sections, nor is he entitled to prevent the respondents taking possession of the lands until they have settled his claim of compensation or made a deposit by way of security.

“The complainer also founded (as an alternative, I suppose, to his argument upon the 17th, 83rd, and 84th sections) upon sections 93 to 98 of the Lands Clauses Act, and argued that to entitle the respondents

to take possession of any part of the Gardens they must follow the procedure provided in these sections. Now, these sections fall under the general heading, ‘And with respect to such lands as shall be of the nature of commony, be it enacted as follows.’ The question therefore is, whether the Gardens are lands ‘of the nature of commony.’ They certainly do not constitute a commony within the meaning of the law of Scotland. But the complainer says that they are of the nature of commony because he and other feuars in Princes Street have servitudes over them, and under the Acts of Parliament to which I previously referred the proprietors and householders of Edinburgh are given a title to enforce restrictions as to their use. If that view is sound, then I apprehend that the first thing which the company would require to do would be to convene a meeting of the Princes Street feuars who have servitudes, and also of the whole proprietors and householders within the police burgh of Edinburgh, for the purpose of appointing a committee to treat with the company for the compensation to be paid for the extinction of their rights. It is difficult to believe that the Legislature intended such a proceeding to be imperative in such a case as the present.

“I do not think, however, that the Princes Street Gardens can in any reasonable sense be said to be lands ‘of the nature of a commony.’ The Gardens admittedly belong in property to the Lord Provost, Magistrates, and Council, and no other person has any right of property in them, or any right to occupy or use them. The fact that a negative servitude is constituted over the Gardens in favour of certain feus in Princes Street clearly does not make them of the nature of a commony, nor, in my judgment, does the fact that the Magistrates are restricted by Act of Parliament as to the use to which they are to put the ground, and that any householder in the burgh is given a title to insist that the restriction shall be observed. The most that can be said is that the proprietors—the sole proprietors—are by statute limited to a particular use of the lands. But lands in that position are so far from being a commony that I do not think that by any reasonable interpretation of the words they can be said to be ‘of the nature of a commony.’

“Upon the whole matter I am of opinion that the note must be refused with expenses.”

The complainer reclaimed, and argued—1. This being a private Act of Parliament, must be construed strictly. The compulsory powers given to a railway company should be construed so as not to be extended beyond the express words of the Act or their necessary implication—*Moncreiffe v. Perth Harbour Commissioners*, March 9, 1843, 5 D. 879; *Caledonian Railway Company v. Edinburgh and Glasgow Railway Company*, December 12, 1874, 17 D. 162; *Lamb v. North London Railway Company*, May 3, 1869, L.R., 4 Chan. App. 522. The rights of feuars like the complainer had

been recognised all through in the previous Acts of Parliament. Their interests had never been allowed to be interfered with. Sub-section 22 of section 35 of the present Act expressly declared that their rights were not to be prejudiced; that was a condition imposed on the railway company. 2. Even if his first argument was wrong, the complainer was entitled, as an owner of a right in this ground, to notice before the railway company entered on this ground, in terms of section 17 of the Lands Clauses Act. He was therefore at least entitled to interim interdict until he got such notice, and the compensation for the injury done to him had been deposited in bank, in terms of sections 83 and 84. A mortgagee having an equitable mortgage over certain lands by holding the titles had been held entitled to receive notice of an inquiry as to the amount of compensation to be paid for the lands under the statute—*Martin v. London, Chatham, and Dover Railway Company*, June 29, 1866, L.R., 1 Chan. App. 501. The complainer had a far greater interest in the present case; he had a right in the land actually taken. This distinguished his case from those quoted by the Lord Ordinary. 3. Under sections 93 to 98 of the Lands Clauses Act the railway company should have convoked a meeting of all having rights of property or servitude or other rights in or over these lands in order that compensation might be fixed for the extinction of these rights.

Argued for the respondents—1. Sub-section 22 of section 35 must be read so as not to be repugnant to the Act. That sub-section meant that the rights of servitude were to be respected except in so far as they were necessarily encroached on by the carrying out of the Act. The only servitude over the ground in question was that the line of sight must not be interfered with. The ground in question was in fact not within the range of the servitude; it was part of the *solum* of the North Loch. 2. and 3. The opinion of the Lord Ordinary on these heads was right, and it was unnecessary to enlarge on it. His judgment should be affirmed.

At advising—

LORD YOUNG—The complainer, who is proprietor of a hotel in Princes Street with a frontage to the street opposite the East Princes Street Garden, seeks to interdict the respondents (the railway company) generally from entering the garden, and particularly from using the ground acquired by them from the Corporation under the Act of 1891 for the purpose of widening their railway and executing the works thereon confessedly necessary to that end. He does not allege that the acquisition was not authorised by the Act, or that the use proposed and in course of being made is other than the Act contemplated, and indeed specified and authorised in explicit terms. His contention is that the Act is rendered abortive, unless indeed with his consent and that of every feuar in Princes Street by reason of the provision in clause 35, sub-section 22,

which is in these terms—[*His Lordship read the sub-section*].

The complainer is a vassal of the Corporation, and with a title which gives him a right of servitude or other right in the ground of the East Gardens which his property fronts, and the foundation of his case being that what the respondents are proposing and doing under the Act, will “prejudice and affect” his right in virtue of his title, it is proper at the outset to examine his title in order to see what that right is—[*His Lordship quoted from the feu-charter and decret-arbitral*].

Now, what “servitude or other right” was by this feu-charter of 1779 conferred on the vassal, an owner of the dominant tenement, over the servient tenement? I think clearly only a servitude against the erection of building whereby sight and prospect might be intercepted, together with an obligation on the superior to put and keep it in a decent and sightly (*i.e.*, not unsightly or offensive) state. Railroads—that is, roads with rails laid on them—were then unknown, but with respect to such roads as were known, whether for driving, riding, or walking, I find nothing even to suggest the idea that a right to prohibit them was conferred on the vassal by the charter. Servitude with respect to prohibiting roads is of course out of the question, a servitude against roads being unknown. An obligation on the owner of the ground not to make or permit roads would probably be lawful, but it would require distinct expression, and there is, so far as I know, no instance of such an obligation. Taking the charter of 1779 as the vassal’s title, I could not hold that it gave him any servitude or other right entitling him to object to the formation or use of roads on the ground therein described as “lying to the south betwixt Princes Street and the lake called the North Loch,” or to require the owner thereof to plant trees or shrubs thereon, or to refrain from pruning or cutting down trees or shrubs (if any) then existing or which might thereafter be planted thereon. There are no words in the charter expressing or vindicating such a “servitude or other right.” What language would be appropriate in order to constitute such a right over the land of another, assuming that it possibly might be constituted, I cannot say. There has not, so far as I know, been any attempt hitherto to do such a thing.

The complainer acquired his property in 1877 at which time the respondent’s lines of railway had existed on the ground and been in daily, and I suppose hourly, use for a quarter of a century. He must therefore be dealt with on the footing that such was the state and condition of the servient tenement when he bought his property. It will appear from what I have said that in my opinion his predecessors in title had no right to object to the construction and use of these lines of railway which did not hinder the ground being kept as an open space unbuilt on and with free prospect over it. But if they had such right and did not object, the complainer’s

right must be considered with reference to the state and condition of the ground when he acquired the dominant tenement. Had a line of buildings then existed along the whole south side of Princes Street, although his predecessors might have prevented their erection, I should think it clear that the whole servitude created by the charter of 1779 would have been gone. Taking the case as it stands, and assuming contrary to my opinion that the charter of 1779 created a servitude against the construction and use of lines of railway on the servient tenement, I am of opinion that to this extent the servitude had ceased when the complainer acquired his property in 1877.

What then was his right of servitude or other right in virtue of his title in 1891, when the statute in question was passed? I think and very clearly only this, that the servient tenement should be maintained unbuilt on and as an open space with free prospect over it, and be kept in decent and slightly condition. Right to object to lines of railway as such, and to their ordinary legitimate use, he had none. His servitude extended, I assume, over the ground on which they existed, so that he could by virtue of it object to its being built upon or used so as to interfere with the open space and prospect which it secured to him, and this might be very valuable, for the railway might be discontinued at any time and the site of it sold by the railway company. This consideration enables me to attach an intelligible and rational meaning to the provision of clause 35, subsec. 22 of the statute. By that statute the railway company were empowered to acquire from the Corporation more ground, part of the servient tenement, whereon to extend their lines, and assuming the right of the vassals of the Corporation by virtue of their titles—all being the same as the complainer's—to be what I have stated, it was reasonable and in no way inconsistent with the object of the statute to provide that they should not be thereby prejudiced or affected. The statute itself makes explicit and careful provision that in the hands of the railway company the ground authorised to be acquired shall not be used by them for building or in any way inconsistent with the preservation of open space and prospect or even with the sightliness of the prospect. But then, as I have pointed out, the railway through the gardens may possibly be discontinued, as some people think it ought to be and eventually will be, and should this happen the ground would be sold by the railway company and cease to be in their hands. It may therefore be represented as no idle or meaningless provision that the existing servitude or other rights over it by the title-deeds of the vassals shall subsist unprejudiced and unaffected. The language of the clause is indeed inaccurate, for it professes to preserve unaffected the rights of servitude or other rights of the Corporation, who had certainly no right of servitude, and whose right of property (and they had no other) in ground which they sold and conveyed to

the railway company could not remain unaffected. But the import and meaning of the whole provision is, I think, clear enough to the effect that the rights of all parties interested over the line of railway as widened and extended under the Act should be the same as over the line and the site and *solum* of it as existing before such widening and extension. This interpretation of the proviso in question has the advantage of being reasonable and consistent with the plain and only object of the statute, while that contended for by the complainer is so irrational that it would, I think, be unseemly to impute to the Legislature the intention which it implies. One of the cases referred to in argument before us was that of *The Caledonian Railway Company v. The Edinburgh and Glasgow Railway Company*, 17 D. 162. I think it unnecessary to say more than that in my opinion that case is not at all in point. The question there was about the meaning of the clause in the statute whereby the Edinburgh and Glasgow Railway Company were authorised to acquire ground for various purposes which were specified, but it contained a clause providing that they should not be entitled to take any ground from the Caledonian Railway Company—and no ground of theirs was specified in the schedule—without their written consents previously given by the directors. But that clause wound up with a proviso in these words, “except for the purpose of making and maintaining the junction before mentioned in the manner hereinbefore provided;” and the only question in the case, whether the declaration that they should not be entitled to take ground of the Caledonian Company without their consent in writing was subject to that exception, the Edinburgh and Glasgow Company maintaining that for no other purpose specified in the Act could they take the ground of the Caledonian Railway Company without their consent except “for the purpose of making the junction there provided;” and the question, and the only question, in the case was whether that was the true construction of the statute or not. The Court took the view—which did not occur to me to be the right on reading the case—that these words “except for the purpose of making the junction” were not applicable to the provision and did not qualify it. It was maintained, on the most plausible grounds—and I should have thought sound grounds—that it did qualify the provision, but the Court held otherwise. That was the only question raised for argument, and there is nothing of the sort here. It was, of course, not disputed that if the Legislature allowed one to take land the property of another, but only in the event of their previously obtaining the consent of the other company, no one could doubt the effect of that, and it was not doubted there. Therefore that case is in my view not at all in point.

There is one observation which I should like to make. The record refers to the duty of the Magistrates and Council at common law as trustees for the community of Edin-

burgh, and also under particular statutes applicable to this ground. I think we are not concerned in this case with any such consideration. We are familiar enough with the doctrine that magistrates and town council who hold the title of the property as trustees for the community which they represent, and as guardians of their interests, have duties—duties to abstain from some things and to do others, and duties to their constituents, those for whom they are trustees and guardians—which may be enforced in this Court if they are not observed or violated. If the complainer here thinks that as a citizen of Edinburgh he has any cause of complaint against the Magistrates and Town Council as the trustees and guardians of the community, either at common law or by particular statutes, he must bring them here and state his ground of complaint. It does not occur to me that he has any, but if he thinks he has, he must bring the Magistrates and Town Council into Court and state his complaint against them as failing in their duty either at common law as the trustees and guardians for the community, or some duty imposed upon them by statute. In the present case I can only deal with his legal rights as the proprietor of the dominant tenement in respect of which he is seeking to enforce what he represents as a servitude or other right in him as such against the railway company as now the proprietors of a part of the servient tenement. The Lord Advocate pointed out to us—it was the last observation I heard him make—that as matter of fact the railway company averred upon record that their lines of railway were not upon the servient tenement at all, but on the site formerly occupied at the date of the charter in 1779, and at the date of Mr Rae's award, by the North Loch, and that the servient tenement only extends from the south side of the street to the boundary of the loch. If that be so, of course no question of law arises at all, and the railway company are outwith the servient tenement, but he did not ask any evidence upon that subject and none has been led, both parties thinking it better to have a judgment upon the law of the case upon the assumption made for the purpose of the legal argument that the ground taken and operated upon by the railway company is within the servient tenement.

On the whole matter, and for the reasons which I have stated, I am of opinion that the judgment of the Lord Ordinary is in its results right, and that the complainer here has no good ground for complaint at all, and that the action ought to be dismissed with expenses.

LORD TRAYNER—The complainer in this case asks the Court to interdict the respondents from proceeding with certain works which they have commenced in the East Princes Street Gardens, and he does so on three grounds—First, that the respondents' operations are not authorised by the Act of Parliament under which they profess to be

acting; second, that the respondents have not given the complainer notice of their intention to enter upon and take the land; and third, that the lands in question being of the nature of common, the statutory procedure prescribed with reference to the taking of such lands has not been followed. The first of these grounds is based upon a construction of the Act of Parliament obtained by the respondents last year; the second and third grounds are based upon an alleged violation or disregard of the provisions of the Lands Clauses (Scotland) Act 1845. With regard to the second and third grounds, I agree with the Lord Ordinary that they are untenable. The complainer is not the owner of the ground taken, or of any interest therein which the respondents must purchase, and the lands cannot in any sense be regarded as of the nature of common. What right the complainer may have, if any, on the ground that the subjects of which he is the owner are injuriously affected by the respondents' operations is another question, but that question does not present itself for determination in this case. The only question, then, which remains is, whether the respondents are authorised by their Act of Parliament to execute the works now complained of? and this depends upon the construction to be put upon the provisions of that Act. The complainer maintains that the Act excludes the operations complained of; the respondents, on the other hand, maintain that their operations are expressly authorised. The facts necessary to be borne in mind in dealing with the present question are few, and are not disputed. The East Princes Street Gardens belong in property to the city of Edinburgh, but are held by the city subject to the restriction that they shall be "kept and preserved in perpetuity as pleasure ground." The complainer is proprietor of certain subjects *ex adverso* of the gardens held by him under a feu-right granted by the city, in which it is stipulated that the ground in question shall remain in all time coming of the nature and character above described. Nearly fifty years ago the respondents (with the authority of Parliament) constructed a railway (now a part of their system) through the gardens in question, and being desirous of widening their railway there they applied last year to Parliament for the necessary powers and obtained the Act now under consideration. By it the respondents are expressly authorised to take a certain limited and well-defined part of the gardens for the purposes of their railway under restrictions as to the extent and character of the buildings to be erected thereon, if any, none of which restrictions have been disregarded, or, at all events, are here brought in question. The respondents' Act, however, contains this clause upon which the complainer founds, viz.—"Nothing contained in this Act shall prejudice or affect the rights of servitude or other rights of the Corporation, or of the vassals of the Corporation in virtue of their title-deeds." The effect of this clause, as the complainer contends, is

to prohibit the respondents from exercising any of the powers conferred by their Act, if in the exercise thereof the right of servitude which the complainer has is in anyway affected. I assume that the complainer's right of servitude extends over the ground taken by the respondents, although that is disputed by the latter. Now, if the clause I have above quoted from the respondents' Act is read and construed in accordance with the complainer's contention, the result is, that what the Legislature gave by one clause of the Act it took away by another clause in the same Act. Note how this stands. The Act authorises the respondents to take compulsorily and to use a certain piece of ground for the purposes of their railway. That ground was the property of the Corporation, and to transfer it by force of statute to the respondents on their paying the ascertained price or value was affecting "the rights of the Corporation" in a very direct manner. But nothing in the Act is to affect the "rights of servitude or other rights of the Corporation." Therefore nothing in the Act shall authorise the respondents to take compulsorily the ground in question, as that affects the Corporation's right of property. I have referred to the clause in so far as it deals with the rights of the vassals, because it shows more strikingly the absolute inconsistency between the different provisions of the Act when read as interpreted or construed by the complainer. The result of that construction is however the same, if for rights "of the Corporation" one reads the rights "of the vassals of the Corporation." Now, is that the construction of the clause? It is obviously very improbable that the Legislature intended by the subsection under consideration to destroy or prevent the carrying out the primary purpose for the accomplishment of which the Act was passed, and a construction which would lead to that conclusion is not to be accepted unless no other can be found. Any reasonable construction which will render the Act available will be preferred to one which will render it nugatory, and in my opinion such a construction can be found.

I agree with the Lord Ordinary in thinking that this sub-section is to be read as preserving all the rights of the Corporation or its vassals in so far as these have not been expressly dealt with. Any right of property servitude or other right which the Act has not transferred or authorised the respondents to acquire is reserved to its present holder unimpaired; just as if the clause had said, subject to the foregoing provisions no rights of the Corporation or their vassals shall be affected. This construction appears not only a reasonable but the right construction, when it is considered that the section (section 35) of which this sub-section forms a part is a mere addendum or proviso qualifying the clauses (and the rights thereby conferred) which precede it. But an addition to or a qualification of preceding clauses presupposes that these clauses shall stand in force

as qualified, not that these clauses are thereby repealed or rendered of no avail. A proviso which would operate a repeal of the clause is not a mere qualification.

LORD JUSTICE - CLERK — I so entirely concur in the opinion of your Lordships that I have nothing to add. It would be quite out of the question to read an Act of Parliament as containing provisions absolutely repugnant one with another if it is possible to read it in a sense in which there is no repugnancy, but I agree that there is no difficulty here in reading the sub-section in favour of the Corporation and its vassals consistently with the rest of the Act, namely, that the new proprietors when they got a right to take over a certain portion of the ground did not thereby acquire a right to do anything upon that ground except what is authorised in the Act by which they obtained it, and that every other right which the Corporation or their vassals have over the ground is reserved to them absolutely.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for the Complainer—Dickson—Cooper. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Lord Advocate Balfour, Q.C. — A. S. D. Thomson. Agent—James Watson, S.S.C.

Saturday, February 4.

FIRST DIVISION.

DAVIDSON v. MACRAE AND OTHERS.

Succession — Trust — Discretionary Power of Trustees — Selection of Charitable Purposes — Failure of Trustees — Judicial Factor — Exercise of Power.

A testatrix conveyed her whole estate in trust to two persons named and the acceptor or survivor as trustees, and directed that the residue of her estate should be paid by the trustees "to such charitable or religious purposes, and in such proportions, as they or the acceptor or survivor of them may think proper, according to their or his discretion." The two trustees named having died leaving part of the residue undisposed of, a judicial factor was appointed on the trust-estate.

Held that the discretionary power given to the trustees named by the testatrix was personal to them, and could not be exercised by the judicial factor; that as regarded the undistributed portion of the residue the bequest had failed, and that the same fell to be divided among the next-of-kin of the testatrix.

Helen Robbie died on 28th July 1870 leaving a testament whereby she conveyed her whole estate "to James Webster Barnett,