

But while charitable trusts are, as matter of legal doctrine, merely one class of trusts, and while their prominence in legal decisions results from nothing more than their being the most numerous class of public trusts, I do not think that it is true that they have been uniformly treated by the Courts in Scotland exactly as other trusts would be treated. The Courts have, I think, as matter of historical fact, reflected more or less, consciously or unconsciously, the bias which disposes everyone favourably towards charity; and this never appeared more plainly, or was avowed more frankly, than in the decision of your Lordships' House in the case of *Morgan (Magistrates of Dundee v. Morris*, 3 Macq. 134). To this favour of charities I ascribe the decision in favour of the validity of a bequest for such charitable purposes as a trustee may select. Accordingly when I am asked to apply, by analogy, to public purposes decisions about charitable purposes, I decline to do so. The proper inference from those cases is not that the law that the testator must select a particular class or particular classes of objects before he can leave it to a trustee to select the object of the bequest is relaxed, but merely that it is settled that charitable purposes form such a particular class. On the merits of the question now before your Lordships I am unable to hold that the designation of public purposes is a compliance with the rule.

Interlocutor appealed from affirmed, and appeal dismissed.

Counsel for the Pursuers, Reclaimers, and Respondents—Solicitor-General for Scotland (Dickson, K.C.)—Younger, K.C.—Duncan Miller. Agents—A. & W. Beveridge, for Duncan & Black, W.S.

Counsel for the Defender, Respondent, and Appellant—Lord Advocate (Graham Murray, K.C.)—J. Wilson, K.C.—Scott Brown—Allan J. Lawrie. Agents—Faithfull & Owen, for Davidson & Syme, W.S.

COURT OF SESSION.

Thursday, November 28.

FIRST DIVISION.

[Lord Stormonth Darling,
Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* STEVENSON.

Railway—Compulsory Taking of Lands—Tenant's Interest—Right of Company to Take Less from Tenant than what Acquired from Landlord—Compensation—Notice to Treat—Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19), secs. 6, 17, and 112.

By agreement a railway company acquired from a landlord his interest in certain lands, part of a farm. Thereafter they obtained an Act which conferred powers upon them to acquire

these lands compulsorily. After the passing of the Act, which incorporated the Lands Clauses Consolidation (Scotland) Act 1845, the railway company served a notice to treat upon the tenant of the farm, but this notice only referred to a portion of the part of the farm acquired from the landlord. In a suspension and interdict brought by the tenant, held that the railway company were not bound to take the tenant's interest in the whole of that part of the farm which they had acquired from the landlord.

By agreement dated 11th May 1900 the North British Railway Company acquired *inter alia* 23,983 acres of land, part of the farm of Lochgrog in the parish of Cadder and county of Lanark, from the proprietor, Archibald Stirling of Keir, and the latter agreed to withdraw his opposition to a bill then before Parliament for the purposes of which the land was acquired. The current tacks and rights of possession of tenants were to be excepted from the disposition, and the Railway Company was to relieve the proprietor of all tenants' claims, excepting deductions of rent for land taken, which were to be dealt with in terms of the Lands Clauses Consolidation (Scotland) Act 1845. No disposition of the said 23,983 acres of land had been granted at the date of this action. The bill became the North British Railway Company (General Powers) Act 1900. It received the Royal Assent on 6th August 1900. This Act conferred power to enter upon, take, and use for the purposes of the undertaking certain lands in the parish of Cadder belonging to Mr Stirling, but this power did not cover all the land acquired by the agreement, and the agreement did not include all the land to which this power extended.

On 15th May 1900 the Railway Company wrote to John Stevenson, the tenant in possession of the farm of Lochgrog, informing him of the purchase, and that possession would at once be taken of a portion only of the land acquired, and that the rent for the balance should be paid to them instead of to the former proprietor. Certain correspondence followed, but as no agreement was arrived at, on 22nd August 1900 the company served a notice to treat upon Stevenson. This notice related merely to 13,181 acres, being the amount of land proposed to be taken at once. Stevenson claimed to be compensated for the whole 23,983 acres acquired from the landlord, and brought the present suspension and interdict to prevent any proceedings under the said notice to treat.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. c. 19) enacts as follows:—Section 6—“Subject to the provisions of this and the Special Act it shall be lawful for the promoters of the undertaking to agree with the owners of any lands by the Special Act authorised to be taken, and which shall be required for the purposes of such Act, and with all parties having any right or interest in such lands, or by this or the Special Act enabled to sell and convey the

same, for the absolute purchase of any such lands or such parts thereof as they shall think proper, and for the purchase of all rights and interests in such lands of what kind soever."

Section 17—"When the promoters of the undertaking shall require to purchase any of the lands which by this or the Special Act, or any Act incorporated therewith, they are authorised to purchase or take, they shall give notice thereof to all the parties interested in such lands, or to the parties enabled by this or the Special Act to sell and convey the same, or their rights and interests therein, or such of the said parties as shall after diligent inquiry be known to the promoters of the undertaking, and by such notice shall demand from such parties the particulars of their interest in such lands, and of the claims made by them in respect thereof; and every such notice shall state the particulars of the lands so required, and that the promoters of the undertaking are willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works."

Section 112—"If any lands shall be comprised in a lease or missive of lease for a term of years unexpired, part only of which lands shall be required for the purposes of the Special Act, the rent payable in respect of the lands comprised in such lease or missive of lease shall be apportioned between the lands so required and the residue of such lands, and such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part and the promoters of the undertaking on the other part, and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by the Sheriff; and after such apportionment the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the Special Act; and as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of rent as previously to such apportionment he had for the recovery of the whole rent reserved by such lease or missive of lease; and all the obligations, conditions, and agreements of such lease or missive of lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purposes of the Special Act in the same manner as they would have been in case such part only of the land had been included in the lease or missive of lease."

On 23rd February 1901 the Lord Ordinary pronounced the following interlocutor:—"Repels the pleas-in-law for the respondents: Suspends, interdicts, prohibits, and discharges in terms of the note of suspension and interdict as restricted by minute of restriction, No. 9 of process; and discerns: Finds the complainer entitled to expenses," &c.

Opinion.—"The North British Railway Company, by their General Powers Act of 1900, which received the Royal Assent on 6th August of that year, acquired power from time to time to enter upon, take, and use, for the purposes of their undertaking, *inter alia*, certain lands in the parish of Cadder belonging to the complainer's landlord Mr Stirling of Keir. While the bill was before Parliament the Company entered into an agreement with Mr Stirling, dated 11th May 1900, whereby he agreed to withdraw his opposition to the bill, and the company agreed to purchase 64 acres of land belonging to him at a certain price with entry on 15th May 1900. It was part of this agreement that the disposition should be granted under exception of current tacks and rights of possession of tenants, and that the company should relieve Mr Stirling of all tenants' claims excepting deductions of rent for land taken, which were to be dealt with in terms of the Lands Clauses Consolidation (Scotland) Act 1845. It was also part of the agreement that the ground so purchased should be separated by the company from Mr Stirling's adjoining land by a good post and wire fence, and should be used for ordinary railway purposes. It is not contended by the respondents that this transaction, though dated prior to the passing of the Special Act, is to be treated in argument otherwise than if it had been an ordinary case of purchase of lands by agreement subsequent to the passing of the Act.

"It is admitted that, of the lands so taken, 23'983 acres formed part of the farm of Lochgrog, of which the complainer is tenant under a lease for twelve years from Martinmas 1895. On 22nd August 1900 the Railway Company served upon him a notice to treat applicable to 13 acres and a fraction of an acre, which is all the ground of which they require immediate possession. With regard to the balance of 10 acres or thereby they propose that he shall continue in occupation and pay rent to them. He, on the other hand, declines to become their tenant, and demands that they shall pay him compensation in respect of the whole 23 acres, his tenancy of which has been brought to an end by their purchase from his landlord under statutory powers.

"It seems to me that this question depends entirely on a construction of section 112 of the Lands Clauses Act, which applies to the case of lands 'comprised in a lease or missive of lease for a term of years unexpired, part only of which lands shall be required for the purposes of the Special Act.' It was argued on behalf of the Railway Company that there is nothing in the statute to compel them to use for the purposes of their undertaking all the lands which they may have purchased by agreement, and that if, for example, they found a portion of such lands under a lease which was shortly to expire, they might competently and reasonably leave the tenant undisturbed in his possession, and so avoid the necessity of compensating him for loss of occupancy. It may be that such

a course would be open to them where they did not require to disturb the tenant at all, for his lease in that case would remain unimpaired in its provisions, and the whole rent might be claimable by them from the landlord under their contract with him.

“But it seems to me that no such question arises in the present case, and that I do not require to consider it. As matters stand, the Railway Company do find it necessary to disturb the complainant in his occupancy, because not only is part of his farm required for the purpose of the Special Act, but they are taking immediate possession of a part of that part. Now, what are the consequences of that state of matters under section 112? The first consequence is that the rent of the whole farm is to be apportioned ‘between the lands so required and the residue of such lands,’ either by agreement or by the Sheriff; and the second consequence is, that after such apportionment the lessee is in future to be liable only for so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the Special Act, and the lessor is to have, as against the lessees, the same rights and remedies for recovery of such portion of the rent as he previously had for recovery of the whole, the lease being kept in full force with regard to that part of the land not so required except as to the amount of the rent to be paid.

“I think it is impossible to read the section without seeing that the distinction between ‘lands required for the purposes of the Special Act,’ and lands not so required—a distinction which runs all through the section—is drawn between the part of the farm purchased by the company on the one hand and the part retained by the vendor on the other. If the phrase ‘lands required for the purposes of the Special Act’ had been intended to denote the lands which the company might find it convenient from time to time to enter upon and use, there would have been some provision for a double apportionment of the rent, that is to say, an apportionment between the part first taken and the part which might be taken subsequently, and a further apportionment between these two parts and the part left in the hands of the vendor. There ought also, in that case, to have been a provision that the apportioned rent applicable to the part purchased but not used should be payable to the company, and that the conditions of the lease should hold good with reference thereto. But there is not a word to that effect. And consequently, so far as I see, there are no means under the statute of arriving either at the rent which the complainant is to pay to the company, according to their contention, for the portion of the farm which belongs to them but which they do not propose to use at once, or at the other terms and conditions on which he is to hold it. All these things might of course be settled by agreement, and probably the company might find it for their interest to reduce the tenant’s claim for compensation by offering to continue his occupation of the ten acres on favourable terms. But the question is

whether he can be compelled to become their tenant in these ten acres, and my opinion is that he cannot. His statutory right is to receive compensation in respect of the whole ground which has been carved out of his holding by the exercise on the part of the company of their statutory powers.

“I shall therefore repel the pleas-in-law for the respondents, and grant interdict in terms of the prayer of the note as restricted.”

The Railway Company reclaimed, and argued—Interdict was asked here because the notice to treat did not embrace all the lands in possession of the tenant which had been acquired by agreement with the landlord, but if the notice had done so it would have included lands not under the Act, and would therefore have been invalid.—*Wrigley v. Lancashire and Yorkshire Railway Company*, April 22, 1863, 9 J. (N.S.) 710. The question as to what compensation was payable to the tenant had therefore no connection with the question as to what compensation was payable to the landlord, and if so, to make the former depend on the latter was to introduce into the procedure in dealing with the tenant a step not authorised by statute, which was incompetent.—*Forfar and Brechin Railway Company v. Bell*, 19 R. 786, 29 S.L.R. 648. To make the compensation payable to the tenant depend on the compensation paid to the landlord would also enable the tenant to prevent all arbitration, for he could insist on waiting till the final settlement with his landlord was made, and what was the final settlement with the landlord could not be known till the time limit under the Act had been reached. Perhaps the pursuer meant that every agreement with the landlord gave rise to a separate and corresponding claim by the tenant, but if so his right to compensation would be governed by the number of agreements the Railway Company had chosen to make with his landlord. That could not have been contemplated by the statute. The true view was that the agreement with the landlord here was private. It conferred no rights on third parties, and was not dependent on the Act of Parliament, although any possession following on it was protected thereby. The tenant’s right was to be compensated for the lands of which he was deprived, and the apportionment contemplated by the statute was between them and those of which he continued in possession. There was no difficulty in having successive apportionments as from time to time the tenant was deprived of further portions of his lands.

Argued for the complainant and respondent—The agreement must come under the Special Act, for apart from their Act the Railway Company had no power, and so far as land was not within the limits mentioned in the Act its acquisition was *ultra vires*. The reclaimers could not therefore derive any advantage from the agreement being prior to the Act, nor was it material whether the acquisition was by agreement or under compulsory powers. Of course if

any part of the 23-983 acres in question was outside the limits mentioned in the Act, the Railway Company could not be compelled to act *ultra vires*, and to acquire that part. The important point was this—Were the lands required for the purposes of the Act? Sections 6 and 17 make it clear that the word “lands” in the statute meant the physical thing as distinguished from rights and interests. Section 6 gave power to acquire lands provided (a) they came under the Special Act, and (b) they were required for the purposes of the Act. Section 17 ordained the undertakers, when once they decided that the lands were required, to acquire all interests therein, and whatever they acquired from the landlord they must take also from the tenant. Possibly the undertakers might be entitled to leave the tenant undisturbed and to escape any claim from him for a time, but as soon as they used the Act against him they must take all that had been stamped as “required for the purposes of the Act” by being taken from the landlord.

LORD PRESIDENT—This is a short point, but it is one of great importance, for if the complainer’s contention is well founded I apprehend it would make a material change in the practice followed in such cases. The facts of the case are very brief. The respondents desired to make certain railway works at the place to which the question relates, and they entered into an agreement with the proprietor for the purchase of the land which they thought they would require to use for the purposes of their undertaking. The agreement with the proprietor was entered into on 11th May 1900, and under it the respondents acquired the property of the land shown in colours on the plan before us. On 6th August of the same year the bill which they were promoting became law, and it did what was necessary in the way of giving statutory effect to the agreement and making the whole proceeding quite regular. It happens that the land which the Railway Company acquired by their agreement is not exactly the same as all that they may need. Part of it is outside the limit of land to be acquired, and at another part that limit is outside the land acquired under the agreement. But the material point is that the property of the land was acquired by the company under a private bargain with the proprietor, who had full power to sell, before the Act was passed; so that the case is not one of the acquisition of the property of the land under compulsory powers. The company, I suppose, paid to the proprietor the purchase price which they had agreed to pay before the Act passed, and thus the proprietary interests were fully satisfied, and the company became the owners of the land.

But it happens that the land which they so acquired was under lease to tenants, and the company had not thought it necessary to make any arrangement with the tenants, and that is not surprising, as I do not think they were under any obligation to make such an arrangement, as they knew that,

having got their Act, they would have to enter upon and use the lands when they required to do so, subject to the usual statutory condition of compensating the tenants for their interests in the lands, of which the company had prior to the passing of the Act become proprietors. Then the time arrived at which they wished to enter on the lands and use part of them for their works. They did not require to get entry to the whole at once. The portion of the land under lease to the complainer which the company had purchased from the proprietor was 23-983 acres, and as they only required immediate possession of 13-181 acres, they gave the complainer notice for that area in the ordinary way; but they did not give notice for the remainder, of about ten acres, which they did not desire to enter upon or use at the time. The complainer then presented this note of suspension and interdict, praying that the work should be stopped until the company should take the tenants’ interest in the whole of the 23-983 acres, although they only wanted thirteen in the meantime.

This seems to me to be a somewhat startling proposition, and I do not remember to have seen anything like it before. The argument by which it is sustained, as I understand it, is of this nature. The complainer says, “You have settled with the proprietor for all the proprietary interests, and you have, by buying the land from him, become my landlord, and I must be settled with at once for all the tenants’ interests in the lands which you have bought, whether you require to take these tenants’ interests or not.”

The argument comes to this, “If you take any of the occupation interests, you must take them all at once.” That would certainly be a very inconvenient, and not a very reasonable, position, and the question comes to be whether it is sustained by the argument which we have heard upon the railway statutes.

I shall not go through the sections which have been referred to. We are all familiar with them, and the fallacy of the complainer’s argument seems to me to be that it involves the contention that the word “lands” used in the sections means the aggregate of all the rights in the particular estate; they contend that if the company requires to take any of these rights for the purposes of their undertaking, they must take them all at once, even rights which they do not require to interfere with for the purposes of their undertaking. Now, I do not find any provision laying such an obligation upon a company in the position of the respondents. I see nothing in the statutes which would have the effect of putting upon the undertakers the burden of acquiring rights with which they do not propose to interfere. As the company require or intend to occupy or use the surface of the thirteen acres, they propose to acquire the complainer’s interests in it, and of course to pay for them. But they do not desire, in the meantime at all events, to enter upon or interfere with the ten acres, and I see nothing in the statutes to compel them to

take the tenant's interests in that area unless and until they require to interfere with these interests. Accordingly, it seems to me that the view which has been taken by the Lord Ordinary is erroneous, and I think that we should recal his interlocutor and refuse suspension.

LORD ADAM concurred.

LORD M'LAREN—I agree with your Lordship, and have very little to add. It is admitted that the question in dispute depends on the construction of the clauses of the Lands Clauses Consolidation Act, which empower public companies who obtain Special Acts to purchase and take lands. This may be either by agreement under section 6 or by compulsory purchase under the 17th section of the Act. Now, my view of the effect of these clauses is that the undertakers are empowered to acquire the aggregate of all the different rights in the lands, what is ordinarily called the surface, the minerals, fee and liferent, servitudes, tenants rights' and any others if there be such; and that it is a condition of their right to enter upon the lands—that is, under subsequent sections—that they shall have acquired all these interests, or shall have deposited money as a guarantee that they mean to acquire them, or so that they may be compelled to acquire them. But except for the purposes of the clauses relating to entry on lands I do not see any necessity for the simultaneous acquisition of all these separate interests. Indeed, unless they are all to be included in one notice and dealt with under one arbitration or judicial proceeding, I see great difficulty as to how Mr Campbell's argument should receive effect. Because if the parties having interest are not to be dealt with in one proceeding the company must treat with them *seriatim*, and the first man who receives a notice to treat would say, "You have not acquired the interests of the other persons having an interest in the land, and that is a condition of the acquisition of my interest." The true meaning of the Act of Parliament is that the undertakers are not entitled to enter on the lands until they acquire all the interests going to make up the aggregate, or provide by a deposit for their purchase. In dealing with the owner or possessor of any particular interest they deal with him as an independent person having no relation whatever to any other claims that may be made against them in respect of the same lands. And in this case it seems to me that the measure of the company's requirements in a question with the present defender is simply what they claim under their notice to treat with him. The larger interest they may have acquired from the proprietor or other persons is a matter with which he is in no way concerned, but which he will no doubt hear of by-and-by when the Railway Company come to make the contract of sale operative to the full extent. As to the argument which the Lord Ordinary founds on section 112, I think it is open to the observation I have made on the argument founded on the purchase

clauses, because I think that the contemplation of section 112 is that a certain part of the tenant's interest is claimed by the company and it deals only with that interest. I see no warrant for the Lord Ordinary's supposition that there could not be successive claims by the same tenant as from time to time the company's requirements were notified. Indeed, I see no reason to doubt that in the present case, if the Railway Company should eventually wish to enter on the remaining part of the lands which they acquired from Mr Stirling of Keir, it will be open to the company to serve a second notice on the tenant in respect of his interest in the lands then in his possession. For these reasons I agree that the interlocutor reclaimed against should be recalled.

LORD KINNEAR concurred.

The Court pronounced this interlocutor:—

"Recal the said interlocutor: Refuse to grant the prayer of the note, and decern: Find the reclaimers entitled to expenses, and remit," &c.

Counsel for the Complainer and Respondent—Campbell, K.C.—Guy. Agents—Wylie & Robertson, W.S.

Counsel for the Respondents and Reclaimers—Lord Advocate, K.C.—Solicitor-General, K.C.—Cooper. Agent—James Watson, S.S.C.

Saturday, December 7.

FIRST DIVISION.

[Lord Low, Ordinary.

M'DOUGALL v. BROWN.

Church—Dissenting Church—Loosing of Minister from Pastoral Charge—Refusal to Discontinue Duties—Action by Trustees of Church Fabric—Interdict against Minister Officiating in Church Building—Model Trust-Deed of Free Church—Title to Sue.

By a trust-deed the conditions of which were incorporated in the titles of all the churches belonging to a voluntary religious body, it was provided that the trustees of the congregation in whom the church fabric was vested should hold it for the purposes of religious worship, and should "permit and suffer to preach . . . within the said building . . . such person or persons only as may or shall from time to time be authorised or appointed so to do by the said body or united body of Christians." The trustees were also given power to sue actions in a court of law where necessary "for the purpose of excluding any party from, or any use, possession, occupation, or enjoyment of the building."

A minister who had been inducted to a church was, in accordance with the laws of the religious body, and by