

that, looking to the admitted circumstances of his establishment as regards the modes of vehicular conveyance successively employed by him, we shall in the slightest degree strain the language of his settlement if we decide, as your Lordships propose to do, that the motor cars fall within the expression of his bequest of "carriages." It seems to me, therefore, that the first question put to us should be answered in the affirmative and the second in the negative.

LORD M'LAREN and LORD PEARSON were not present.

The Court answered the first question in the affirmative and the second in the negative, and decerned.

Counsel for the First and Second Parties—C. H. Brown. Agents—Smith & Watt, W.S.

Counsel for the Third Parties—G. D. Valentine. Agent—Henry Smith, W.S.

Friday, October 18.

#### FIRST DIVISION.

[Lord Ardwall, Ordinary.

#### NORTH BRITISH RAILWAY COMPANY AND ANOTHER v. CALEDONIAN RAILWAY COMPANY.

*Railway — Running Powers — Siding — "Sidings Constructed at the Commencement of this Act or any Renewals Thereof" — Lateral and Vertical Deviation — Identity of Subject—The Caledonian and General Terminus Railways Amalgamation Act 1865 (28 and 29 Vict. cap. clxvii), sec. 15.*

In 1857 a railway company, in fulfilment of a feu-contract granted by it, constructed a siding from a branch of its railway to the plot of ground feued. In 1865 the railway company was purchased by another company, and the amalgamating statute conferred on certain other railways statutory running powers over "all or any of the . . . sidings or branches . . . constructed at the time of the commencement of this Act or any renewals thereof."

The siding as originally constructed ran to and along the south side of the plot of ground, and branched off another siding which continued further on, but in 1895, to suit the then tenants, the latter siding, which otherwise had become useless, was diverted into the south-west corner of the plot of ground, and the former siding was stopped at the south-east corner and turned in there. In 1901, the tenants having left and having removed whatever belonged to them, the siding was little if at all used, and ended in a bifurcation and somewhat short of the plot of ground. In 1903 a new owner acquired the plot

of ground and erected warehouses thereon, and at his request a siding was again laid, but it was at a lower elevation, to the extent of five feet at the entrance to the plot of ground, and it also deviated laterally, the greatest amount of deviation being ten feet. The owning company refused running powers.

Held that as the siding was for the accommodation of the same subjects, its identity with the original siding was not affected by the lateral or vertical deviation, or by any temporary disuse, and consequently that it came under "sidings constructed at the time of the commencement of this Act or renewals thereof" over which running powers were conferred.

The Caledonian and General Terminus Railways Amalgamation Act 1865 (28 and 29 Vict. cap. clxvii) transferred to the Caledonian Company the undertaking of the General Terminus and Glasgow Harbour Railway Company.

Sec. 15 thereof enacts—"The Glasgow and South-Western Railway Company, the City of Glasgow Union Railway Company (including all companies and persons lawfully using the City of Glasgow Union Railway), the Edinburgh and Glasgow Railway Company, the Monkland Railways Company, and the Committee of Management of the joint line of railway between Glasgow and Paisley, respectively, may, from and after the commencement of this Act, but subject to the regulations and bye-laws of the Company in force for the time, run over and use with their engines and trains (and all proper servants accompanying such engines and trains), for traffic of all kinds, the above railways and works; (that is to say) each of the four companies above named (including as aforesaid), and the said Committee, may so run over and use the railways by this Act vested in the Company, and the Glasgow and South-Western Railway Company and the said Committee may so run over and use so much also of the railways vested in the Company by the Caledonian Railway 'General Terminus Purchase Act 1854,' as is necessary for conveying traffic between the joint line and the railways vested in the Company by this Act, and each of the four companies (including as aforesaid) and the said Committee may so run over and use all or any of the stations, sidings, or branches of the last-mentioned railways constructed at the time of the commencement of this Act or any renewals thereof, . . . on paying to the company for running over the said railways, accommodation and appliances, or any part thereof, the tolls and rates following. . . ."

Under and in virtue of the North British and Edinburgh and Glasgow Railway Companies Amalgamation Act 1865 (28 and 29 Vict. cap. cccviii), secs. 2 and 61, the North British Railway Company are in right of the powers conferred by the above enactment on the Edinburgh and Glasgow Railway Company, and the Monkland Railways Company.

On April 16th 1906 the North British Railway Company and the Glasgow and South-Western Railway Company raised an action against the Caledonian Railway Company, in which they sought declarator that they were entitled to running powers over a siding situated on the defenders' branch line to the Terminus Quay, Glasgow, and running therefrom into the bonded store belonging to and occupied by Slater, Roger, & Company, Limited, on payment of the necessary tolls and rates.

The defenders, *inter alia*, pleaded—“(2) The siding in question not being a siding constructed and existing at the time of the commencement of the said Caledonian and General Terminus Railways Amalgamation Act 1865, or a renewal thereof, but being a new, independent, and separate siding, the defenders are entitled to absolvitor.”

The facts are set forth in the opinion (*infra*) of the Lord Ordinary (ARDWALL), who on October 30th 1906 pronounced this interlocutor—“Finds and declares that the pursuers are entitled to run over and use with their engines and trains for traffic of all kinds the siding tinted red on the plan situated on the defenders' branch line to the Terminus Quay, Glasgow, and running therefrom to the bonded store belonging to and occupied by Slater, Roger, & Company, Limited, so far as said siding is situated on land belonging to the defenders, on paying to the defenders the tolls and rates specified in the 15th section of the Caledonian and General Terminus Railways Amalgamation Act 1865, or such other tolls and rates, or on such other terms as may be agreed on, and decerns.”

*Opinion.*— . . . [After narrating the purpose of the action, *supra*].—“The history of the matter shortly stated is as follows:—In 1857 the General Terminus and Glasgow Harbour Railway Company entered into a feu-contract with William Sim regarding the identical ‘steading of ground’ now occupied by the said bonded store, and in that feu-contract the Railway Company obliged themselves to lay suitable rails from the existing branch of the said railway to the boundary line of the said steading of ground conveyed to William Sim. This ground was situated in a locality well adapted by its situation for industrial or commercial purposes, and it gave it great additional value to have secured to it under its titles direct railway accommodation by means of a siding leading to main lines of railways. The siding was subsequently constructed accordingly, and as provided in the feu-contract it ended at the boundary of the piece of ground, indeed it ran alongside of its southern boundary. At this time there was another siding which led into Vermont Street, but about that siding there is no dispute, as it was shut up at or about 1895 without any objection by any person. It had practically been rendered useless by the construction of the Kinning Park Goods Station by the defenders, barely a quarter of a mile distant. In 1865 the Amalgamation Act referred to in the summons was passed, and at that time undoubtedly the

siding between the General Terminus Branch and Mr Sim's steading of ground had been constructed. The 15th section of the Act provides that each of the four companies there mentioned (who are now represented by the North British Railway Company and the Glasgow and South-Western Railway Company) might ‘run over and use all or any of the stations, sidings, or branches of the last-mentioned railways constructed at the time of the commencement of this Act, or any renewals thereof.’ Both parties admit that this description included the said siding as it existed in 1865, and the question is whether the siding which at present exists between the General Terminus Branch and the steading of ground on which the said bonded warehouse is built is or is not to be regarded as the siding between these two termini, which existed at the passing of the Act of 1865 or a renewal thereof.

“Various alterations were made on the siding as it existed in 1865. . . . The steading of ground in question has undergone several transmissions. It was disposed by William Sim to a Mr Robson, and by him to the present occupants, Messrs Slater, Roger, & Company. In Mr Sim's time it was occupied as a granite work, and the siding to it came to be called the ‘granite siding.’ It subsequently was occupied by the Birkenshaw Coal Company as tenants, and they used it partly as a coal depot and partly for carrying on a manufacturing business connected with ironworks, such as the grinding of charcoal and similar operations. In 1895, the Vermont Street siding having become useless, the Birkenshaw Coal Company arranged with the defenders that the granite siding, instead of being carried along the southern boundary of the steading of ground, should enter the said steading at its south-east corner, and be prolonged for a considerable distance into the steading, and that similarly what was before the Vermont Street siding should be carried into the said steading of ground at or near its south-west corner and prolonged into the steading for some distance. In this way they got much better accommodation for their works, and apparently the extended portions of these sidings were laid by the Birkenshaw Coal Company. Their occupancy ceased in 1901, and they thereupon took up and removed the rails of both sidings so far as belonging to them, and if the drawing on the plan is correct they must also, I think, have taken up some of the rails which belonged to the defenders. At all events the effect of their operations was to remove the sidings altogether for a short distance to the south of the said steading of ground of which they had been tenants. It will be observed that in 1895 a very considerable alteration was made in the position or direction of what had formerly been known as the granite siding; in particular, the rails of the siding must have been taken up for some length and relaid in a different position. And it is worthy of note that no one thought of questioning the right of the pursuers to continue their running powers over the

siding as so altered; and, indeed, it is admitted that they continued to exercise these powers from 1879 or thereabouts until 1903. After acquiring the ground in question, Slater, Roger, & Company proceeded to erect thereon a large bonded warehouse. They excavated the ground to some depth, and the ground floor of their warehouse was elevated some feet above the original level of the ground, so as to give them space for storage and other purposes between the ground floor and the floor of the excavated portion. After erecting this store they applied to the defenders for siding accommodation, and the defenders laid down the siding now in dispute, and they maintain that the said siding is not the siding which was constructed at the time of the commencement of the Act of 1865, or a renewal thereof. They point to the facts that it is laid in a different position and direction from the original granite siding, the divergence being 10 feet at the widest point of divergence. They also point to the fact that it is on a different level, being about 5 feet lower than the original granite siding at the point where it touches the boundary of the said steading of ground. They further point out that instead of running along the southern boundary of the said steading of ground it enters into it, and runs for a considerable distance through it. These facts, they say, constitute it a wholly different siding, and should preclude the Court from holding that it is either the original siding or a renewal thereof. I am unable to adopt this view. A siding, like any other piece of railway line, is intended to constitute a way for the transit of goods or passengers from one point to another, and it seems to me that the identity of the present siding with the old 'granite siding' must be judged of by the test whether it fulfils the same purposes as the old siding did. It appears to me to be a matter of indifference whether it is laid on precisely the same route as the old siding, or deviated a few feet to one side or another, or whether the levels of the rails have been altered a few feet up or down, provided it is laid in such a way as to serve the purpose of a means of transit between the same subjects as the siding formerly existing at that place served. In the present case it is not open to doubt that the siding as now existing serves as a means of transit between the identical steading of ground which the granite siding served, and the same branch of the General Terminus Railway, and this being so I do not think it matters in the least what alterations have been made either in its direction or levels, and in my opinion it would be absurd to hold that the pursuers could lawfully be deprived of statutory running powers over a siding leading to a particular place or piece of ground merely because the defenders and the present owners of the ground, for the convenience of the latter, make alterations on the levels and position of the siding as compared with the siding as it existed at the passing of the Act of 1865.

"On these grounds I consider the pur-

suers are entitled to the declarator they ask, subject to the qualifications I have inserted in the decree. I am of opinion that the siding in question is a renewal of the siding which existed at the same place and substantially in the same position in 1865."

The defenders reclaimed, and argued—The Lord Ordinary was in error. There was a physical difference between the siding of 1865 and the present siding. Its line was different, its termination was different, its elevation was different. Its origin was also different. The siding affected by the statute depended on the obligation to Sim and his heirs, and it ceased to exist when they ceased to occupy the subjects. There had been a break in the existence of a siding which proved the original and the existing one to be different. Between 1901 and 1903 any siding there was only existed as a derelict, a *cul-de-sac* serving no terminus. It could not therefore be claimed as a siding in continuous use which it was open to any trader, to whom it might be useful, to have reconstructed. The interlocutor of the Lord Ordinary should be recalled.

Argued for the pursuers (respondents)—The siding was identical with, or it might be a renewal of, that existing in 1865, over which the pursuers had statutory running powers. That was so, independently of who happened to use it as a terminus. The use, moreover, of the siding by the pursuers had been continuous. The Lord Ordinary's interlocutor should be affirmed.

LORD PRESIDENT—By the Caledonian and General Terminus Railways Amalgamation Act 1865 the Caledonian Railway Company took over the system called the General Terminus Railway, and as is usual in such amalgamations various other railway companies were given rights by some of the sections of the Amalgamation Act. In particular, by section 15 four railway companies, who I may say are represented by the present pursuers, were given running powers, in these terms—that they might "run over and use all or any of the stations, sidings, or branches of the last-mentioned railways constructed at the time of the commencement of this Act, or any renewals thereof." The "last-mentioned railways" there referred to include, *inter alia*, the General Terminus Railway. The plain meaning of that seems to be that what I may call the system of the General Terminus Railway which was handed over to the Caledonian Railway Company by the Amalgamation Act was subject to running powers in favour of those other railway companies. They were to be allowed to run over that system, and it was provided that if the system at any time was renewed they were still to have the same running powers over the renewed portion. It is obvious that it would have been no concession at all if at any moment when the rails got worn out in any portion of the system, and were replaced by new rails by the Caledonian Railway Company, the running powers ceased and determined. On

the other hand the running powers, of course, were limited to the General Terminus system and did not extend to any new creations that the Caledonian Railway Company might afterwards make.

Now, the dispute in question has arisen over a certain siding, and the history of that siding seems to be this—Originally there was a long siding going to a place called Vermont Street, and from that there was a branch siding which went to serve some works that at that time—I am now speaking of the time which ended in 1865, the date of the Amalgamation Act—belonged to a gentleman of the name of Sim. Subsequently Vermont Street really went out of existence, being superseded by a large depot known as the Kinning Park Depot, and accordingly part of the siding that went to Vermont Street was entirely abandoned, and the portion that went into Sim's works was still continued, although the actual direction of the rails was a little altered—in particular, instead of being only one branch, it was bifurcated and made into two branches, and these two branches were prolonged into the works themselves, Sim having been succeeded by the Birkenshaw Coal Company. That was the state of affairs in 1895. In 1901 the Birkenshaw Company left the ground, and they were eventually succeeded by Messrs Slater, Roger, & Company, who seem to have taken possession in 1903, and who are the present possessors of the ground. During the period after the Birkenshaw people left and Slater, Roger, & Company came in, the siding was so far altered. The Birkenshaw Company took away the rails in so far as they were within their own ground, and the siding therefore became a sort of bifurcated end which approached the ground without actually entering into it. There seemed to be a little dispute between the parties as to whether this bifurcated end was actually used for the purpose of taking goods which went into the ground or taking anything away from the ground, but in the view I take of it it really does not make any difference.

I think the whole question is whether there really is identity of subject. I think it is perfectly clear that the question of who the private person was who used the siding is neither here nor there. All sorts of people would use the sidings on the general terminus system, and the running powers were not given merely so long as these sidings were used by the same people; they were given so long as there was identity of subject. I come to the conclusion without any difficulty that here there is in the fair meaning of the words identity of subject. I do not think that the fact, if it be a fact, that for a short period the siding was so to speak disused really alters the question. The siding now is what it originally was, namely, a siding for the use of those particular works connecting with the Caledonian Railway system at that point. I do not think it has lost its proper identity at all, and accordingly I think the conclusion the Lord Ordinary has come to is right.

LORD M'LAREN—I am of the same opinion, and have nothing to add.

LORD KINNEAR—I quite agree. I agree with the final sentence of the Lord Ordinary's opinion in which he says the siding in question is in his judgment a renewal of the siding which existed in the same place and substantially in the same position in 1865.

LORD PEARSON—I am of the same opinion.

The Court adhered.

Counsel for the Defenders (Reclaimers)—Clyde, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Pursuers (Respondents)—Hunter, K.C.—Macmillan. Agent—James Watson, S.S.C.

Wednesday, October 30.

## SECOND DIVISION.

[Lord Ardwall, Ordinary.]

### M'KECHNIE v. M'KECHNIE'S TRUSTEES.

*Succession—Will—Reduction—Undue Influence—Confidential Relationship—Paramour—Testamentary Provisions in favour of Paramour and her Child to Detriment of Legitimate Children.*

A testator whose wife was in an asylum left the great bulk of his property to his mistress (to whom he had previously made large gifts) and their illegitimate son. A legitimate son brought an action of reduction. Facility was not proved.

*Held* that the relationship existing between the testator and his mistress was not such that the natural and legitimate consequence was trust and confidence on the one side and influence on the other, as in the case of client and lawyer, and that accordingly there was no room for the plea of "undue influence."

George Turnbull M'Kechnie, youngest lawful son of the deceased John M'Kechnie, raised an action of reduction of his father's trust-disposition and settlement dated 11th January 1904, and a codicil thereto dated 16th September 1904. The defenders were Miss Jemima White (otherwise known as Mrs M'Kechnie) and others, the trustees acting under the said settlement, and the said Miss White as an individual.

The pursuer pleaded—“(1) The said trust-disposition and settlement and the codicil thereto not being the deeds of the testator, decree of reduction should be pronounced. (2) Or otherwise, the pursuer is entitled to reduction as concluded for, in respect that at the time of executing the said trust-disposition and settlement and the said codicil thereto the said John M'Kechnie was weak and facile in mind and easily