

the day of the accident, and for four days thereafter, the respondent was his employer in terms of the Act.

Counsel for the respondent was not called on.

LORD JUSTICE-CLERK—We have here a very clear statement from Mr Mercer, but the case seems to me to present no difficulty. On the first question I have no doubt that the Sheriff is right, and it is consequently unnecessary to consider anything else. I am quite unable, on the facts stated, to hold that the deceased in climbing on to this railing in order to get access to the churchyard, and thence to the church, was then in the course of his employment in the sense of the Act. His employment had not commenced. He had not reached the "building," and was taking his own way of coming to it; the accident could not therefore arise out of and in the course of his employment.

LORD YOUNG and LORD TRAYNER concurred.

LORD MONCREIFF—I have more difficulty than your Lordships on the first question in the case, and I should have preferred to rest my decision on one of the others. At the same time I am not prepared to differ.

The Court answered the first question of law in the negative, found it unnecessary to answer the other questions of law, therefore affirmed the dismissal of the claim by the arbitrator, and decerned.

Counsel for the Claimant and Appellant—Salvesen, K.C.—Mercer. Agent—Alex. Mitchell, Solicitor.

Counsel for the Respondent—A. S. D. Thomson. Agent—John Veitch, Solicitor.

Tuesday, March 12.

## FIRST DIVISION.

### CALEDONIAN RAILWAY COMPANY v. CORPORATION OF EDINBURGH.

*Police—Paving Private Street—Lands "Fronting or Abutting on" Street—Ground belonging to Railway—Frontager without Right of Access to Street—Edinburgh Corporation Act 1897 (60 and 61 Vict. cap. xxxii.) sec. 73.*

Section 73 of the Edinburgh Corporation Act 1897 enacts, *inter alia*, "When in any private street . . . permanent buildings have been erected on one-fourth or more of the ground fronting or abutting on the same, . . . and when such street is not . . . made up, constructed, causewayed, paved, and in a complete and efficient state of repair, . . . the Corporation may if they think fit, by notice call upon the owners of the lands and heritages fronting or abutting on such street . . . to complete the same."

*Held* that liability under this section was incurred by a railway company whose ground in fact fronted or abutted on a private street to which the conditions of the section applied, although they had no right to the *solum* of the street, and no right of access to it.

The Corporation of Edinburgh served upon the Caledonian Railway Company a notice in the following terms:—"Notice is hereby given to the owners of the lands and heritages fronting or abutting on the private street of Wardlaw Terrace, from Stewart Terrace northwards to Wardlaw Place, that the Magistrates and Council of the City of Edinburgh call upon them to free the carriageway of the said street from obstructions, and to properly level, make up, construct, causeway, pave, channel, and complete the same, in terms of the specification hereto annexed, all to the reasonable satisfaction of the Magistrates and Council, within two months from and after the date of this notice, and in case this notice is not complied with within the time specified, the Magistrates and Council shall themselves, on the expiry of said period, cause the said private street or part thereof, to be freed from obstruction, and to be properly levelled, made-up, constructed, causewayed, paved, and channelled, and completed in such way and manner, and with such materials as the Magistrates and Council may think fit, and the costs and expenses which may be incurred by them in connection therewith shall be charged as a debt against the owner or owners in default; all in terms of the Edinburgh Municipal and Police Acts 1879 to 1900."

Against this notice the Caledonian Railway Company presented an appeal under section 62 of the Edinburgh Municipal and Police Amendment Act 1891.

The appellants averred as follows:—"The appellants are owners of a line of railway (known as the Haymarket Branch), which connects their main line between Glasgow and Edinburgh with their line between Princes Street Station and Granton. . . . About 700 yards from the point where it leaves the Edinburgh and Glasgow main line the Haymarket branch runs alongside a private street in the city of Edinburgh known as Wardlaw Terrace." They maintained that they were not the owners of lands and heritages fronting or abutting on Wardlaw Terrace in the sense of section 73 of the Edinburgh Corporation Act 1897 (quoted *infra*). They further averred as follows:—"The land occupied by their said Haymarket Branch (in so far as *ex adverso* of said street) was acquired by the appellants for the purpose of constructing their line from William Murray, Esq., of Henderland, in 1853, but no right or interest of any kind in or over the land which is now the *solum* of said street was granted to the appellants, and the said street was formed without the appellants being informed thereof. Since the date of the disposition the land conveyed has been separated from the ground now forming said street by a wall built and maintained by the appellants,

in terms of their statutory obligations for the protection of the adjoining owners or occupiers. The appellants have not, and never had, any right of access to or of passage upon said street, and further, a practicable access could not be made opening on said street (assuming the appellants' right) owing to the difference of the levels. The railway at the place in question is carried upon an embankment many feet above the level of the street known as Wardlaw Terrace, upon its eastern side, and the land occupied by the railway does not front or abut upon said street. Upon said eastern side there neither is any building now, nor can there be in the future, owing to the existence of said railway and the unsuitability of the ground otherwise."

Answers were lodged for the Corporation. They stated that the south-east side of Wardlaw Terrace was bounded by the appellants' railway line, which had been for many years and was now permanently enclosed; that tenements of buildings had been erected on the north-west side of Wardlaw Terrace from Stewart Terrace to Wardlaw Place, and that said buildings occupied more than one-fourth of the ground fronting or abutting on the said private street.

Section 73 of the Edinburgh Corporation Act 1897 enacts:—"Section 33 of the Act of 1871 is hereby repealed, and in lieu thereof it is hereby from and after the passing of this Act enacted as follows:—Where in any private street or court houses or permanent buildings have been erected on one-fourth or more of the ground fronting or abutting on the same, or where such ground has been otherwise than temporarily enclosed and laid out to at least the said extent, and where such street or court is not, together with the foot pavements or footpaths thereof, made-up, constructed, causewayed, paved, and in a complete and efficient state of repair to the reasonable satisfaction of the Corporation, the Corporation may if they think fit by notice call upon the owners of the lands and heritages fronting or abutting on such street or court to free the same and any foot pavements or footpaths thereof from obstructions, and to properly level, make-up, construct, causeway, pave, channel, and complete the same to the reasonable satisfaction of the Corporation within a time to be specified in such notice; and in case such notice is not complied with within the time so specified therein, the Corporation may themselves at any time thereafter cause any such street or court, or part thereof, and any foot pavements or footpaths of the same, to be freed from obstructions, and to be properly levelled, made-up, constructed, causewayed, paved, and channelled and completed in such way and manner, and with such materials as the Corporation may think fit, and the costs and expenses which may be incurred by them in connection therewith shall be recoverable as a debt from the owner or owners in default."

The appellants argued that owners of lands bounding the street were not liable

as owners of lands "fronting and abutting on" the same, unless they had a special access to and the use of the street, or property in the *solum* thereof. They cited the following authorities—*Magistrates of Leith v. Gibb*, February 3, 1882, 9 R. 827; *Police Commissioners for Kinning Park v. Thomson & Company*, February 22, 1877, 4 R. 528; *Campbell v. Magistrates of Edinburgh*, November 24, 1891, 19 R. 159; *London School Board v. Vestry of St Mary, Islington*, 1875, 1 Q.B.D. 65; *Great Eastern Railway Company v. Hackney Board of Works*, 1883, 8 A.C. 687; *Lightbound v. Higher Bebington Local Board*, 1885, 16 Q.B.D. 577.

Argued for the respondents—Liability to make up a private street under the section in question depended on a matter of fact, viz., whether the lands in respect of which it was alleged did or did not "front or abut on" the private street in question. It had nothing to do with access to the street or ownership of the *solum*. If the lands of the Caledonian Railway Company did not "front or abut on" Wardlaw Terrace, what lands did? *Campbell v. Magistrates of Edinburgh*, cited *supra*, was a direct authority in the respondents' favour, and to the same effect were the English cases of *London and North-Western Railway Company v. Vestry of St Pancras*, 1868, 17 L.T. N.S. 654, and *Williams v. Wandsworth Board of Works*, 1884, 13 Q.B.D., 211.

LORD PRESIDENT—This is a comparatively short question, but it is one of great importance. The facts upon which it arises are very simple. The Caledonian Railway Company are owners of certain land which runs along one side of a street in Edinburgh called Wardlaw Terrace. They acquired that land from the owner at the time when that part of the railway was made, I think we were told about 1850 or shortly thereafter, and no doubt under the ordinary conditions. It happens that this part of the line is constructed on an embankment, and in accordance with the statutory obligation laid upon railway companies they built a wall at the foot of the embankment. This was in fulfilment of the ordinary obligation upon railway companies to fence off the land which they take from the land which they leave. So long as the place was not urban the Railway Company had no right to go beyond the wall, and within the wall they could do very much as they pleased so long as they did not violate any statutory provision. I understand that the railway embankment is not to any extent supported by the wall, in other words, it is not a retaining-wall, and it is not one of the railway works in the sense of works constructed by the Railway Company for its own convenience in carrying on its business.

In that state of facts we have to apply section 73 of the Act of 1897, which was section 33 of the Act of 1891. That section declares that "Where in any private street or court houses or permanent buildings have been erected on one-fourth or more of the ground fronting or abutting

on the same, or where such ground has been otherwise than temporarily enclosed and laid out, . . . the corporation may if they think fit by notice call upon the owners of the lands and heritages fronting or abutting on said street or court," to do certain things towards putting the street into the condition of a public street. Now, that is certainly a very strong clause, as it empowers the municipal authorities to compel people who do not want a street made, who at present have no right to go into it, and who do not wish to have anything to do with it, if one quarter of it has been subjected to a particular treatment, to subject all the rest to similar treatment and make the street public. Though it is a strong clause it appears to me that it is unambiguous. It has not two meanings, and we have no alternative but to uphold the order which has been made. I should have thought that if the language had reasonably admitted of any other interpretation the Railway Company would have had a great deal to say, because it undoubtedly is a great hardship to it or to any other person in similar circumstances to be put to great expense to do something which they do not wish to do, and from which so far as we can see they are not likely to derive benefit, but I suppose it must be regarded as one of the incidents of urban occupancy. Being of opinion that there is no ambiguity in this provision, I think the appeal must fail. I may add that this conclusion seems to me to be in accordance with the decision in the *London and North-Western Railway* case, and not in conflict with any of the other decisions to which we have been referred. It also seems to be in accordance with the views which prevailed in the case of *Gibb v. Cameron*.

LORD ADAM—This case relates to urban property, and it seems to me that the subjects in question fall within the codes under the various police and municipal Acts relating to management and administration of urban property. We may think that some of these provisions are somewhat arbitrary, but possibly in their practical working out in urban life they may have a convenience which justifies their apparently arbitrary character. The case we are dealing with now is a case of a private street, and I suppose that private street was duly laid out and sanctioned by the public authorities—I mean as to its lines and levels—after the parties had been consulted regarding it. Now, the street is bounded by the Caledonian Railway on one side, and it is bounded on the other side by property belonging to one or more proprietors, and I suppose that there are at least four houses built on the other side. Whatever the length of the street may be, if there are four houses on one side of the street, although the other side be unbuilt on, that confers the necessary statutory powers on the Magistrates. The Magistrates have now come to think that it is for the benefit of the community to direct that this street, which has hitherto been private, should be made public, and they

have power under sections 33 and 34 of the Act to bring that about. The way in which that is brought about is by serving notices calling upon the proprietors of lands and heritages fronting such street to do certain things. It seems to me that the simple question we have to decide is this, whether or no the Caledonian Railway Company is the owner of lands and heritages fronting that street. It seems to me to be a very simple proposition at first sight. There is the street; there are the lands and heritages; you are the owner of them; and therefore you are under the Act. I have never been able to see during the discussion what importance attached to the land being enclosed by a wall. I do not think the existence of the wall makes any difference. The fact that the Railway Company do not use the street does not make the Railway Company less or more owners of land abutting on or fronting the street. As your Lordship has said, the Act says—and it is unambiguous—that the owners of land fronting any private street shall be bound to make and complete that street, and if they are in that position they must just submit. The Act does not say that owners having access to or the use of the street shall be bound to do so. It says nothing about that; it simply says that the owners of houses fronting the street shall be bound. It may be, as I said before, rather a hardship on the owners of the street that they have to make it a public street, but no doubt they will have the advantage, when it is put in order, of having it kept at the public expense. But these are all matters with which we have nothing to do. We have simply to ask ourselves whether or not the Caledonian Railway Company's property fronts this street. I cannot in the exercise of my ordinary common reason believe that it does not, and therefore I concur with the opinion of your Lordship.

LORD M'LAREN—The Caledonian Railway Company are proprietors of a railway embankment which lies on one side of the street in question and in immediate contact with the street, and it is plain enough that so long as the land is used for the purpose of a railway embankment, part of the permanent way of the railway, the company will derive no benefit from its proximity to this street. The question for consideration was, I think, rightly stated by the Dean of Faculty when he said the question was, whether we could find solid ground for limiting the generality of the 73rd section of the Edinburgh Municipal Act of 1897. Well, if it had been intended that the liability to make up a street or to repay the Corporation in the event of their making it up was to be confined to proprietors of the *solum* of the street it would have been very easy to say so. The Act of Parliament would then put the duty on such persons as were owners or part owners of the street. That has not been done, and accordingly it was not seriously contended that in order that a person should be liable under the statute he must be a *pro indiviso* owner of the *solum*. But the argument

was rather that the person charged must have such an interest in the street as would entitle him in association with others to put the street into proper repair. But the answer, as I think, is conclusive—that as the statute has given power to the frontagers, whom failing the Corporation, to put a street into proper repair, no further title than what the 47th section has itself given is requisite to authorise the execution of the work, whether it is to be executed by the frontagers or by the corporation. I confess I am unable to see any ground for limiting the generality of the statute, and while we see from the current of the authorities that some exceptional cases have been recognised, I think the exceptions are more apparent than real. One of them is a case where there was a proprietor who had a wall interjected between the street and his ground. That is only an apparent exception, because the property of the person sought to be charged did not in fact abut on the street. And then in another case, on the construction of one of the London Metropolitan Acts, while the owner of a field adjacent to the street or road was held exempt, the proprietor of a wall which separated the street from that field was held to be liable. That was certainly a very critical case for testing the generality of the enactment there under construction, and it is a decision entirely consistent with the judgment proposed in this case.

I do not think there is any substantial difference in meaning or phraseology between that Metropolis Act and the Act for Edinburgh.

I therefore agree in the opinion that the appeal is not well founded, and that it ought to be dismissed.

LORD KINNEAR—I agree with your Lordships.

The Court refused the appeal.

Counsel for the Appellants—Dundas, K.C.—M'Clure. Agents—Hope, Todd, & Kirk, W.S.

Counsel for the Respondents—Dean of Faculty (Asher, K.C.)—Cooper. Agent—Thomas Hunter, W.S.

Wednesday, March 13.

## FIRST DIVISION.

### MACDONALD v. HEDDERWICK & SONS.

*Proof—Diligence—Action of Damages for Slander—Defender's Right to Recover Pursuer's Income-Tax Receipts*

In an action against the proprietors of a newspaper in respect of an alleged slander in an article published in the newspaper, the pursuer averred that his business credit and reputation had been seriously injured thereby. Held that the defender was entitled to a diligence to recover the

pursuer's income-tax receipts for the last three years.

Charles C. Macdonald, jeweller, Glasgow and Birmingham, brought an action against Messrs James Hedderwick & Sons, publishers of the *Glasgow Evening Citizen* newspaper, concluding for payment of £2000 as damages for slander.

In his condescence the pursuer averred that he had been employed to make a sword of honour to be presented to Colonel Hector Macdonald, and that the defenders on 5th September 1900 had published an article in the *Evening Citizen* stating that the sword had come to pieces in the hands of Colonel Macdonald, and was of little value. With regard to the damage he had thereby sustained he made the following averment;—“(Cond. 9) The publication of the article complained of has inflicted serious injury on the pursuer's reputation and feelings. In the pursuer's business, both wholesale and retail, the absolute confidence of the public and of his customers in his integrity and honest dealing is essential. The defenders' newspaper is widely circulated and read by a large section of the public, and the dissemination by its means of the false and slanderous statements complained of has seriously injured the business credit and reputation of the pursuer, besides injuring his feelings. The pursuer has called on the defenders to make reparation for the loss and damage thus suffered by him, but they repudiate all liability. The pursuer estimates the damage suffered by him at the sum sued for.”

After the issues for the trial of the cause had been adjusted, the defenders moved for a diligence for the recovery of, *inter alia*, the receipts for income-tax paid by the pursuer for the last three years. In support of their motion they cited *Johnston v. Caledonian Railway Company*, December 22, 1892, 20 R. 222.

The pursuer opposed the granting of the diligence, and argued that the proper evidence of loss to business resulting from slander was contained in the business-books kept by him.

LORD PRESIDENT—There is no doubt that there was at one time a variation in the practice as to granting a diligence for the recovery of income-tax receipts, but for a considerable time it has been settled, and it is very important to adhere to a settled rule of practice, that such a diligence may be granted in actions of damages for loss of business through personal injury. The reason for granting such a diligence must be to enable the jury to compare the earnings of the pursuer before and after the injury, and for that purpose such receipts are often used. A man's books do not form absolute proof of what his profits are, and they may be kept in such a way as not to show his profits at all. Nor are they in themselves evidence. They require to be proved, and often also explained by witnesses. Income-tax receipts are more direct as containing a man's own statement, and he cannot complain if he is