Replied for defenders—there were no witnesses examined who would not have been necessary upon the other question of fact, which was to try whether the contract of 26th June was not a contract in which Armstrong Brothers were principals. The plea stated against the set-off was, that it was Vaughan's contract and not Armstrong Brothers' contract, and we required to go to proof upon that.

LORD JUSTICE-CLERK—We find the defenders entitled to expenses, under deduction of one-half the expenses of the proof.

Counsel for Reclaimers (Defenders)—Dean of Faculty (Clark), Q.C., Asher and Lorimer. Agents—Webster & Will, S.S.C.

Counsel for Respondent (Pursuer)—Balfour and Mackintosh. Agents—J. & R. D. Ross, W.S.

Tuesday, February 9.

OUTER HOUSE.

[Lord Curriehill, Ordinary.

PETITION—REV. JAMES STEWART.

Lands Clauses Act 1845, §§ 67, 79—*Compensation Money—Petition—Temporary Investment—Permanent Reinvestment—Expenses.*

A railway company under the Lands Clauses (Scotland) Act 1845 took certain portions of glebe land, and in terms of the statute consigned the price. Thereafter the fund consigned was invested in a heritable bond, the expenses being paid by the company. The estate over which the bond was held having been sold, the bond was cancelled and the money again consigned in bank. Application was made to the Court to authorise the reinvestment of the fund in the purchase of certain feu-duties, and to find the railway company liable in the expenses of this second application. The company opposed the motion. *Held* that the investment in feu-duties was one of a permanent character, and that the railway company were liable in the expense of it as such.

Observed (per Lord Curriehill) that feu-duties are truly "lands" under burden of the feu-rights.

This was a petition presented by the Rev. James Stewart, minister of the parish of Wilton, in the Presbytery of Jedburgh, for authority to re-invest consigned money. On 30th April 1867 the petitioner presented a petition setting forth that under two arbitrations and one joint-valuation with the North British Railway Company, under "The Lands Clauses Consolidation (Scotland) Act, 1845," the said Company were held liable in payment of the total sum of £3813, 1s. of compensation for certain portions of the glebe of Wilton taken by them for the purposes of their railways, under the Acts set forth in said petition, which sum was consigned in the Bank of Scotland in name of the Presbytery; and in terms of sections 67 and 68 of the said Lands Clauses Act, 1845, authority was asked, *inter alia*, to invest £2500 of the said sum, by taking an assignation of a bond and disposition in security over the estate of Freeland, in the county of Perth. The authority having been obtained, the £2500 was invested in the manner proposed. Freeland was sold by the proprietor, Lord Ruthven, with entry to the purchaser at Whitsunday last; the £2500 has been paid up and the burden extinguished. After an unsuccessful attempt to obtain a security over an estate in Fife, a minute was put in by the petitioner proposing an investment of the money in the purchase of feu-duties, as detailed by the Lord Ordinary in the note appended to his interlocutor. This transaction having been sanctioned, the petitioner sought to have the Railway Company found liable in the expenses. This was opposed by the Railway Company.

Argued for them—We rest our case on sections 67 and 79 of the Act. Section 67 provides modes in which purchase money, payable to parties in the Rev. Mr Stewart's position, is to be paid; and the second purpose is for "The purchase of other lands to be conveyed," &c. This, like all statutory enactments, requires to be strictly interpreted, and on a reference to the interpretation clause we find "lands" defined to be "heritages of any description or tenure." Were "heritage" to be deemed equivalent to "heritable property," the term would, in 1868, have embraced "heritable bonds," which could not have been deemed a "permanent investment." Again, under section 79 the Court may order the expenses to be paid by promoters—that is to say, the expenses (1) of investment in Government or real security. This has already been done when we paid the expenses in connection with the bond over Freeland; (2) of "Reinvestment in the purchase of other *lands*," &c. That is not so here. The meaning of this part of the clause has been explained by two English decisions (*Milward; Buckinghamshire Railway Company*). The second part of section 79 clearly provides for the expenses being given against us in two cases, and two only, (1) Where there is a temporary investment, as in the bond over Freeland, already paid for by us; (2) Where there is a permanent investment. This being still of the nature of a temporary investment the petitioner cannot ask for expenses. We might be called on in future to pay for reinvesting the money permanently in "land." No doubt feuing was authorised under the Glebe Lands Act, 1866; but that Act does not in any way refer to the present case—(*Gloag*). If, however, the Court should deem this a permanent investment, see *Lomax*.

Argued for petitioner—This is a permanent investment, and as such we are entitled to claim expenses for it. Feu-duties are heritable, and "lands," as defined by the Act to be "heritages of any description or tenure," include "feu-duties." The owner or creditor of feu-duties is really infeft in the land, and is the superior thereof. It is not admitted, and has not yet been decided, that the Railway Company are liable only in the costs of one investment. The statute gives a discretion to the Court, and in several cases the Court have used it.

Authorities for Railway Company—*Milward* v. *Oxford, Worcester, and Wolverhampton Railway Company*, 29 L. J. Ch., 245; *Buckinghamshire Railway Company*. 14 Jur., 1065; Lands Clauses Act, 8 Vict., c. 19, sections 67 and 79; Deas on Railways, 352; Shelford on Railways, 366; *Lomax*, 34 Beavan, 294; *Gloag* v. *Rutherford*, 11 Macph. 261.

Authorities for petitioner—*Grant* v. *Edinburgh, Perth, and Dundee Railway Company*, May 29, 1851, 13 D. 1015; Hodge's Law of Railways, 365 and 366; *In re Incumbent of Whitfield*, 1 Johnson & Hemming, 610; *Rector of Welbourne*, April 25 1868, 3 Weekly Notes, 104.

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 19th January* 1875.—The Lord Ordinary having heard counsel for the petitioner and for the North British Railway Company, Finds the said Railway Company liable in the expenses of this application and of the proceedings under the same and incident thereto, except the expenses incurred in connection with the proposed security over Bonnytown, mentioned in the petition: Appoints an account of said expenses to be lodged, and when lodged remits the same to the Auditor of Court to tax and report.

"*Note.*—In 1867 the North British Railway Company took for the purposes of their railway certain portions of the glebe of the parish of Wilton, of which parish the petitioner, the Reverend James Stewart, was then and still is the incumbent. The compensation money was, under the provisions of the Lands Clauses (Scotland) Act 1845, fixed by arbitration and valuation at the sum of £3,813, part of which, amounting to £2,500, was, in pursuance of §§ 67 and 68 of the said Act, and by the authority of the Court, temporarily invested on heritable security over the estate of Freeland in Perthshire. That estate was lately sold by the proprietor, and the said sum of £2,500 has been paid up by him, and the burden has been extinguished. It thus became necessary to procure a new investment for the said sum of £2,500, and the petitioner presented the present application for the purpose of obtaining the authority of the Court to reinvest the money on heritable security over the estate of Bonnytown in the County of Fife. The petition set forth that the proposed security was to be postponed to other debts, amounting in all to £13,000, and that the estimated value of the estate was about £23,000. A remit was made to Mr Patrick Adam, S.S.C., to enquire into the nature and sufficiency of the proposed security. Mr Adam informed the petitioner's agent that, as the security was not to be a first charge upon the estate he could not report in favour of it unless it were to be accompanied with collateral security for the regular payment of the interest. As the borrower declined to grant such an obligation, the proposed transaction was not further proceeded with, and the petitioner by a minute, No. 17 of process, proposed that the money, instead of being invested on heritable security, should be applied in the purchase of feu-duties, which are parts of feu-duties of considerable amount payable out of house property in and near Edinburgh, and presently held by the trustees of the Endowment Committee of the Church of Scotland, who are feudally infeft therein. The price to be paid is equal to 24 years' purchase of the feu-duties, and it has been arranged that instead of the feu-duties being conveyed to new trustees for behoof of the benefice, the trustees of the Endowment Committee shall remain vested with the title thereto, but shall execute and deliver a deed of appointment and declaration, setting forth the transaction, and declaring that the feu-duties so purchased shall be held by them and their successors in office for behoof of the minister of the parish and his succcssors in office in all time coming, to whom payment shall be made accordingly.

"The proposed transaction has been sanctioned by interlocutor of 14th January 1875, and is being carried through under the superintendence of Mr Adam.

"The petitioner now asks that the Railway Company shall be found liable in expenses in terms of the 79th section of the statute. The Railway Company oppose the motion on the ground that the present is not a permanent investment in land, and that they are therefore not liable for the expense of the application. That section of the Act provides that the Court may "order the expenses of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters of the undertaking (that is to say) . . . the expense of the investment of such monies in Government or real securities, and of the re-investment thereof in the purchase of other lands, and of re-entailing any of such lands and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid, and of the orders for the payment of the dividends and interest of the securities upon which such monies shall be invested . . . . . provided always that the expense of one application only for re-investment in land shall be allowed, unless it shall appear to the Court of Session that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the expenses of any such investments to be paid by the promoters of the undertaking.'

"The Railway Company concede that under the statute they may be found liable in the expense of one temporary investment on Government or heritable security, and also of one permanent investment in the purchase of land. They have been already found liable in the expense of the heritable security over Freeland, and they admit that if the investment which is now proposed be truly a purchase of land they may be held liable in the expense of that purchase, and of this application. But they maintain that the purchase of feu-duties is not a permanent re-investment in the purchase of land, and they dispute their liability for the expenses. I am of opinion that the contention of the Railway Company is not well founded. Feu-duties, *i.e.* superiorities, are truly lands under burden of the feu-rights by which the *dominium utile* has been given out to vassals for the payment of an amended *reddendo*, and the superior is the proprietor of the *dominium directum* of the lands. The purchase of the superiority is both in form and substance a permanent and irredeemable investment in land, and I therefore think that the Railway Company is under the statute liable in the expenses of the investment, and of this application. I do not, however, think that any part of the expense incurred in negotiating or enquiring into the sufficiency of the security proposed to be taken over Bonnytown ought to fall upon the Railway Company. That security was one which the Court could not have sanctioned, and which should never have been proposed, and the Company cannot reasonably be subjected in any costs incurred in connection herewith."

This interlocutor not having been reclaimed against has become final.

Counsel for Petitioner—M'Kie. Agent—T. J. Gordon, W.S.

Counsel for Railway Co.—J. J. Reid. Agents—Dalmahoy & Cowan, W.S.