

The LORD JUSTICE-CLERK was absent.

The Court answered both questions in the negative.

Counsel for the First Parties—George Watt. Agent—Adam W. Gifford, W.S.

Counsel for the Second Party—Sym—C. D. Murray. Agents—J. & R. A. Robertson, S.S.C.

Counsel for the Third Party—Jameson—Crole. Agent—S. F. Sutherland, S.S.C.

Saturday, July 8.

## FIRST DIVISION.

[Lord Low, Ordinary.]

### STIRLING STUART v. CALEDONIAN RAILWAY COMPANY.

*Railway—Compulsory Acquisition of Land—Application of Purchase Money—Expenses—Lands Clauses Consolidation Act 1845 (8 Vict. cap. 19), sec. 79—Entail.*

In a petition by an heir of entail for authority to uplift money consigned by a railway company as the price of lands acquired under compulsory powers, and to apply it *pro tanto* in payment of a bond and disposition in security over the entailed estate, the Court (approving judgment of Lord Manor in *Pollok v. Glasgow Waterworks Commissioners*, 41 Scot. Jur. 325), held that the railway company was not liable for expenses incurred in connection with the preparation, execution, and recording of a partial discharge and deed of restriction by the creditor in the bond.

The following narrative of the case is taken from the opinion of the Lord Ordinary (Low):—"The petitioner is heir of entail in possession of the estate of Milton. In 1892 the Caledonian Railway Company acquired a portion of the estate, and consigned the price, which was fixed by valuation, in bank. The petition is for authority to uplift the consigned sum, and to apply it in repayment *pro tanto* of a large debt upon the entailed estate constituted by bond and disposition in security in favour of the Scottish Widows Fund and Life Assurance Society. The authority craved has been granted, but a question has been raised as to the liability of the railway company for the expenses of preparing, executing, and recording a partial discharge and deed of restriction by the insurance company, disburdening the entailed estate to the extent of the uplifted money, and wholly disburdening the portion of the estate acquired by the railway company. The Auditor has disallowed these expenses as a charge against the railway company, and the petitioner objects to the Auditor's report in that respect."

By section 67 of the Lands Clauses Consolidation Act 1845, it is provided that the purchase money or compensation payable in respect of any lands taken by the pro-

motors of an undertaking from any heir of entail or other party having a limited interest shall, if it amounts to or exceeds £200, be consigned in bank, to the intent that it may be applied under the authority of Court to one or more of the following purposes—"In the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith on the same heirs, or for the same trusts or purposes, or affecting succeeding heirs of entail in such lands whether imposed and constituted by the entail, or in virtue of powers given by the entail, or in virtue of powers conferred by any Act of Parliament. In the purchase of other lands to be conveyed, limited, and settled upon the same heirs, and the like trusts and purposes, and in the same manner, as the lands in respect of which such money shall have been paid stood settled; or if such monies shall be paid in respect of any buildings taken under the authority of this or the special Act, or injured by the proximity of the works, or in removing or replacing such buildings, or substituting others in their stead, in such manner as the Court shall direct; or in payment to any party becoming absolutely entitled to such money."

Section 79 provides that in all cases of monies deposited in the bank (with certain excepted cases) "it shall be lawful for the Court of Session to 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 expenses of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such expenses as are herein otherwise provided for, and the expense of the investment of such monies in government or real securities, and of the reinvestment 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, and for the payment of the principal of such monies, or of the securities upon which the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants." . . .

On 23rd June the Lord Ordinary reported the case to the First Division.

"*Opinion.*—The same question was raised in the case of *Pollok v. The Glasgow Waterworks Commissioners*, 41 Scot. Jur. 325, which was decided on 5th March 1869 by Lord Manor, who held that the expense of the partial discharge could not be awarded against the promoters. That judgment was acquiesced in, and the Auditor informs me that it has ruled the practice ever since its date.

"The question depends upon the construction of certain sections of the Lands Clauses

Act of 1845, and especially the 67th and the 79th sections.

“The 67th section provides for the purchase money, or compensation coming to parties having limited interests being consigned; and further, that the consigned money may be applied, under the authority of the Court, to certain purposes, among which is ‘the discharge of any debt or incumbrance affecting the land in respect of which the money shall have been paid, or affecting other lands settled therewith on the same heirs.’

“The 79th section provides that in the case of money deposited in bank, it shall be lawful for the Court to order the expenses of certain matters to be paid by the promoters, and among others, ‘the expense of the purchase or the taking of lands, or which shall have been incurred in consequence thereof,’ and also ‘the expense of the investment of such monies in Government or real securities, and of the reinvestment thereof in the purchase of other lands.’

“Apart from the decision in *Pollok*, I should have thought that the expenses of the partial discharge fell within the 79th section. The expenses have certainly been incurred in consequence of the purchase or taking of the lands. No doubt it may be said that such expenses have not been incurred directly in consequence of the taking of the land, but I think that the inclination of the Court has been to regard the application of consigned money in the way authorised by the 67th section as an act done in consequence of the taking of the land, and therefore a matter for the expense of which the promoters are liable. Thus, in *Primrose v. The Caledonian Railway Company*, December 12, 1848, 11 D. 236, where the railway company acquired part of an entailed estate which was burdened with a redeemable bond of annuity, the Court held that the company was liable for the expense of a bond of corroboration granted to the holder of the bond of annuity over lands bought with the consignment money. Again, in *Grant v. The Edinburgh, Perth, and Dundee Railway Company*, May 29, 1851, 13 D. 1015, the Court held that the company was liable in the expense of applying the consigned money in payment of improvement expenditure on the entailed estate for which decree had been obtained in terms of the Montgomery Act.

“In England the clause in the English Act corresponding to the 79th section of the Scotch Act has been construed liberally in favour of the persons whose lands have been taken. Thus it has been repeatedly held that the portion of the clause which provides for the expense of investment and reinvestment of the consigned fund (the words being the same as those which I have quoted from the 79th section) covers the expense of the application of the money in redemption of the land tax—see in *re Bethlem Hospital*, L.R., 19 Equity, 457, and cases there cited.

“While, therefore, I should be inclined to sustain the objection to the Auditor’s

report, if the question had arisen for the first time, it seems to me that, in view of Lord Manor’s judgment, and the practice which has followed upon it, it is proper that I should report the point.”

Argued for the petitioner—The expense of clearing the land of incumbrances was either an expense consequent on the taking of the land by the company, or it was an expense of the investment of the purchase money. Such an expense was payable by the company, and it had been so held in England where the statute was in similar terms. *Ex parte Trafford*, 1837, 2 Younge & Collyer’s Exch. Rep. 522. The intention of the Legislature in the 79th clause was not to particularise every expense chargeable against the promoters, but only to indicate the kind of expenses in which they were liable—*Primrose v. Caledonian Railway Company*, December 12, 1848, 11 D. 236; *Grant v. Edinburgh, Perth, and Dundee Railway Company*, May 29, 1851, 13 D. 1015; in *re Bethlem Hospital*, 1875, L.R., 19 Equity 457; *re The Buckinghamshire Railway Company*, 1850, 14 Eng. Jur. 1065. The railway company were therefore liable in the expenses of the partial discharge and deed of restriction.

Argued by the railway company—The expenses in question were not expenses consequent on the taking of the land. The taking of the land was concluded, and the price consigned before these expenses originated. They arose out of a particular application of the purchase money, but were not among the expenses of investment which the Court could order the promoters to pay—*Pollok v. The Glasgow Waterworks Commissioners*, March 5, 1869, 41 Scot. Jur. 325. The principle of that decision had been applied in a series of English cases which were quoted in *Brown and Theobald on Railways*, 2nd ed. 197. The relations between promoters and creditors holding rights over the ground to be taken were dealt with in section 99 and the following sections—*Cripps on Compensation*, 3rd ed., 294. The Court could award no expenses which the statute did not award, *per* Lord President Boyle in *Erskine v. The Aberdeen Railway Company*, 1851, 14 D. 119.

At advising—

LORD PRESIDENT—This question arises primarily under section 79 of the Lands Clauses Act 1845, and I think it is important to observe that section 79 does not do what might have been a quite intelligible thing, and that is, allow all the expenses incident to the several things which are contemplated to be done in section 67. That would have brought in by a simple reference all the expenses of the class of which this is a specimen; but section 79 does not adopt that method at all, for it specifies and enumerates “the expenses of the following matters,” and it is the expenses of these matters only which it shall be lawful for the Court of Session to order to be paid. The first of these matters is—“The expense of the purchase or taking of the lands, or which shall have been incurred in consequence

thereof." If the section had stopped there, then the latitude of these words, "or which shall have been incurred in consequence thereof," might fairly have been argued to cover indirect consequences such as the expense of all forms of disposal of the money. But, then, that is rendered an illegitimate construction by the fact that the section proceeds to treat, as it were, under a separate head or chapter the consideration of the ultimate disposal of these moneys, for it says, "the expense of the investment of such moneys in Government or real securities," and Mr Mackenzie is right, I think, in saying that that relates, although not expressly, to section 68—that is to the case of a temporary investment. Then it goes on, "and of the re-investment thereof in the purchase of other lands, and of re-entailing any of such lands, and incident thereto." That deals expressly with one kind of re-investment and by the particularity of the description it precludes us, as I think, from sweeping in the expenses of all the various things which might be done under section 67. It is only the expenses of matters which are enumerated here that the Court of Session has authority to charge against the railway company. Then there are general words which follow, "and also the expense of obtaining the proper orders for any of the purposes aforesaid." It is enough to say here that this is not the expense of an order in any sense of the term. Therefore I think that, following the accurate statement of Lord President Boyle in the case of *Erskine*, 14 D. 119, we must allow only the expenses which the statute allows, and as I have said, I think we are not entitled to allow such expenses as logically would seem to follow those which are enumerated as being of the same class with those enumerated.

Accordingly, although I can quite see there might have been a very good defence made of an enactment which would include these expenses, I do not discover that enactment in the statute with which we have to deal.

LORD ADAM—I am of the same opinion. This is a statutory matter, and I agree with your Lordship that we have no authority unless we can find it in the statute to impose the expenses in question upon the railway company. Whatever we might think right and proper had we been legislating is not the question. The question is, have we authority under the statute to say that the railway company are liable for these expenses?

I understand from the report of the Lord Ordinary that this matter was decided by Lord Manor a good many years ago, and that the practice has been in conformity with that decision ever since; and in my opinion Lord Manor's decision was right, and the practice following it was right and proper also.

The case we have to deal with is this. The petitioner is heir of entail in possession of an entailed estate, and being a limited owner he could not sell. Proceedings were

taken under the statute, and a certain amount was ascertained to be the sum payable by the railway company for the land taken under their statutory powers. That money was consigned in bank to await investment.

There are in the statute a number of clauses, beginning at the 67th and terminating at the 79th, which deal with the matter of the money paid and consigned in respect of land taken from the owner and re-invested. The 67th section points out and directs to what purpose such money may be applied. It may be applied "in the purchase or redemption of the land tax, or the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid;" and that is proposed to be done here, and it is certainly authorised by that 67th section. Then it goes on to provide for other things. For example, in the next clause, "in the purchase of other lands to be conveyed, limited, and settled upon the same heirs," and so on. Then the 68th section provides that "such money"—that is, the consigned money—"may be so applied as aforesaid upon an order of the Court of Session made on the petition of the party who would have been entitled to the rents and profits," and so on, "and until the money can be so applied it shall be retained in the bank at interest, or shall be laid out and invested in the public funds or in heritable securities," and the proceeds paid to the limited owner. That meets the case where parties have not found a permanent investment at the time. The money lies in bank or in temporary security until such permanent investment is found.

We go on to the 79th section, upon which this case more immediately depends, and upon the construction of which we have now to decide. That section, as it appears to me, very clearly is divided into two branches. The first relates to the expenses of taking the land, and the second to the matter of the investment of the money paid for the land so taken. These two things, the taking of the land and the subsequent investment of the money, are to my mind quite different things. The first branch of the 79th section provides for the first of these. It says—"It shall be lawful for the Court of Session to 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 purchase or taking of the lands, or which shall have been incurred in consequence thereof." That is the first thing.

Now, it appears to me that so far as the taking of the land and the expense incurred in consequence of the taking of the land are concerned the matter is over. We have not to deal with that, because the land is taken and the expenses have been paid, and the money is consigned; and that being the state of matters, we come to the second branch of the clause, which relates to the investment of the money, and the expenses which the Court is authorised to order the railway company to pay in respect of such investment. The clause goes

on to say that the Court is authorised to order the railway company to pay "the expense of the investment of such moneys in Government or real securities"—investment, no doubt, in Government or real securities is only temporary—"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."

There is there a distinct enumeration of the expenses incurred in these particular ways which we have authority to order the railway company to pay, and I do not think the mere fact that certain things—certain specific things—are provided for in this section implies that certain other things which are not provided for are included. It is impossible to say that the expense incurred here of discharging a bond is an expense in investing the money "in Government or real securities," or in re-investing it in "the purchase of other lands" or "incident thereto." It is none of these things, and this becomes the more clear when we go back to the 67th section, for we find that it provides for the re-investment of the consigned money not only in these particular ways which the railway company is ordained to pay the expenses of, but also in such other ways as to which the 79th section is entirely silent. The 67th section says the money may be invested "in the purchase or redemption of the land tax," or in "the discharge of any debt or incumbrance affecting the land in respect of which such money shall have been paid." We find that is exactly one of the things which is omitted in the 79th section. Why it is so omitted I do not know. We find that while it is lawful to invest the money in the discharge of a debt or incumbrance, and while it is quite lawful to invest it in the purchase of other land, when we come to the matter of expenses the Court is authorised to say that the expense incurred in the purchase and re-entail of other lands shall be paid by the railway company, but that the section is entirely silent in the matter of directing us to order the railway company to pay the expense of applying the money in the discharge of a debt affecting the petitioner's own land. I can come to no other conclusion than that Lord Manor was right a good many years ago, and that the practice which has been followed since is also right.

LORD M'LAREN—I so far support the view indicated by the Lord Ordinary in his report, that if this question had arisen now for the first time I think I should have held with the Lord Ordinary that the expenses of granting a deed of discharge disburdening lands acquired by the railway company was a proper incident of the acquisition of the lands by the company, and matter for which the company were liable. But I could only have arrived at that result by putting a construction upon the words of the 79th section. These words are quoted in the Lord Ordinary's report—

"The expense of the purchase or the taking of the lands, or which shall have been incurred in consequence thereof," and also "the expense of the investment of such moneys in Government or real securities, and of the re-investment thereof in the purchase of other lands."

The question seems to me to be, whether the 79th section, which comes at the end of a series, is framed on the principle of enumeration or on the principle of relation? I should have thought, if I were to trust to my unaided view, that it was framed on the principle of relation, and that the words which I have read are just intended to express in general terms the assemblage of all the things which have been authorised to be done under the previous sections with a view to the appropriation of the price of land compulsorily acquired in a manner consistent with the rights of limited owners.

I think it would not be difficult to show by analysing the preceding series of sections that, even in regard to those things which are plainly pointed to, the expression which I have read from the 79th section is not completely enumerative so as to take in everything dealt with in the sections pointed to. Really it could scarcely be held as necessary to repeat at great length all the powers which the Court were directed to exercise in regard to the application of the consigned money.

But then there are two constructions of this 79th section, and the construction that it is enumerative and confined in its application to the precise things mentioned has received the support of a judgment of this Court, because a judgment of a Lord Ordinary, acquiesced in and acted on for a series of years, is just as good authority—at least in a case of this kind I think we must treat it as being as good authority—as if it had proceeded on an application to the Inner House. And then it has the support of your Lordships, who have taken the same view.

Therefore, even if I were more clear than I am in my view of the statute, I should not approve of reversing a course of practice which has followed upon a previous decision; and I agree with your Lordships that we ought to adhere to the principle of construction which was adopted by Lord Manor after full consideration of this point.

LORD KINNEAR was absent.

The Court disallowed the expenses incurred in connection with the preparation, execution, and recording of the partial discharge and deed of restriction, and remitted to the Lord Ordinary to proceed.

Counsel for the Petitioner—C. S. Dickson—A. J. Mitchell. Agents—Graham, Johnston, & Fleming, W.S.

Counsel for the Railway Company—C. K. Mackenzie. Agents—Hope, Mann, & Kirk, W.S.