to be the law of Scotland, and I therefore concur with my noble and learned friend in advising your Lordships to reverse the interlocutor complained of, and to declare that the pursuer is entitled to a decreet in the terms of the summons, so far as relates to the piece of land on which the ruins stand. But, as the claim originally went much beyond that to which it is now confined, I think there should be no expenses on either side.

Mr ANDERSON—My Lords,—With regard to the expenses of the Crown paid to the respondent, the expenses in the Court below, there will be the usual order for repayment.

LORD CHANCELLOR—As I understand my noble and learned friends' opinion, it is, that there should be no expenses on either side, and I entirely agree with him in that. I rather inaccurately stated that there should be no costs of appeal, but I meant what my noble and learned friend has expressed.

Mr ANDERSON—The expenses paid to be repaid.

Interlocutor appealed from reversed, with declaration.

Agents for Appellant—Andrew Murray, W.S., and Horace Watson, Westminster.

Agents for Respondents—Hamilton & Kinnear, W.S., and Grahames & Wardlaw, Westminster.

COURT OF SESSION.

Saturday, Feb. 16.

FIRST DIVISION.

PETITION—MILES AND SPOUSE.

Lands Clauses Consolidation Act—Railway—Consigned Money—Authority to uplift—Competency—Sufficiency of Title. Property having been taken compulsorily by a railway company, and a sum consigned under sec. 84 of the Lands Clauses Consolidation Act, 1845, the sellers applied for authority to uplift the money. The company opposed on the grounds, (1) that the application was incompetent; and (2) that the title offered was bad. Competency sustained, and held that as the title offered was a good title to the beneficial right to the subjects which the company might, if necessary, complete feudally by adjudication, the sellers were entitled to get up the consigned money.

This was an application for authority to uplift certain consigned money. The petitioners were proprietors of certain heritable subjects in Couper Street, Leith. On 24th October 1865, they received notice from the North British Railway Company that they required to purchase under Acts of Parliament obtained by them a portion of the said subjects, and demanding from them the particulars of their interest therein, and the claims made by them in respect thereof, and giving them notice that the company was willing to treat for the purchase of the subjects and as to the compensation to be made.

On 23d November 1865, the petitioners sent in a claim in which they set forth that they were owners of the subjects, called upon the company to take the whole of the subjects, and claimed £270 as compensation.

On 20th January 1866, the company, with the view of entering upon the subjects in virtue of the Lands Clauses Consolidation Act, consigned in bank the sum of £270, being the amount claimed, and tendered a bond. The deposit receipt bore, in terms of the act, that the consignation was made "subject to the control and disposition of the Court of Session."

The petitioners thereafter agreed with the company to accept £250 as compensation, and the titles were sent to their agents with a view to a conveyance being prepared. The petitioners offered, in implement of their statutory obligation to grant a title, to give the company an assignation by the trustees of the Scottish Property Investment Company (who held an *ex facie* absolute assignation of the personal right and title of the petitioners in security of advances) of their personal right and title, and to become consenting parties thereto. This the railway company refused to accept, in consequence of certain alleged defects in the prior titles.

The petitioners thereupon presented this application for authority to uplift £250 of the consigned fund, they, at the same time, giving the company the assignation which they had tendered. They founded on sections 84 and 85 of the Lands Clauses Consolidation Act.

The railway company lodged answers, in which they stated that the application was, by reason of the terms of section 86 of the Lands Clauses Act, incompetent. A bond had been tendered by them previous to their entry to the lands, which was by the act equivalent to granting a bond, and there was no condition of that bond which had not been fulfilled by them. They were willing to settle the price on their objections to the title being removed.

Their objections to the title were—"1. That no prescriptive title had been produced to the respondents. 2. That the petitioners are not infeft. 3. That the petitioners have only a right to a *pro indiviso* half of the subjects, in respect that the subjects had been at one time held under a disposition and sasine in favour of the then deacon and boxmaster of the barbers of Leith, *nominatim*, and their successors in office, for the use and behoof of the said incorporation, and that the subjects have never been taken out of the *haereditas jacens* of one of these persons, but still to the extent of one *pro indiviso* half thereof remain with his heirs. Mr Johnston, the deacon to whom the title was so taken, died without conveying his right and interest in the subjects; and in 1817 the then deacon, together with the old boxmaster, who still survived, pretended to dispone the subjects to the petitioners' authors. 4. An important part of the petitioners' subjects was and is omitted in the charter of resignation in their favour. This objection the petitioners proposed and did attempt to remedy by getting the omitted portion of the description put on the margin of the charter, and signed after the objection was taken, in order that it might pass as if signed of the proper date of the deed, as is shown by the respondents' agents' letter of 30th April 1866, and the charter of resignation as it now stands, which the petitioners have produced. The charter is No. 19 of process."

The Lord Ordinary (Mure) pronounced an interlocutor, in which he repelled the objection to the competency, and found, with reference to the annexed note, that the respondents are not bound to accept the title offered by the petitioners until the objection taken to the charter of resignation No. 19 of process is removed. The following is his Lordship's

"*Note.*—The object of the present application is to obtain an order on the City of Glasgow Bank for payment of a sum of money deposited by the

respondents, under the provisions of the 84th section of the statute 8 and 9 Vict., cap. 19, regulating the conditions upon which railway companies are to be allowed to enter upon lands before any agreement is come to, or award made as to the price to be paid for the lands; and with reference to which the 85th section provides that money deposited in terms of the 84th section shall be paid into the bank, there to be 'subject to the control and disposition of the Court of Session.'

"The receipt under which the money in question was deposited bears that it was consigned, 'subject to the control and disposition of the Court of Session;' and assuming the present question to turn upon the 85th section alone, the Lord Ordinary is, in these circumstances, unable to see why a summary application to this Court to regulate the 'control and disposition' of money deposited under the 84th section of the statute should not be a competent mode of proceeding under the 85th section, as it admittedly would have been in the case where money had been deposited under the 75th section, in which the very same expression, 'subject to the control and disposition of the Court of Session,' is used. It is, however, objected on the part of the respondents, that this case must be determined upon the 86th section of the statute, which, they contend, alone gives jurisdiction to this Court to deal with money deposited by way of security. The Lord Ordinary doubts the soundness of this contention. But, assuming it to be necessary to have recourse to the 86th section, its provisions would not, in the opinion of the Lord Ordinary, in any respect affect the competency of this application. It provides (1) for applications at the instance of the promoters of the undertaking, where the conditions of any bond, granted under the provisions of the 84th section, have been performed, in which case the Court of Session are authorised to order the money to be repaid to the promoters; and (2) for the case where such conditions shall not be fully performed, in which case the deposited money is to be applied as the Court 'shall think fit for the benefit of the parties for whose security the same shall so have been deposited.'

"In the present case no bond was granted, because none was required by the petitioner. But one is alleged to have been tendered, as explained in the minute given in by the respondents, containing the leading obligations or conditions of the 84th section of the statute—viz., an obligation to pay a sum equal to the sum deposited by way of security, or to make a deposit in bank of all purchase money or compensation which may be determined to be payable by the promoters, with interest at 5 per cent. till payment. Now, assuming that the 86th section applies to the case of tendering as well as granting a bond, as contended for by the respondents, these conditions have neither of them been performed. No sum equal to the sum deposited under section 84th has been paid to the petitioner; neither has any such farther sum with interest been deposited in bank. And that being so, a case appears to the Lord Ordinary to have occurred, in which the Court of Session is authorised by section 86th to interfere. So that, under whichever section the case is dealt with, there is in the opinion of the Lord Ordinary no incompetency in the present application, which is brought in order that it may be determined whether the money ought now to be applied for the benefit of the petitioner, for whose security it was deposited.

"The title offered in the present case flows from the same parties as in the case of Thomson, viz., the vassals under the feu-contract No. 8 of this process, and, apart from the objection taken to the charter of resignation, is not, in the opinion of the Lord Ordinary, one which the respondents are entitled to reject, provided the petitioners show, by a complete search, that no competing right has been created since the date of the infeftment upon the disposition, No. 9 of process.

"That disposition is taken to Henry Johnston, deacon, and William Andrew, boxmaster of the Incorporation of Barbers, not for themselves as individuals, but as deacon and boxmaster, 'for the use and behoof of the Incorporation, and to the disponees of the deacon and boxmaster for the time being, authorised by a special sederunt for that purpose,' &c. Now, although the word trustee is not used as descriptive of the character of the *nominatim* disponees, the conveyance was plainly one in trust for the incorporation. It was therefore *qua* trustees that the disponees were infeft on the conveyance; and as the disposition, No. 11 of Process, to which objection is taken, was granted by the then deacon and boxmaster as specially authorised, and also by William Andrew, the former boxmaster, and survivor of the officers in whose person the original trust title had been created, it appears to the Lord Ordinary that the objection taken by the respondents to this disposition is not well founded, because, upon the authority of the case of Gordon's Trustees *v.* Eglinton, July 17, 1851, the surviving boxmaster had, it is thought, a good title as surviving trustee, to convey, when duly authorised to do so by the incorporation.

"If, then, the charter of resignation had been free from objection, the Lord Ordinary, would, in these circumstances, have been disposed to grant the prayer of the application upon the petitioners delivering to the respondents a conveyance to the title now held by the Property Investment Company. But that charter is defective, inasmuch as a part of the subjects in question was omitted from the body of the deed, and only inserted on the margin several years after the date of the charter. The deed is therefore one which the respondents are not, in the opinion of the Lord Ordinary, bound to accept as a valid title from the superior to the whole of the subjects, for it is open to the objection that it is not correct in point of fact that a charter bearing that marginal addition was signed on the 14th of November 1861, as stated in the testing-clause.

"The objection is, however, one which may, it is thought, be cured without much difficulty by getting a new charter from the superior to the whole property, or a supplementary charter to the omitted portion. Or it might perhaps be held to be obviated by an addition to the testing-clause to the effect that the marginal addition was signed before the same witnesses of the date on which the signature to it was adhibited. But as this is a point not free from doubt, the petitioners are, it is thought, bound, if the respondents insist upon it, to rectify the matter in some other way.

"D. M."

The respondents reclaimed, but before this was done the petitioners lodged a prescriptive progress of titles in process and the following minute:—

"M'Laren, for the minuters, with reference to the Lord Ordinary's interlocutor of 17th January current, and without prejudice to their pleas, in the event of the said interlocutor being brought under review, stated to his Lordship that the petitioners proposed to remedy the objection therein

stated to the charter of resignation, dated 14th Nov. 1861, by getting a supplementary charter from the superior, embracing the subjects mentioned on the margin of the said charter, and which supplementary charter the superior was willing to grant."

SOLICITOR-GENERAL and THOMS, for the company, argued—1. The petitioners were not under sec. 86 of the Act entitled to make this application until breach of the conditions of the bond. If the title offered was sufficient, the application was competent, but under sec. 75 the company are the judges of its sufficiency. The connection and effect of those sections is the subject of remark in Willey, 10th Feb. 1849, 6 R.C., 106. 2. The title offered was not a good title, as it had been taken to two persons, and one-half of the subjects had never been taken out of the *haereditas jacens* of one of them. Black *v.* Lorimer, 25th June 1822, 1 S. 521; 3 Juridical Styles, p. 431; Campbell *v.* Orphan Hospital, 28th June 1843, 5 D. 1278 (Lord Medwyn's opinion); Gardner *v.* Trinity House of Leith, 23d Jan. 1845, 7 D., 286.

CLARK and M'LAREN, for the petitioners, replied—1. In arguing the question of competency the title must be assumed to be good, and if good, the competency is not questioned. 2. The title is unexceptionable. The property was held by the office-bearers as trustees, and the right of the deceasing trustee accresced to the survivor. But, farther, the beneficial right was really in the incorporation, and the office-bearers for the time being were entitled to dispone. Gordon's Trustees *v.* Eglinton, 17th July 1851, 13 D., 1381; Finlay, 30th June, 1855, 17 D. 1014; at any rate, the corporation could assign, and thereby enable the railway company, by declaratory adjudication, to make up a good title. Graham *v.* Caledonian Railway Company, 27th Jan. 1848, 10 D. 495.

At advising,

Lord CURRIEHILL—This petition prays for a warrant to uplift £250 consigned to meet a claim of the petitioners for the price of certain subjects which the railway company had taken under their compulsory powers. It appears that afterwards the company agreed to pay that sum as the price of the subjects; but the company object to the money being got up by the petitioners on the ground that the condition on which alone they are entitled to get it has not been complied with. The failure is said to consist in this, that they have not exhibited a sufficient title. Two objections are stated to the title—(1) that one-half of the subjects is in the *haereditas jacens* of a Mr Henry Johnston, and had been so since 1807; and (2) that part of the subjects had been omitted in a charter of resignation recently expede. This last objection, however, has been obviated, and the first only remains. In support of it reference is made to the original title obtained by the Incorporation of Barbers in 1807. That incorporation then bought the subjects from the original feuars, and the title taken was granted not to the corporation itself, but to two of its office bearers. The disposition bears that the granters "in consideration of a certain sum of money instantly advanced, paid, and delivered to us by Henry Johnston, hairdresser in Leith, present deacon, and William Andrew, hairdresser there, present boxmaster to the Incorporation of Barbers in Leith, for themselves, and as representing the said incorporation, and out of the proper funds belonging to the said incorporation, as the agreed price, worth, and value of the said subjects, have sold, alienated, and disponed, as we do hereby sell, alienate, and dispone from us our heirs and successors, to and in favour of the said Henry Johnston as deacon, and William Andrew as boxmaster, for the use and behoof of said incorporation, and to the disponees of the deacon and boxmaster of the said incorporation for the time being, authorised by a special sederunt for that purpose in the incorporation their books, heritably and irredeemably, All and whole," &c. Now, the feudal conveyance here is to these two individuals, Johnston and Andrew, as deacon and boxmaster of the corporation, but expressly, as I read the deed, to them *qua* trustees. The corporation is the purchaser, and the price is paid out of its funds, and the conveyance is for its use and behoof. I think it clear that the corporation became the owners. Farther, it appears from the disposition as a condition of the title that, in the event of the corporation wishing to sell the subjects, the parties entitled to do so were not these disponees, but the deacon and boxmaster for the time being, if authorised by a special sederunt in the books of the corporation. In short, these two individuals merely held the feudal right as trustees, the beneficial right belonging to the corporation. Infeftment was expede in 1807. So standing matters, it appears that, at the end of ten years, the corporation wished to sell the subjects, and accordingly there is on 3d March 1817, a sederunt of the corporation appointing the subjects to be disposed of and granting the requisite authority; and a few days thereafter a disposition is granted by Thomas Shoolbraid, present deacon, and Robert Laurie, present boxmaster of the corporation, and it is concurred in by William Andrew, one of the two persons in whom the feudal title was, Johnston, the other, being then dead. The disposition is in these terms:—

"We, Thomas Shoolbraid, present deacon, Robert Laurie, present boxmaster of the Incorporation of Barbers in Leith, and William Andrew, formerly boxmaster to the said incorporation, and who in that character was, together with the now deceased Henry Johnston, then deacon of the said incorporation, infefted in the subjects herinafter disponed, and that for the use and behoof of the said incorporation conform to the rights and titledeeds of the said incorporation to be herewith delivered up, considering that for the payment of the debts at present owing by the said incorporation, and discharging other legal claims against them, they found it absolutely necessary to sell the said subjects; that by their special sederunt of the 3d March current, whereof an authentic copy subscribed by the deacon is herewith delivered, they appointed the deacon and boxmaster, with Alexander Burnet and John Maclean, two of the members, to transact with John Dawson of the Custom House, Leith, respecting the offer mentioned in the said minutes, which he had made to the incorporation, of the sum of £210 sterling as the price of the said subjects; that the said deacon and boxmaster, with the said Alexander Burnet and John Maclean, did accordingly proceed to treat with the said John Dawson, and they being all well satisfied and assured that the sum offered by the said John Dawson was the full and adequate price of the said subjects, they, as authorised by, and acting for, the said incorporation, did accept of his offer; and now considering that the said John Dawson has instantly paid to us, the said deacon and boxmaster, the foresaid price of £210 sterling, whereof we hereby, for ourselves and all concerned, acknowledge the receipt, and discharge him and his heirs for ever, have sold and

disponed, as we, with the said William Andrew, do hereby for ourselves, and acting in name and by authority as aforesaid, sell, alienate, and dispone from the said incorporation, from ourselves as individual members thereof, and from all that are or can anyways be concerned in the premises, or in the other property of the said incorporation, and from the successors in office of us the said present deacon and boxmaster, and from our heirs or other successors whomsoever, whether as official persons in the said incorporation, or as individuals, to and in favour of the said John Dawson."

Now, one thing is clear; there was a good contract of sale here, and I think there is no question made on that point; but the objection is that, the feudal title standing in the names of two functionaries, only one concurred in granting the disposition. Several other transfers took place, and at last the subjects were acquired by the petitioners. The beneficial right came to be transferred to the petitioners. The question is — Is there any good objection to the petitioners getting up the deposited price? The objection is that one-half *pro indiviso* is in the *haereditas jacens* of Johnston. Now, if that was the true legal position, the case would be brought very much to the position of one of the cases quoted to us. But it is said Johnston never had any right but as a trustee, and I think that is the true state of matters. I think there has been a confounding of two rights of a quite different character—that vested in a person for himself, and that vested in him as a trustee. I don't think Johnston's heir-at-law could have been served as his heir in these subjects, or that the right required to be taken out of his person in any such manner. There are two answers to the objection. The first is, that the trust was in two individuals, and that one of them concurred, the other being dead. It is said the fiduciary right accresced to the survivor, and I have an opinion on that subject which I am not going to express, for it is not necessary for the decision of this case. The next answer made to the objection is that there is here a valid title from the beneficiaries, and, if the railway company think it necessary, they may if they please take any steps they may think advisable to complete their own title. They have the same right to do so as the corporation in 1807, or its disponees in 1817, had. Even assuming the objection to be a valid one to the full extent stated, the law has provided the means whereby the company can complete its title. The law is quite clear that where subjects are vested in trustees, and they die without being divested of the feudal right, the beneficiaries may complete their title by a declaratory adjudication. There was once great difficulty as to this, but in the time of Lord Kames (1 Ross' Leading Cases, 320–328) a case occurred in 1756, and two years afterwards the case of Drummond *v.* M'Kenzie, and the rule was laid down that a beneficial right might be connected with the feudal title by declaratory adjudication. That rule has been followed ever since. The point occurred again in the case of Gordon's Trustees *v.* Harper (F.C. 4, Dec. 1821,) and in the case of Black *v.* Lorimer the principle was again acted on, and the summons in that case is the form for the purpose given in the Juridical Styles. The railway company may, therefore, make up their own title. It was said that in the case of Graham it was decided that a purchaser is not bound to make up the title of the seller. Certainly not; but the petitioners here are not asking the company to do so. In Graham's case it was indispensable to make up the seller's title, because the subjects were certainly in the *haereditas jacens* of another, and the seller only possessed on apparency. The principle on which I hold this objection to be groundless is, that the company are not here asked to make up the title of the sellers.

The LORD PRESIDENT and Lord ARDMILLAN concurred.

Lord DEAS declined, being a shareholder of the company.

The following interlocutor was pronounced :—

"*Edinburgh, 16th February*, 1867.—The Lords having considered the reclaiming note for the North British Railway Company, No. 35 of process, and heard counsel for the parties: Finds that, on the objection to the charter of resignation being obviated, the petitioner is not bound to establish any other title in his person, and that on the conveyance and titles offered by him being delivered to the respondents, he will be entitled to payment of the consigned money and interest thereof, and, subject to this finding, adhere to the Lord Ordinary's interlocutor, and remit the case to the Lord Ordinary: Find the reclaimers liable to the petitioners in the expenses of process since the date of the Lord Ordinary's interlocutor. Allow an account thereof to be given in, and remit to the auditor to tax the same, and to report to the Lord Ordinary and remit to his Lordship to decern for the taxed amount thereof.

"DUN. M'NEILL, *I.P.D.*"

Agents for Petitioners—White-Millar & Robson, S.S.C.

Agents for Railway Company—Dalmahoy & Cowan, W.S.

PETITION—THOMSON.

This was another application of the same kind as that in the preceding case. The North British Railway Company stated the same objection to the competency, which was disposed of in the same manner.

The objections stated to the title were—"1. That no prescriptive title had been produced to the respondents; 2. that the petitioner is not infeft; 3. that the word 'dispone' is awanting in the disposition in which the only warrant for infefting the petitioner is contained."

The Lord Ordinary (Mure) granted warrant to the petitioner to uplift the consigned fund upon her delivering to the respondents, along with a regular search of incumbrances, an assignation, or other deed of conveyance to the subjects in question, which will enable the respondents to complete their title under the charter of resignation, No. 9 of Process. His Lordship observed in his Note:—

"The objections to the title appear to the Lord Ordinary not well founded. For, although the property has been possessed upon a personal title for a series of years, it flows from a party who was duly infeft in 1806 on a feu-contract from the superior; and if the petitioner can show, which the Lord Ordinary thinks she is bound to do, by searches in common form, that there has been no preferable or competing right created in favour of any other party since the date of the disposition, No. 7 of process, the circumstance that the petitioner is herself not infeft, and that no infeftment was passed on the disposition No. 7 of process, is not, the Lord Ordinary conceives, a sufficient ground for the respondents rejecting the title, pro-