tory Dempster was so ample and comprehensive as to entitle the Bank as a *bona fide* third party to rely on it. Accordingly, the Lord President in concluding his remarks when giving judgment observed, the only question was, "whether Dempster, the mandatory, did not deal with the Bank in that department of business in which he was specially authorised to deal? I am clearly of opinion he did." And Lord Ardmillan, the only other Judge who appears to have expressed an opinion, said—"We have no case here of implied authority. We have very clear and ample authority expressly conferred. On that authority given by the defenders to their manager, their general representative and agent in Scotland, the Bank were entitled to rely." But in the present case Sir David Ochterlony gave no general powers to his trustees and commissioners. On the contrary, the powers and directions he gave were so plain and explicit as to render it impossible to mistake or misunderstand them.

Independently, however, of the question of *bona fides* on the part either of Sir David Ochterlony's trustees or of Sir Charles Ochterlony, it was argued for the pursuer,—and this was the plea chiefly relied on by him,—that the 43d section of the Entail Amendment Act applies, and enacts that where an entail is invalid under the Act of 1685 in any of its essential prohibitions it is to be held invalid in all respects, and the estate shall be subject to the acts of the person in possession at the time as if it belonged to him in fee-simple. But this argument proceeds, I think, upon an entire fallacy. The Entail Amendment Act, in the section referred to, has no relation to a deed of entail like that in question, which is absolutely and was from the beginning null and inept, just as if it had never existed, for I take it that such is truly its nature, seeing that it was executed not only without authority but in violation of the powers and directions under and in terms of which alone it could have, or ever ought to have, been executed. And it is made all the clearer that such an authorised deed cannot be upheld as good to any effect when it is considered that there is no reason, as remarked by the Lord Ordinary, why another unobjectionable one should not now be executed and the purposes of the trust be thus carried into effect. It is not suggested that the existing deed has been by prescription or otherwise so fortified as to render it impossible now to put matters right.

I am therefore of opinion that the Lord Ordinary's interlocutors reclaimed against ought to be adhered to. What steps will require to be taken in order now to put matters right is a question which has not been brought under our consideration by either of the parties, and therefore I offer no opinion regarding it.

Lord Gifford—I concur. Sir David Ochterlony directed his trustees to execute in favour of the heirs mentioned a deed containing all the clauses required and usually inserted in the strictest entails. The duty of the trustees was therefore to make a strict entail. They purchased lands as directed by the truster, and executed a disposition of these lands which professed to be a strict entail, and under which the pursuer has possessed for many years, but not for the prescriptive period. It now appears that this disposition was in an essential part written on an erasure. This was a failure of duty on the part of the trustees, in whose *hæreditas jacens* the estate still is; and I think every one of the substitute heirs is now entitled, as he would have been entitled immediately on the execution of the defective deed, to call for the execution of a new deed of strict entail in terms of the trust-directions. No doubt possession for the prescriptive period might have fortified the title. It is quite clear that the Entail Amendment Act does not apply to invalid deeds. I had some doubts as to the manner in which the correction of the faulty title should take place, but I agree with the Lord Ordinary that the existing deed must be reduced.

Lord Justice-Clerk—I concur in thinking that the case is a very clear one. The entail is manifestly defective, and so not what the trustees were directed to execute, and the Rutherfurd Act in sec. 43 does not apply to cases of breach or non-execution of trust. There may be ulterior questions as to how far the acts of the heir in possession are to be cut down, but I agree that the faulty title must be reduced.

The Court adhered.

Counsel for Sir Charles Ochterlony—Balfour—Low. Agents—Mackenzie, Innes, & Logan, W.S.

Counsel for Respondents—Asher—Keir. Agents—Dalgleish & Bell, W.S.

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*Saturday, February* 24.

## FIRST DIVISION.

[Lord Adam, Ordinary.

### PETITION—SIR. W. EDMONSTONE.

*Improvement of Land Act* 1864 (27 *and* 28 *Vict. cap.* 114)—*Entail—Minor—Railway.*

In an application to the Court by an heir in possession of an entailed estate, for an order authorising and requiring the Inclosure Commissioners for England and Wales to sanction his charging the estate with a sum of money which he was desirous of subscribing to a proposed railway to pass through the estate, in terms of the Improvement of Land Act 1864—*held* that it was not necessary to show that without the applicant's subscription the railway would not be made.

This was a petition presented under the Improvement of Land Act (27 and 28 Vict. cap. 114) by Sir William Edmonstone, heir of entail in possession of the estate of Kilsyth, for the purpose of charging the estate with the sum of £5000, which the petitioner was desirous of subscribing for shares of the Kelvin Valley Railway Company and its proposed extension betwixt Kilsyth and Falkirk. The next heir of entail was the petitioner's son, who was a minor, which under the 21st section of the Act rendered it necessary that this application should be made to the Court.

The 78th and 80th sections of the statute, under which this application fell, were as follows—(78) "In case any landowner shall be desirous of subscribing for any shares or stock in the capital, whether original or additional, of

a company having power to construct a railway or navigable canal, or any branch or extension railway or navigable canal, or any deviation of a line of railway or a navigable canal already sanctioned, the works for which such subscription is to be made being unfinished, or in any additional capital to be raised for the completion of any such railway, canal, branch, extension, or deviation, the same being upon or near to, and which will improve or benefit, the lands of such landowner, and who shall be desirous that such amount, or any part thereof, may be charged upon the lands so to be improved, it shall be lawful for him to apply to the Commissioners for that purpose within the time limited by the Railway or Canal Companies Act or Acts for the construction of the works in question." "(80) If the Commissioners shall be satisfied that the railway or canal, when constructed and open for traffic, will effect a permanent increase of the yearly value of the lands exceeding the yearly amount proposed to be charged thereon, they shall execute and deliver to the landowner a provisional order under their seal and the hands of two of them, expressing their sanction of the charge proposed," in the form therein set forth. The reporter, to whom a remit was made to inquire whether the provisions of the Act had been complied with, reported that he saw no reason to doubt that the lands would be benefited, at least to the extent of the annual charge created.

The Lord Ordinary had some doubt whether the application should be granted, as it appeared that the railway would be constructed and the lands benefited whether the petitioner gave the proposed subscription or not, and reported the matter to the First Division.

At advising—

Lord President—I am quite satisfied that this application should be granted, and an interlocutor pronounced in the terms suggested in the Lord Ordinary's report, "authorising and requiring the Inclosure Commissioners of England and Wales to proceed upon the application to them by the petitioner in virtue of the Improvement of Land Act 1864, and to deal with the same according to the provisions of the foresaid Act, authorising them on that behalf, notwithstanding the circumstances that the petitioner is the father of a person entitled to an estate in the lands to be improved under the foresaid application to them, and that such person is a minor." There is one difficulty suggested by the Lord Ordinary to which it is necessary to advert, as our attention has been so specially directed to it. His Lordship says—"An agreement has been made by the promoters of the Kelvin Valley Railway with the North British Railway which practically amounts to a guarantee of 5¼ per cent. per annum on the stock of the Kelvin Valley Railway from the time it is opened, with an option to the North British Railway to purchase the stock at a premium of 10 per cent.; and it is the fact that the construction of the Kelvin Valley Railway is not contingent on the proposed subscription of £5000 being made to it by the petitioner. It is apparent, therefore, that the increased value of the lands by the making of the railway does not depend on the application being granted. The lands will be equally increased in value whether the application be granted or refused." Now, his Lordship does not express an opinion that it is indispensable to the success of the application that the petitioner should show that without his assistance the railway would not be made, but he suggests that that is a possible interpretation of the clause under which the application is made. Now, I do not think that that clause is susceptible of such an interpretation. The party must no doubt be interested in the construction of the railway, and there is no reason to doubt that the petitioner is in that position. This small branch line of two miles in length is of local value, intended to benefit the estates through which it passes, and it was therefore very natural that the Railway Company should try to induce the landowners in the district to interest themselves in the proposed line. If the construction of the Railway must under the Act depend on the petitioner's subscription being made, the case is not in that position at all, for the investment is plainly a very satisfactory one, and therefore there can be no difficulty in getting the money; but I have no idea that it is necessary to prove that the petitioner's subscription is indispensable to the carrying on of the undertaking. In all other respects the petition is satisfactory.

Lords Deas, Mure, and Shand concurred.

The Court pronounced this interlocutor:—

"Authorise and require the Inclosure Commissioners of England and Wales, acting under the Statute 27th and 28th Vict. chap. 114, commonly called the "Improvement of Land Act 1874," as regards lands in Great Britain, to proceed on the application to them by the petitioner, and to deal with the same according to the provisions of the said Act, authorising them on that behalf, notwithstanding the circumstance that the petitioner is the father of a person entitled to an estate in the lands to be improved under the foresaid application immediately after the petitioner, and that such person is a minor: And direct that the costs of the application to the Court and of the procedure following thereon, as the same shall be taxed by the Auditor of Court, shall be decerned to be part of the expenses of and incidental to the said application to the said Commissioners, and decern; and remit to the Auditor to tax the account of said costs."

Counsel for Petitioner — Balfour — Murray. Agent—J. Stormonth Darling, W.S.

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*Saturday, February* 24.

## SECOND DIVISION.

[Court of Exchequer.

### COMMISSIONERS OF INLAND REVENUE *v.* BELCH.

*Stamp—Contract of Ground-Annual—Discharge of a Security—Reconveyance—Statute* 33 *and* 34 *Vict. c.* 97.

Where certain subjects were disponed by contract of ground-annual, with power to the purchaser at any term after the expiry of 20 years to redeem the ground-annual on 6 months' notice at 22½ years' purchase—*held* that the stamp-duty exigible upon the instrument granted under that power to the pur-