SUMMER SESSION, 1893.

COURT OF SESSION.

Tuesday, May 9.

BILL CHAMBER.

[Lord Kincairney.

KEITH (KEITH'S *CURATOR BONIS*).

Curator Bonis—Power to Discharge Bond.

An assignation to a bond and disposition in security was taken in favour of a *curator bonis* and his successors in office for behoof of the ward, and to the disponees and assignees of him and them, and was recorded in the register of sasines. A new curator having succeeded to the office—*held* competent for him to discharge the bond without completing any further title either in his own person or that of the ward.

George Keith of Usan, near Montrose, was appointed *curator bonis* to Miss Jane Ann Keith, residing at Whitehouse, Inveresk, on 5th June 1877. He had been preceded in the office by John Burness, surgeon in Montrose. Part of the ward's estate consisted of "the sum of £2000 secured over estate of Lochiel, conform to (1) bond and disposition in security for £22,000, by Donald Cameron, Esq. of Lochiel, and his trustees, dated 10th September, 9th, 12th, 22nd, and 28th October 1818; (2) notarial instrument thereon recorded in the General Register of Sasines 2nd June 1855; and (3) assignation thereof to extent of £2000 in favour of John Burness, sometime surgeon in Montrose, as the then '*curator bonis* to the said Jane Ann Keith, and his successors in that office, for behoof of the said Jane Ann Keith, and to the disponees and assignees of him and them, dated 20th February 1857, and recorded in the General Register of Sasines 18th March 1857, and which sum so secured still forms part of the curatory funds of the said Jane Ann Keith.'" The borrower being prepared to pay the loan, objected to make payment until the *curator bonis* completed a feudal title in his person. The curator thereupon presented a note to the Accountant of Court for his opinion, in which he stated the following questions—"(1) Whether the curator can, in the circumstances, grant a valid discharge of the said bond and disposition in security to the extent foresaid, without special powers to discharge the bond or feudally completing his title? (2) Whether warrant for completion of the title by expeding and recording a notarial instrument in the present curator's name should be applied for, or what other course adopted in order to secure payment of the amount due?"

The Accountant's opinion was as follows —"The point raised by the first question has not, so far as the Accountant is aware, been definitely settled by the Court. In the case of *Wills' curator bonis, Brand*, 20th June 1879, 6 R. 1096, the Court held that special powers were not required by a *curator bonis* in order to discharge a bond taken in name of the ward—a lunatic, prior to her incapacity and to the appointment of the *curator bonis*. In that case the bond being in name of the ward, and she being alive, no title required to be made up.

"The present case is different from *Wills'* in that the person in whose name the assignation is taken is dead. It may therefore be held that the curator stands somewhat in the relation of a trustee for his ward, and that accordingly a title must be completed in name of the present *curator bonis* 'as successor in office' of the said deceased Dr John Burness. It may, on the other hand, however, be held that the curator is merely the hand of the ward, and that as he has power without special authority of the Court to discharge a bond taken in name of his ward, he has also power to discharge a bond taken in name of his predecessor in office when it is expressly set forth in the deed that the funds were the ward's and were invested for her behoof.

"Petitions are occasionally presented to the Court for authority to complete titles to bonds in like circumstances to the present, and powers are granted; but the Accountant is inclined to be of opinion that if the principle of the decision in *Wills'* case be followed, special powers to complete a title and discharge, as desired by the borrower's agents, are not necessary, and that a discharge by the *curator bonis* of the debt due to the ward is sufficient.

"If powers to complete titles are necessary, the Accountant is of opinion that the title should be completed in name of the ward and not in the name of the *curator bonis*."

The curator thereupon presented a note to the Court for authority to complete a title and grant a discharge of the bond, upon which the Lord Ordinary officiating on the Bills (KINCAIRNEY) pronounced the following interlocutor:—

> "The Lord Ordinary officiating on the Bills having considered the note No. 67 of process, Refuses the same as unnecessary, and decerns: Dispenses with the reading of this decree in the minute-book: Finds that the expenses of the note and relative procedure, as the same shall be taxed by the Auditor, form a proper charge against the ward's estate," &c.

Counsel for the Noter—Cook. Agents—Webster, Will, & Ritchie, S.S.C.

Tuesday, May 16.

SECOND DIVISION.

[Lord Low, Ordinary.

EARL OF HOPETOUN *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Mines and Minerals—Shale in Banks of Cuttings — Construction of Special Act and Disposition following thereon.

A special Act of Parliament in 1838 authorising the making of the Edinburgh and Glasgow Railway enacted that in the price of the lands to be purchased by the railway company from the Earl of Hopetoun was to be included "the value of the whole stone, lime, coal, ironstone, silver, tin, lead, or slate which may require to be dug up or excavated in the formation of the said railway through the said lands."

By deed of submission between the Earl and the railway company, dated in 1839, "all the claims of the Earl for the agricultural value of the lands to be taken over by the railway company, and for the value of any stone or minerals to be taken and used by the said railway company out of the said estates," were referred to arbiters and oversman, and in terms of the decreet-arbitral following thereon a disposition of land was granted by the Earl in favour of the company, "excepting from the said conveyance and reserving to me and my foresaids all freestone, coal, ironstone, limestone, slate, or other mines or minerals under" the land conveyed.

Held that the railway company were not under the said disposition and Act of Parliament the owners of the "minerals," including under that term "shale," above the formation level of the railway forming part of the sides of cuttings through which the railway ran, and within the railway company's fences.

Under the Act of 1838 (1 and 2 Vict. cap. 58), which authorised the making of the said Edinburgh and Glasgow Railway, now incorporated with the North British Railway Company, it is enacted by section 28—"That in the price of the land to be purchased from the said Earl of Hopetoun, there shall be included the value of the whole stone, lime, coal, ironstone, silver, tin, lead, or slate which may require to be dug up or excavated in the formation of the said railway through the said lands; provided, nevertheless, that it shall be in the option of the said Earl of Hopetoun, and his heirs and successors, at any time to require the said company to lay down upon his or their property, at convenient places, not exceeding the distance of 100 yards from the places where such coal, ironstone, silver, tin, lead, or slate shall be dug or excavated, all such coal, ironstone, silver, tin, lead, or slate as aforesaid, which may be dug up or excavated after such option is declared, or such part thereof as the said Earl of Hopetoun, his heirs and successors, may think proper and direct, which the said company shall be bound to do; and in such case the said company shall not be bound or obliged to pay to the said Earl, or his heirs or successors, for any such coal, ironstone, silver, tin, lead, or slate as aforesaid so received by him or them."

By section 26 it is, *inter alia*, provided, "That in forming the said railway through the lands and estates belonging to said Earl of Hopetoun, the said company shall be bound, except in rock cutting, to smooth and carefully soil over and sow down with grass seeds the sides or slopes of the embankments, and of the cuttings through the said lands and estates of the said Earl, and to make such slopes not steeper than one and a-half horizontal to one perpendicular; and the said company shall further be bound to erect and constantly maintain on each side of the said railway, along the bottom of the embankments, and along the summit or top edge of the cuttings through the lands and estates of the said Earl (except in the inclosures at Craigton House and Niddry Castle on the side next the said house and castle to be fenced in manner after provided), a substantial dry stone wall, with cope on edge set in lime, at least four and a-half feet high from the finished surface of the outer side of the wall, and to keep and preserve the said