

LORD YOUNG—I agree that the *conditio si sine liberis* should be held to apply to the residue, and I am rather disposed to hold with the Lord Ordinary that it applies also to the legacy of £250. My inclination in cases of this kind has always been in favour of children taking their parents' share if the latter dies before the testator.

I should like to observe that I think it is a pity that this matter is not settled definitely by legislation. It is not creditable to the law to have such cases as we have been referred to, and such arguments as this case presents. The question in every one of such cases is, whether, if a provision or legacy is left to a person, and that person predeceases the testator and leaves children, the children take as coming in the parent's place. I think it might be a fitting subject of enactment that children in such circumstances are to take their parents' places, or are not, in the event of the testator saying nothing on the matter in his will. He has it always in his power to let the provision or legacy go to children or not, but if there is nothing said in the will to that effect the cases like the present arise, and arguments are submitted to us in order to reach the testator's intention, on the assumption that he knew the involved decisions on the subject and had framed the deed in order to meet them. This is not a satisfactory state for the law on this matter to be in, and I think it ought to be settled definitely by enactment. But as long as the law continues as at present, I think conveyancers in framing trust-deeds should bring the matter under the notice of testators in order that their intention may be definitely expressed in the deed.

LORD RUTHERFURD CLARK—I agree with your Lordship.

LORD TRAYNER—I agree with the decision of your Lordships with regard to the legacy of £250. As regards the residue the disposition of my mind would have been to hold that the *conditio* did not apply to it either, but I do not dissent, as the considerations in favour of the *conditio* applying expressed by your Lordship and pressed at the bar are as strong as if not stronger than the considerations against its application.

The Court pronounced the following interlocutor:—

“Find that the *conditio si sine liberis decesserit* applies to the bequest of a share of residue in favour of the late Mrs Jane Black or Allan contained in the trust-disposition and settlement mentioned in the summons: Find further, that the said *conditio* does not apply to the legacy of £250 to the said Mrs Jane Black or Allan, and in that respect recal the interlocutor of 10th January last, and *quoad ultra* adhered.”

Counsel for the Pursuer—Sym—Cook.  
Agents—Mackintosh & Boyd, W.S.

Counsel for the Defenders—H. Johnston  
—Law. Agents—Jaek & Bryson, S.S.C.

Friday, February 24.

OUTER HOUSE.

[Lord Low.]

GLOVER AND OTHERS (MANUEL'S TRUSTEES), PETITIONERS.

*Expenses—Railway—Liability of Promoters for Expenses of Re-investment of Consigned Money—Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), secs. 67 and 79.*

In an application by marriage-contract trustees for authority to uplift money consigned by a railway company under the Lands Clauses Consolidation Act, and to invest the same in any way authorised by the marriage-contract or prescribed by the Trusts Acts, or in the purchase of heritable subjects—*held* (1) that the trustees were “absolutely entitled to” the consigned money within the meaning of the 67th section of the Act, but (2) that they were not entitled under section 79 to receive from the promoters the expenses of re-investing the money as craved in their petition.

*Opinion* that promoters are not liable under section 79 in the expenses of re-investment unless authority is expressly given to invest the consigned money in one of the particular investments there specified.

In virtue of the compulsory powers contained in the North British Railway (Waverley Station, &c.) Act 1891, the company acquired certain subjects in Torphichen Street, Edinburgh, vested in Thomas Craigie Glover and others as trustees under the marriage-contract between David Manuel and Louisa Brown. The compensation payable for the subjects was fixed at £520; and, as the trustees had not a power of sale specially expressed, it was agreed that the company should consign the money in bank, and the trustees should give a conveyance in terms of the Lands Clauses Consolidation (Scotland) Act 1845.

By section 67 of the said Act it is provided that “the purchase money or compensation which shall be payable in respect of any lands, or any interest therein purchased or taken by the promoters of the undertaking from any corporation, heir of entail, liferenter, married woman seised in her own right or entitled to terce or dower, or any other right or interest, husband, tutors, curators, or other guardians for any infant, minor, lunatic or idiot, fatuous or furious person, or for any person under any other disability or incapacity, judicial factor, trustee, executor or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands, shall, if it amount to or exceed the sum of £200, the same shall be paid into the bank,

to the intent that such moneys shall be applied under the authority of the Court of Session to some one or more of the following purposes (that is to say): . . . In payment to any party becoming absolutely entitled to such money." Section 68 provides that "such 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 of the lands in respect of which such money shall have been deposited; and until the money can be so applied it shall be retained in the bank at interest, or shall be laid out or invested in the public funds or in heritable securities, and the interest, dividends, and annual proceeds thereof shall from time to time, under the like order, be paid to the party who would for the time being have been entitled to the rents and profits of the lands." Section 79 provides "that in all cases of moneys deposited in the bank under the provisions of the said Act or the special Act, or any Act incorporated therewith, 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, other than such expenses as are herein otherwise provided for, and the expense of the investment of such moneys in Government stocks or real securities, and of the re-investment thereof in the purchase of other lands and incident thereto, and also the expense of obtaining the proper orders for any of the purposes aforesaid."

The trustees presented this petition to the Junior Lord Ordinary for authority to uplift and reinvest the consigned money, submitting that they had, on a construction of the terms of the marriage-contract a right to exercise a power of sale of the heritage. The prayer of the petition contained the following crave—"To authorise and empower the petitioners to hold the said sum of £520 as part of the capital of the estate put under trust by the said antenuptial contract of marriage, and to invest the same in the investments prescribed and authorised in the said antenuptial contract of marriage, or in one or more of the investments prescribed and authorised by the said Acts, viz., 'The Trusts (Scotland) Acts 1861 to 1891,' and with power to vary from time to time these investments; or otherwise to invest the said sum of £520 in heritable securities in Scotland, with power from time to time to vary the investment, or otherwise to invest the said sum of £520 in the purchase of heritable subjects in Scotland; and further, to find the said North British Railway Company liable to the petitioners in the expenses of the present application, and in all reasonable charges and expenses relating thereto, including the expense of the investment of said sum of £520."

The railway company opposed the prayer of the petition so far as it claimed the

expense of re-investment of the consigned money.

On 24th February 1893 the Lord Ordinary (Low), after a report by Mr J. S. Wright W.S., granted authority to uplift, &c., and found the railway company liable to the petitioners "in the expense of the present application and all reasonable charges and expenses incident thereto."

"*Opinion.*—In regard to the first question in this case, viz.—whether the petitioners here are in the position of a party becoming absolutely entitled to the money in question in terms of the 67th section of the Lands Clauses Consolidation Act, I am satisfied that they are in that position. The report of Mr Wright puts the point very clearly, and I have no difficulty in granting authority to uplift the money.

"Then there is a question in regard to expenses. In the interlocutor suggested by the reporter, the petitioners are authorised to hold the uplifted money under the trust under which they act, and to invest the same in the investments authorised in the antenuptial contract of marriage, or by the Trust Acts, or in the purchase of lands, houses or other heritable property or Government stock, or to retain the same in bank with power to alter and vary the investments from time to time. And then there is a proposed finding that the North British Railway Company shall be found liable to the petitioners in the expenses of the investments of the said sum in the investments aforesaid.

"I read that proposed finding as meaning that the railway company are to be liable for the expenses of the investments whether they are investments of the kind authorised by the marriage contract or investments authorised by the Trusts Acts 1861 to 1891, or of whatever nature they may be.

"Now I can find no warrant in the Lands Clauses Consolidation Act for expenses being given against a railway company in regard to general investments in that way, because under the 79th section of the Act, which is the one dealing with the expenses for which the company may be found liable, there is no provision for the expenses of any investments except investments in Government stocks or real securities being borne by the company.

"But even assuming that the trustees here proposed to invest in Government stocks or real securities, I should be of opinion that they were not entitled to claim the expenses of so doing against the railway company, and for these reasons the portion of the Lands Clauses Consolidation Act, beginning with section 67 and ending with section 79, deals with purchase money or compensation money payable to persons who have a limited title, and provision is made for the consignment of such money in bank and for the subsequent application of it. The 79th section is the last section of the series, and it provides for the consignment of the purchase or compensation money, and of the uplifting of the money in the various cases to which the previous sections apply.

"Now, it seems to me that where in any application the Court is asked to find promoters liable in expenses under the 79th section it is necessary to see what kind of case it is in which the application is made, and which of the different classes of expenses dealt with by the 79th section is applicable to the particular case.

"Here the case is that certain persons ask for authority to uplift money consigned under the 67th section as being absolutely entitled to it. In regard to such a case, I find nothing in the 67th section respecting investment of the money which has been uplifted. When I turn, however, to subsequent sections, I find there are two sections which deal with the investment of consigned money. The first is section 68, which deals with the interim investment of money until application can be made for uplifting it, and there it is provided that the money may be "laid out or invested in the public funds or in heritable securities." Then again in the 77th section there are certain circumstances in which it is provided that the consigned money may be invested in public funds or in heritable securities. These are the only two sections in the series which deals with the investment of consigned money, and under neither of them does the present case fall.

"Now, it appears to me that when you get to the 79th section and find that one of the expenses for which promoters may be found liable is the expense of investing the consigned money in Government stocks or real securities, that that obviously refers to the cases in which authority is expressly given to invest consigned money in that way, and to no other cases, and that, I think, is sufficient for the decision of the case.

"Any other view would, I think, lead to very anomalous results. The trustees here, although absolutely entitled to the money within the meaning of the 67th section, are bound to hold it upon certain trusts, and must deal with it as trust money. But so dealing with it, there are a great variety of investments in which they have power to place the money besides Government stocks or heritable securities, and it would be an extraordinary thing if the railway company should be liable for the expenses of investment if the trustees chose to invest in Government stock or heritable securities, and should not be liable if the trustees put the money into investments of another kind such as Preference Stock or Colonial Securities. I can see no reason why the railway company should be charged with expense of investment in the one case and not in the other, and yet I think it is clear that they could not be invested in anything but Government stock or heritable securities, because the provision in regard to the expense of investment is limited to these.

"Then, again, there is this consideration, that a person who is absolutely entitled to money under the 67th section may be a person who is absolutely entitled to the money in the sense that he may spend it or do with it what he likes. In such a case I cannot see any reason why the promoters

should be saddled with the expense of investing the money at all, and still less why, if the person entitled chooses to invest it in a particular way, they should be liable in the expense, and not liable if he chooses to invest it in another way.

"I am therefore of opinion that the petitioners here are not entitled to have the railway company charged with the expense of this investment, so I propose to limit the expenses to those in regard to the application, and to all reasonable expenses and charges incident thereto.

"I shall therefore pronounce an interlocutor finding the petitioners entitled as against the company to the expenses of the present application and all reasonable charges and expenses incident thereto, and remit to the Auditor to tax and report."

Counsel for the Petitioners—Craigie. Agents—Boyd, Jameson, & Kelly, W.S.

Counsel for the North British Railway Company—Cooper. Agent—James Watson, S.S.C.

## VALUATION APPEAL COURT.

Friday, May 19.

(Before Lord Wellwood and Lord Kyllachy.)

BLACK (INSPECTOR OF POOR FOR DUNDONALD) v. IRVINE HARBOUR TRUSTEES.

*Valuation Cases—Harbour—Waterway.*

Harbour trustees claimed a deduction from the valuation of a harbour, in respect that part of the dues received were received in respect of an incorporeal right of waterway.

The Court, without expressing any opinion as to whether such a deduction ought to be made from the valuation of a harbour, *refused* any deduction in the present case, in respect the case did not furnish materials for deciding what proportion of the gross harbour dues should be deducted, assuming that the deduction fell to be made.

This was a case stated by the Magistrates and Town Council of Irvine in an appeal by the Irvine Harbour Trustees and in a complaint by Robert Farquhar Black, Inspector of Poor for the parish of Dundonald, regarding the valuation of Irvine Harbour, of which the Irvine Harbour Trustees were proprietors and occupiers.

The case was stated at the instance of the complainer Black and the Assessor of the burgh of Irvine, who complained, *inter alia*, of the following finding of the Magistrates—"That there is an incorporeal right of waterway, in the sense of the decision in *Adamson v. The Clyde Navigation Trustees*, and that the deduction claimed in respect of waterway must be allowed on the authority of that case, and on the principle which has been since that deci-