

Wednesday, February 21.

FIRST DIVISION.

WEST HIGHLAND RAILWAY COMPANY v. PLACE AND OTHERS.

Railway—Entry upon Lands without Owner's Consent—Compensation—Deposit Unaccompanied by Bond—Interest—Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), secs. 84 and 86.

The Lands Clauses Consolidation (Scotland) Act 1845 by sec. 84 provides that where the promoters of an undertaking are desirous of entering upon lands without the owner's consent, before an agreement has been come to as to the compensation to be paid, they may do so if they deposit in bank by way of security a sum to be fixed by a valuator, and also, if required to do so, give the owner "a bond with two sufficient securities for a sum equal to the sum to be deposited for payment to such party . . . of all such compensation as may be determined to be payable by the promoters of the undertaking . . . together with interest thereon at the rate of £5 per centum per annum, from the time of entering on such lands until such . . . compensation shall be paid."

A railway company having made a deposit as required by this section, but without giving any bond, that not being required by the landowner, and having afterwards paid the compensation found due with interest from the date of the decree-arbitral fixing such compensation, presented a petition under the 86th section of said Act, praying the Court to ordain the bank to repay their deposit. *Held* that the landowner was entitled to interest from the date of entry on the lands upon the compensation found due, just as if he had required a bond, and that a portion of the deposit sufficient to meet such interest must meanwhile remain in bank.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19) by section 84 provides—"If the promoters of an undertaking shall be desirous of entering upon and using any . . . lands before an agreement shall have been come to, or an award made or verdict given, for the purchase money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter mentioned, either the amount of purchase money or compensation claimed by any party interested in or entitled to sell and convey such lands, and who shall not consent to such entry; or such sum as shall by a valuator . . . be determined to be the value of such lands, or of the interest therein which such person is entitled to, or enabled to sell and convey, and also, if required to do so, to give

to such party a bond . . . with two sufficient securities . . . for a sum equal to the sum so to be deposited, for payment to such party . . . of all such purchase money or compensation as may in manner hereinafter provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon at the rate of £5 per centum per annum, from the time of entering on such lands until such purchase money or compensation shall be paid to such party . . . and upon such deposit by way of security being made as aforesaid, and such bond being delivered or tendered to such non-consenting party as aforesaid, it shall be lawful for the promoters of the undertaking to enter upon and use such lands without having first paid or deposited the purchase money or compensation in other cases required to be paid or deposited by them, before entering upon any lands to be taken by them under the provisions of this or the special Act."

Section 85 provides—"The money so to be deposited . . . shall be paid into the bank to be placed to an account to be opened in the name of the parties interested in or entitled to sell and convey the lands so to be entered upon, and who shall not have consented to such entry, subject to the control and disposition of the Court of Session" . . .

Section 86 provides—"The money so deposited . . . shall remain in the bank by way of security to the parties whose lands shall so have been entered upon for the performance of the bond to be given by the promoters of the undertaking, as hereinbefore mentioned . . . and upon the conditions of such bond being fully performed, it shall be lawful for the Court of Session, upon the application by petition of the promoters of the undertaking, to order the money so deposited . . . to be repaid or transferred to the promoters of the undertaking, or, if such conditions shall not be fully performed, it shall be lawful for the said Court to order the same to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited."

The West Highland Railway Company, incorporated by an Act passed in 1889, were desirous of entering upon certain lands near Crianlarich, in the county of Perth, belonging to Edward Gordon Place, Esquire of Loch Dochart. They accordingly, in terms of the 84th section of the Lands Clauses Consolidation Act 1845, upon December 24, 1889, deposited in the Bank of Scotland the sum of £1350, being the value put upon the lands by a valuator appointed by the Board of Trade, but gave no bond, that not being required by the owner of the lands. They entered into possession on 21st June 1890. By decree-arbitral dated 3rd April 1891 Mr Place was found entitled to £2049, 13s. 3d. as full compensation for the lands taken, the oversman, upon whom the arbitration had devolved, reserving the question of Mr Place's claim

to interest upon said sum from the date of the railway company entering upon the lands as not falling under the reference. The railway company having deposited in bank the sum of £2049, 13s. 3d. awarded as compensation to Mr Place, presented a petition, under the 86th section of the Lands Clauses Consolidation Act 1845, to the Court of Session praying the Court to grant warrant and ordain the Bank of Scotland to repay to them the sum of £1350 deposited upon 24th December 1889, with interest accrued thereon. They also asked for repayment of £130 deposited with regard to another claim which was in precisely the same circumstances.

The respondents lodged answers in which they averred — “The petitioners did not grant bonds for payment of the purchase money or compensation with interest thereon at 5 per cent. per annum from the date of entering on said lands till payment of the purchase money or compensation, as provided by section 84 of the said Act. The respondents have not hitherto demanded such bonds to be granted, nor waived right to require them. They now require them to be granted, or otherwise that interest be paid on the purchase money or compensation found to be due to them at the rate of 5 per cent. per annum from 21st June 1890, when the petitioners entered on said lands, till payment. The respondents all along relied on the petitioners paying such interest in the same way as if bonds had been granted therefor in terms of the statute. The petitioners have not performed the conditions required of them by the Lands Clauses Consolidation (Scotland) Act 1845. Instead of offering to pay interest to the respondents from 21st June 1890, the date of entering on the lands, in the same way as if they had granted bonds in terms of the 84th section of the said Act, they have tendered interest only from the dates of the decrees-arbitral, and have refused to make any arrangement with the respondents with regard to their claim of interest for the period prior to the dates of the decrees-arbitral. The respondents respectfully submit that, under the 86th section of the said Act, the Court have the power, and should order payment to the respondents out of the money deposited in bank, of interest on the purchase money or compensation payable to them from the date of entering on the lands till payment at the rate of 5 per cent. per annum, or otherwise that the interest accrued on the deposits should be paid to the respondents, and that the prayer of the petition should either be refused, or granted only on such conditions as to payment of interest to the respondents as shall be fixed by your Lordships, and that the respondents should be found entitled to expenses.”

Upon 26th January 1894 the Lord Ordinary (Low) pronounced the following interlocutor:—“Finds (1) That the petitioners having entered upon the lands belonging to the respondents mentioned in the petition before an award was given for the purchase moneys or compensations to be

paid by them in respect of said lands, are liable to make payment to the respondents of interest upon such purchase moneys or compensations from the time of entering upon such lands until the date of payment of such purchase moneys or compensation unless the respondents have waived their right to claim such interest, or have otherwise debarred themselves from claiming it in whole or in part; (2) that if the respondents have not waived their right to claim or otherwise debarred themselves from claiming interest as aforesaid, they are entitled to an order for payment of the amount thereof out of the moneys deposited in bank by the petitioners in terms of the 84th section of the Lands Clauses Consolidation (Scotland) Act 1845, in respect that the petitioners have refused to pay to the respondents interest upon the said purchase moneys or compensations prior to the date of the awards mentioned in the petition fixing the amount of the purchase moneys or compensations payable to the respondents; and (3) that the petitioners are entitled to an order authorising them to uplift the said deposited moneys, except to the extent of £300 and £60 to meet interest at the rate of 5 per centum per annum upon the purchase moneys or compensations from the date when the petitioners entered upon the said lands until the date of the said awards: Therefore grants warrant to and ordains the Bank of Scotland to repay to the petitioners, upon production of a certified copy of this interlocutor, the sums contained in the two remaining deposit-receipts specified in the petition to the extent of £1050 and £70, and ordains the balance of the said sums, namely, £300 and £60, to be re-deposited upon two deposit-receipts in the same terms as those previously granted: Ordains the petitioners, within fourteen days from the date hereof, to lodge in process a minute setting forth the facts and circumstances upon which they maintain that the respondents waived their right to interest upon the said purchase moneys or compensations, or otherwise debarred themselves from claiming the said interest in whole or in part, and decerns: *Quoad ultra* continues the cause: Grants leave to the petitioners to reclaim.

“*Opinion.*—I am of opinion that a proprietor whose lands are taken compulsorily by a railway company cannot claim interest on the compensation fixed by an arbiter or a jury from a date earlier than that of the award or verdict if the company have not previously entered upon the lands. That I think must be held to be settled by the judgment of the House of Lords in the case of the *Caledonian Railway Company v. Carmichael*, 2 Scot. App. 56.

“The reason why the statute did not make any provision for interest in such a case appears to me to be this—Although by service of the notice to treat, a contract for the sale and purchase of the lands is concluded, yet until the amount of the compensation is settled, and paid or consigned, as the case may be, the proprietor continues in the enjoyment of the lands, and he is not entitled both to the proceeds of

the lands, and also to interest upon the price.

“But if the company take advantage of the provisions of the 84th section of the Act, and enter upon the lands before the amount of the compensation is settled, a different state of matters arises. Even in that case when the question of the amount of compensation comes before an arbiter or a jury, the amount of the compensation falls to be fixed in the same way and under the same statutory provisions as in a case in which the company had not obtained previous possession of the lands. But, through no fault of either party, a considerable time may elapse before the amount of compensation is fixed, and it would be unjust if, between the time when the company obtained possession and the date of the award or verdict, the proprietor should receive no consideration for being deprived of his lands, and should have neither the lands nor the price of the lands. In such a case it would be equitable that the proprietor should receive interest upon the price of the lands from the date upon which the company obtained possession.

“The statute seems to me to recognise the proprietor's right to interest in such a case in the 84th section. It is there enacted that if the promoters shall be desirous of entering upon and using lands before an award or verdict, they shall deposit in bank, by way of security, such a sum as shall, by a valuator to be appointed by the Board of Trade, be determined to be the value of such lands, and shall also, ‘if so required to do,’ grant a bond to the proprietor with two sufficient securities for a sum equal to the sum so to be deposited for payment ‘of all such purchase money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, together with interest thereon at the rate of five per centum per annum, from the time of entering on such lands until such purchase money or compensation shall be paid.’

“If, therefore, a bond in terms of the Act is granted, no question can arise, because in it the company bind themselves to pay interest upon the purchase money or compensation from the time of entering the lands. But in this case no bond was granted, and a letter was read by the railway company asking the respondent if he required a bond to be granted, and an answer from him saying that he did not do so. Of course, if the respondent waived his right to interest, there is an end of the matter, but the letters which were read do not, in my opinion, necessarily involve such waiver on the respondent's part. The bond is to be granted for the security of the proprietor, and only if the company are ‘required’ by the proprietor to do so. If the proprietor has confidence in the sufficiency of the company for whatever sum he may be entitled to claim from them, he may not insist upon a bond being granted, and that, I believe, is what frequently happens. But I do not think that

the mere fact that the proprietor does not insist upon a certain security which he might demand being actually granted, can affect the amount which the company are liable to pay. Their liability is not affected although the proprietor's security is lessened.

“It therefore seems to me to lie upon the company here to aver and prove that the respondent waived his right to interest upon the compensation money from the time when they entered upon the lands. They might also perhaps show (and they indicated that they intended to plead) that the respondent has barred himself from claiming interest for the whole period by having caused delay in the ascertainment of the amount of compensation.

“The next question is, whether the point is completely raised, and can be determined, upon a petition by the company, to uplift the deposited money?

“By the 86th section of the Act it is provided that upon the conditions of the bond to be granted, in terms of the 84th section, being fully performed, it shall be lawful for the Court of Session to order the money to be repaid to the promoters, ‘or, if such conditions shall not be fully performed, it shall be lawful for the said Court to order the sum to be applied in such manner as it shall think fit, for the benefit of the parties for whose security the same shall so have been deposited.’

“Now, if it should appear that the respondent intimated to the company that he would not require them to grant a bond, not with the intention of giving up any payment which he would otherwise have been entitled to claim from them, but simply for the convenience of the company, I think that the matter would fall to be dealt with just as if a bond had been granted. But if a bond had been granted, and the company had paid the amount of the compensation, but refused to pay interest thereon, I think that under the provisions of the section which I have just quoted, I would be entitled to order the interest to be paid out of the deposited fund.

“It therefore appears to me that a portion of the deposited fund, equal to five per cent. upon the compensation awarded to the respondent from the date when the company entered upon the land, until the date of the award, should remain in bank until it is ascertained whether, as matter of fact, the respondent waived his right to claim interest, or has otherwise barred himself from claiming interest in whole or in part. I see no reason, however, why the company should not now be authorised to uplift the balance of the deposited money.

“The petition contains no statement of the circumstances upon which the petitioners rely, as showing that the respondent waived his right to interest, or has disentitled himself to claim it. The petitioners are not to blame for that state of the pleadings because the petition is in the ordinary form, and the question of interest is raised by the answers. It will now,

however, be necessary for the petitioners to lodge a specific statement of the circumstances upon which they rest their plea that the respondent is not entitled to interest."

The petitioners reclaimed, and argued—(1) The money deposited was in security for payment of the arbiter's award; that had been paid and the money should now be repaid. Interest did not begin to run until the date of the award—*Edinburgh & Glasgow Union Canal Company v. Carmichael*, 1842, 1 Bell's App. 316; and *Caledonian Railway Company*, June 28, 1870, 8 Macph. (H. of L.) 119, and L.R. 2 Scot. App. 56. (2) Interest would have been due under a bond, but if a bond had been required the railway company might not have entered upon the lands. They were entitled to take that into account in determining whether they would enter or not. The proprietor by dispensing with the bond had waived his right to interest, or at any rate he was not necessarily entitled to interest, and it was open to the petitioners to show that he had waived his right.

Argued for respondents—(1) The cases cited by the petitioners were not in point. The rule of interest not beginning to run upon the amount of an award until the date of the award was inapplicable to the case where the promoters of an undertaking had actually dispossessed those entitled to compensation. In that case interest ran from the date of entry, and it was so provided by the statute. (2) They were not to be prejudiced because by their forbearance they had saved the petitioners the expense of a bond. Their rights were the same as if a bond had been granted, and if necessary they would still demand it. They had in no way waived their rights.

At advising—

LORD PRESIDENT—The question mainly argued to us is, whether where money is deposited under section 84 of the Lands Clauses Act 1845, and no bond is delivered to the landowner, the railway company is entitled to have the amount of the deposit paid back to them, though they have not paid interest on the purchase money found due.

On that general question, which was taken for the sake of argument, on the footing that the landowner has a claim for interest, the sections stand thus—Section 84 provides that "If the promoters of an undertaking are desirous of entering upon lands, before the amount of compensation is settled, they may deposit certain money in bank by way of security." Now, the section down to that point does not say for what the money is to be security, but the section promises the reader to tell him further on. It is erroneous to say that up to that point the statute lays down that the security is to be for the compensation money; it leaves the thing to be secured in the meantime entirely untold. Now, reading on, it appears to me that the only passage in the Act which can be pointed at as fulfilling that promise occurs thus—The owner is not only secured by the deposit,

but by being given, if he likes to take it, a bond, and the statute tells to what the obligants in the bond are to bind themselves, for at that stage it is said in so many words that the amount of the bond shall be the purchase money with interest at 5 per cent. Then the Act says that the bond having this tenor is to be "delivered or tendered." The landowner may take it or leave it, but the man who declines it sees, just as much as he who takes it, what is in the bond, and in the bond it is to appear that interest is secured as well as the purchase money. Here then we have a clear statement of what is secured.

Now, all this becomes even more clear when we look at section 86. That section alone brings the Court of Session into contact with the transaction, and it says that we are entitled to grant warrant for payment of the money "upon the conditions of such bond being fully performed." I ask "conditions of what bond?" and I answer "of the tendered bond." It does not matter whether it has been accepted or dispensed with. Now, this seems quite an intelligent way for the Act to set forth its scheme of security, the only thing at all out of the common being, that instead of beginning to tell what is to be secured alike by the deposit or by the bond, it takes the only time at which the conditions of the obligation come to be written out, *i.e.*, in the bond, as the time for stating them.

The reason for the thing—it is important to notice—exactly coincides with the conclusion to which I have come, for it would certainly be strange if a landowner, who declined to accept a bond being satisfied with the deposit, should have no security whatever for interest, while the same man if he insisted upon getting a bond should have two securities for interest, the bond and the deposit.

On the question mainly argued to us, then, my opinion is clearly in harmony with the decision of the Lord Ordinary.

The question raised on the first and second findings of the Lord Ordinary's opinion were not so fully argued, but I have heard nothing to lead me to doubt the soundness of the judgment. The case is one of a company taking possession of lands before the amount of compensation is fixed, and I think it clear that interest is due from the date of entry. The case is not similar to but is just the opposite of a case in which the award is fixed at the end of the owner's possession. There it is clear that the owner has and can have no claim for interest prior to the award because up to that time he had been receiving the rents of his lands.

I think that we ought to adhere.

LORD M'LAREN—The primary obligation of a railway company in cases of compulsory purchase is to make full compensation before entering on the lands, and it is only in the event of the company wishing to enter on the lands in anticipation of the award of compensation that the machinery of sections 84-86 of the Act comes into

operation. I do not think it would have occurred to any mind, however ingenious, to suggest that there is one case of compensation in which interest is payable, and another in which it is not, had it not been that the amount to be deposited is precisely the sum which is certified to be the value of the lands. That suggested the argument that so far as the security was concerned it was only to be security for principal. The argument is altogether fallacious.

The reason why only the estimated price is to be deposited is, that it is impossible to say, at the time the deposit is made, what the amount of interest will be, but the point has not been overlooked by the Legislature, for the owner is entitled to get a bond covering both principal and interest. In section 84 it is stated that the deposit is to be in security as thereafter provided. That plainly refers to section 86, and when we turn to that section it is as clear as can be that the security is to be for principal and interest. That is made clear by the provision that the company is only entitled to uplift the money if they satisfy the Court that they have performed the conditions of the bond. It is, I think, impossible to confine that position only to cases where bonds have been actually granted. The conditions to be performed are the conditions in section 84, that is to say, payment of principal and interest. If in cases where no bond has been granted the company were to be relieved of payment of interest it would logically follow that they should also be relieved from payment of principal, for principal and interest are put in exactly the same position by the section, but it cannot be intended that a landowner shall lose his claim to interest because he is satisfied as to the credit of a perfectly solvent company and does not demand a bond.

I did not understand from the argument that the alleged waiver was put upon any special circumstances: I thought that it was merely grounded on the fact that a bond was not required. If that is so I do not see why the respondents should not at once get their money, as I do not think that circumstance of the omission to take a bond amounts to a relevant averment to waiver.

LORD KINNEAR—If the promoters of an undertaking do not enter on the lands till the purchase money is paid, or deposited in bank, then it is reasonable that no interest should run prior to the date of payment, for the owner up to that time is left in possession of his land, and the railway company of their money. Section 84 of the Act, however, provides for a different set of circumstances. A privilege is there given to the promoter, viz., that he may enter on possession without the landowner's consent although the compensation has neither been paid nor consigned.

It seems reasonable that the Legislature should provide for payment of interest when the payment of the price of land of

which the company has taken actual possession is indefinitely postponed. But I do not think that the matter is left to stand on implication, for payment of interest is expressly provided for in the statute. The 84th section provides that in the event of the promoters entering before payment of the price, they are to give security in two different forms. They are to deposit the amount claimed for the whole lands in their notice to treat, or otherwise the sum determined by a valuator appointed by the Board of Trade, and they are also to give the landowner a bond with two sufficient securities for payment of the purchase money or compensation which may be fixed in the manner prescribed by the statute, with interest at the rate of five per cent. from the date of their entering upon the land, until such purchase money is paid.

The bond which they are thus required to tender does not create the obligation, but only gives effect to an obligation which had previously arisen in consequence of their entering into possession of the lands. The terms of the bond define specifically the obligation which the Legislature intends to impose. But I cannot see any reason to doubt that the obligation remains the same whether delivery of the bond is insisted on or no. It may be that a landowner may discharge his claim for interest, and it is, as I understand, maintained that he has done so in the special circumstances of this case. If so, there will be no obligation to pay interest. But that is a question which remains to be decided. We could not recal the Lord Ordinary's interlocutor and authorise the railway company to uplift the whole sum deposited unless we were prepared to affirm the proposition that a mere waiver of the right to insist on delivery of a bond necessarily involves an abandonment of the claim to interest. But it is clear enough that if the landowner was satisfied with the security of the deposited money he might refrain from insisting on his right to obtain the additional security of a bond, guaranteed by two securities, without the slightest intention to give up any part of his claim. If the petitioners can show that the claim for interest has been discharged they may be entitled to uplift the whole deposited sum. But that has not yet been shown, and in the meantime I agree with the Lord Ordinary that a sufficient sum to meet the respondent's claim must be retained.

LORD ADAM declined to give an opinion as he had not heard the whole argument.

The Court adhered.

Counsel for the Petitioners and Reclaimers—Lees—Neil J. Kennedy. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Respondents—Graham Murray, Q.C.—Salvesen. Agents—Gill & Pringle, W.S.