

required by the pursuer could be done. It seems to the Sheriff this is not, properly speaking, such a declarator as is covered by the 8th section of the Act 1877."

The pursuer appealed to the Court of Session, and argued—This was a declarator for the purpose of determining a question relating to property in moveables, and was therefore within section 8 of the Act. But even if the declaratory conclusion were incompetent, the Sheriff had done wrong in dismissing the whole action, for it was competent *quoad* the other conclusions—*Moroney v. Muir*, November 5, 1867, 6 Macph. 7.

The defenders replied—Unless the pursuer could establish his declaratory conclusion he had no title to sue, and the whole action fell to the ground. The pursuer was a mere member of the public. Before he could sue the company as a partner he must establish the fact of his partnership, and this could only be done by declarator—*Fraser v. Hair*, June 23, 1848, 10 D. 1402; Clark on Partnership, i. 396.

The Court being of opinion that the declaratory conclusion of the petition was not necessary, allowed the pursuer to put in a minute withdrawing that conclusion, and without delivering opinions remitted the case back to the Sheriff to proceed.

Counsel for Pursuer (Appellant) — Thorburn. Agents—Miller & Murray, S.S.C.

Counsel for Defenders (Respondents)—D. F. Balfour, Q.C. — M'Kechnie. Agents — Irons, Roberts, & Lewis, S.S.C.

Saturday, October 24.

FIRST DIVISION.

[Lord Trayner, Ordinary.

BARONESS WILLOUGHBY DE ERESBY v.
CALLANDER AND OBAN RAILWAY
COMPANY.

Entail—Railway—Expenses of Application to Uplift and Apply Consigned Money—Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 9), secs. 67, 79.

In a petition under the Entail Acts it was found that an heiress of entail had expended certain sums on permanent improvements on the entailed estates. In a subsequent petition she prayed the Court for leave to uplift and apply money consigned in terms of sec. 67 of the Lands Clauses Consolidation Act 1845, by a railway company, all in terms of sec. 26 of the Entail Amendment Act 1848. She further prayed the Court to find the railway company liable in the expenses of the application, all in terms of sec. 79 of the Lands Clauses Consolidation Act. The Junior Lord Ordinary ordered intimation, advertisement, and service on the three next heirs of entail in terms of the prayer of the petition, and subsequently found the railway company liable in the whole expenses of the application. In a reclaiming-note, *held* (1) that the petitioner was entitled to the expenses of presenting the application, and

of obtaining warrant for uplifting the money; but (2) (*rev.* judgment of Lord Trayner) that no advertisement of the petition or service thereof on the next heirs of entail being required by the Lands Clauses Consolidation Act, the expenses in connection therewith fell to be borne by the petitioner and not by the promoters of the undertaking.

The Callander and Oban Railway Company having taken a portion of the entailed estate of Drummond and others in the county of Perth, belonging to the Baroness Willoughby de Eresby, and held by her under a deed of entail dated and recorded in November 1874 for the purposes of their undertaking, the purchase money therefor was fixed by arbitration, under the provisions of the Lands Clauses Consolidation (Scotland) Act 1845, on 14th November 1883, at the sum of £77, 6s. 7d., which sum was consigned in bank in terms of that Act.

Subsequently the railway company took another portion of the estate for the same purposes, and the purchase money therefor was in like manner fixed by arbitration at £207, and that sum was also consigned in bank.

On 28th March 1876 Lady Willoughby de Eresby presented a petition to the Court for authority to uplift a sum amounting to £2182, 19s. 7d. which had been consigned by the Callander and Oban Railway Company, and on 14th July 1876 the Junior Lord Ordinary found that the petitioner had expended the sum of £2835, 13s. 11d. on permanent improvements on the entailed estates, and granted warrant to the petitioner to uplift the said sum of £2182, 19s. 7d. in repayment *pro tanto* of the improvement expenditure, leaving a balance expended on improvements of £652, 14s. 4d.

On 19th March 1879 Lady Willoughby de Eresby presented another application to uplift a sum of £406, 7s. 7d. consigned by the City of Glasgow Water Commissioners, and on 19th July 1879 the Junior Lord Ordinary granted warrant to uplift the said sum and apply it in repayment *pro tanto* of the said balance of £652, 14s. 4d., leaving a balance expended on improvements on the estates of £246, 6s. 9d.

On 27th February 1885 Lady Willoughby de Eresby presented this petition to the Court setting forth the above facts.

The petition further stated that in these circumstances she was desirous of obtaining the authority of the Court to uplift and apply the foresaid consigned sums of £77, 6s. 7d. and £207 in repayment of the balance of £246, 6s. 9d., that she was also desirous of uplifting the balance of the consigned sums, amounting to £37, 19s. 10d., which remained after repayment of the sum so found to have been expended, such balance being less than £200, and of acquiring the same for her own use and behoof; and that the petition was presented in terms of the Lands Clauses Consolidation (Scotland) Act 1845, and the Statutes 11 and 12 Vict. cap. 36, 16 and 17 Vict. cap. 94, 31 and 32 Vict. cap. 84, 38 and 39 Vict. cap. 61, and 45 and 46 Vict. cap. 53, and relative Acts of Sederunt. The names and designations of the three next heirs entitled to succeed after her to the estates were set forth in the petition. The petition set forth sec. 26 of the Entail Amendment Act 1848, and sec. 79 of the Lands Clauses Consolidation (Scotland) Act 1845.

The prayer of the petition asked for an order for intimation, advertisement, and service on the three next heirs, for the appointment of a curator *ad litem* to the second and third heirs, who were in minority, and further prayed the Court "to approve of and authorise the proposed application of the foresaid consigned sums of £77, 6s. 7d. and £207 in repayment of the said sum of £246, 6s. 9d., being the balance of the sum found to have been expended on permanent improvement on said entailed lands and estate as aforesaid, and to issue a decree to that effect, and to grant warrant to the petitioner to uplift the said consigned sums and to apply the same in repayment of the foresaid sum of £246, 6s. 9d. expended as aforesaid, and to grant warrant to and authorise the petitioner to uplift the balance of the consigned sum, amounting to £37, 19s. 10d., together with the interest accrued upon the said sums of £77, 6s. 7d. and £207, for her own use and behoof, and further to find the Callander and Oban Railway Company liable to the petitioner in payment of the expenses to be incurred under this application."

The Lord Ordinary (TRAYNER) having ordered intimation, advertisement, and service, appointed a curator *ad litem* in terms of the prayer, and subsequently on 30th May 1885 pronounced an interlocutor approving the discharge and acknowledgment by the petitioner for expenditure in the improvements on the entailed estates, interposed authority thereto, and decreed, and found the Callander and Oban Railway Company liable to the petitioner in the expenses of the petition and procedure thereon.

When the Auditor's report came before the Lord Ordinary, the railway company objected thereto (1) In respect the Auditor had sustained charges incident to the advertisement of the petition, to the service thereof on the three next heirs, and to the appointment of a curator *ad litem* to the second and third heirs; (2) in respect he had sustained against them the whole instead of one-half of the charges incident to the drawing of the petition, and carrying it through the Court, including fees to a reporter appointed by the Lord Ordinary to inquire into the matters set forth in the petition.

On 18th July 1885, the Lord Ordinary having heard counsel, repelled the objections, approved of the Auditor's report, and decreed for the amount thereof against the railway company.

The railway company reclaimed, and argued—(1) Under the Lands Clauses Act no advertisement of the petition was required, neither was it necessary to call the three next heirs. The charges incident to these proceedings ought therefore to have been disallowed. (2) Though the railway company were probably not bound to pay any of the expenses in connection with the petition, they were willing, as matter of concession, to pay one-half, in terms of the decision in *Drummond Hay*, Nov. 12, 1873, 1 R. 180, and *Countess of Stair*, May 20, 1882, 19 S.L.R. 618. The purpose to which the money was to be applied after it was uplifted was not one of the purposes authorised by the Lands Clauses Act, and it was only under that Act that power was given to the Court to find the promoters liable in such expenses as those here sought to be recovered.

Argued for the petitioner—(1) The expenses of advertisement, &c., were all incurred by order of the Court. The Lord Ordinary in ordering advertisement and service followed the invariable practice in such petitions, and further, these very charges (including the appointment of a curator *ad litem*) had been held to be good charges against the promoters in the case of the *Countess of Stair*, *supra cit.* Though the statute did not order intimation and service in such a petition as the present, it was in the discretion of the Court to make such order in precisely the same way as in petitions to disentail, &c., where no consents were required—*Davys*, October 29, 1870, 9 Macph. 44. (2) This objection would have been good if the improvements had been constituted in the present petition, but they had been constituted in earlier proceedings. The question was decided by a train of decisions. In the case of *Grant*, May 29, 1851, 13 D. 1015, it was expressly decided that such an application as the present was within the spirit of the Lands Clauses Act, and that the expenses fell to be borne by the promoters. In the cases of *Lord Torphichen*, July 19, 1851, 13 D. 1400; *Erskine*, Nov. 29, 1851, 14 D. 119; *Drummond Hay*, and *Countess of Stair*, *supra cit.*, the constitution of the improvement debt and the prayer to uplift and apply were united in the same petition, and there it was held that as the petitioner would necessarily have incurred the expense of coming to the Court for the constitution of the debt, he was liable in one-half the expenses of the application; but in all those cases it was recognised that the promoters were liable in the other half, *i.e.*, the expenses which were necessarily incurred in uplifting and applying the money.

At advising—

LORD PRESIDENT—I think the result of all the cases that have been brought under our notice is this, that when a petition to uplift and apply consigned money is presented under this Entail Amendment Act the railway company is to bear all the expenses they would have to bear had the application been made under the provisions of the Lands Clauses Act.

If that principle is applied to the present case, I think it disposes of both points, the result being that we should sustain the first objection and repel the second.

In regard to the first objection, it comes to this, Are these charges which are objected to, charges such as were necessarily incurred in getting the consigned money uplifted and applied, or are they charges arising from the practice which prevails in such applications of calling the three next heirs as respondents?

In this connection it is important to notice that the debt here had been constituted, and that therefore no expenses of constituting the debt are included. In this respect the case is the same as that of *Grant*, 13 D. 1015, in which decree for the expense of the improvements had been obtained in terms of the Montgomery Act. The subsequent case of *Torphichen*, 13 D. 1400, proceeds, I think, on the same footing, *viz.*, that the petitioner should be allowed the expenses which are of such a nature that had the application been under the Lands Clauses Act the railway company would have had to bear them.

This is clearly brought out in regard to the

second point raised in the case of *Torphichen*. Two points were raised in that case, at different stages, and it is to the second point that I refer. On taxing the petitioner's account of expenses the Auditor disallowed the expense of intimating the petition to the next heirs of entail, of obtaining the appointment of a tutor *ad litem* to one of the heirs who was in pupillarity, and of advertising in the *Gazette* and other newspapers. The petitioner objected, and his objection was repelled. That decision is almost precisely in point in regard to the first objection, for the items there were almost identical with those we have to deal with here, as it was the expenses necessary for bringing the three next heirs into the field that the Court held the railway company not bound to pay.

The second objection is disposed of by the rule which I have already stated, viz., that the expenses for which the railway company are liable correspond to these for which they would have been liable in a petition under the Lands Clauses Act. These are such expenses, and therefore the objection must be repelled.

LORD MURE—I am entirely of the same opinion.

The first objection is disposed of, I think, by the express decision in the case of *Torphichen*, and I do not think therefore that they are proper charges against the railway company.

In repelling the second objection I do not think we are interfering with the case of *Drummond Hay*, 1 R. 180, for there the petitioner was presented for two purposes, which is not the case here.

LORD SHAND—If the question were still open whether a railway company was bound to pay any part of expenses such as these, I think there would be considerable force in the argument that the Lands Clauses Act limits the expenses for which the company is liable to the expenses incurred in applying consigned money to the purposes specified in that Act, and that this is not one of those purposes. I agree, however, with your Lordships that the matter has been settled by decision, and although this application is not to carry out one of the purposes of the Lands Clauses Act, yet if the consigned money is to be applied to one of the purposes contained in a later statute, I think the railway company should pay a portion of the expenses, just as they would have had to do under the Lands Clauses Act. I think that the advertisement and the calling of the next heirs would not have taken place under the Lands Clauses Act, and that therefore that portion of the expense should not be allowed.

In regard to the second objection, the whole of these expenses would have been recovered under the Lands Clauses Act. The case is not like that of *Drummond Hay*, 1 R. 180, where the petition dealt with two matters, the constitution of the improvement expenditure and the uplifting and applying the consigned money. I adhere to my decision in that case, and think that in such a case the general expenses should be divided equally. But there was an element present in that case that we have not got here, and therefore I think this objection should be repelled.

LORD ADAM concurred.

The Court sustained the first and repelled the second objection.

Counsel for Petitioner—Asher, Q.C.—Maconochie. Agents—Dundas & Wilson, C.S.

Counsel for Respondents—D.-F. Balfour, Q.C.—R. Johnstone. Agents—Hope, Mann, & Kirk, W.S.

Monday, October 26.

THE IND COURT

BARONESS WILLOUGHBY DE ERESBY,
PETITIONER.

(*Ante*, vol. xxii. p. 891, 17th July 1885.)

Teinds—Process—Act 1707, cap. 9—Petition for Authority to Record Decree of Valuation of Teinds.

In a petition for authority to record a decree of valuation of teinds which had recently been upheld as good and valid by the Court of Session in a question between the Lord Advocate and the petitioner, the Court, in respect of the said judgment, *dispensed* with the usual remit to the Lord Ordinary on Teinds, and *granted* the prayer of the petition *de plano*.

Lady Willoughby de Eresby presented a petition in terms of the Act 1707, cap. 9, "Anent Plantation of Kirks and Valuation of Teinds," for authority to record a decree of valuation dated 22d December 1647. Petitioner's Counsel moved the Court, in respect the First Division had so recently had occasion to examine into and sustain the authenticity of the said decree (17th July 1885), to dispense with the usual remit for that purpose to the Lord Ordinary on Teinds.

LORD PRESIDENT—I think our interlocutor must bear that we do this in respect of the said judgment.

The Court pronounced this interlocutor:—

"The Lords having heard counsel and considered the petition, in respect the decret referred to in the petition was held by the Court on 17th July last, in a question between the Lord Advocate and the petitioner, to be a good valuation, Find it unnecessary to make a remit to examine into the authority thereof: Further, as it is stated that there are blanks in the decret arising from portions thereof being torn off or otherwise destroyed, grant warrant to and authorise the Clerk of Court to record the document referred to, leaving blanks for such words as are no longer extant, and to give out a new extract thereof in terms of the statute, and decern."

Counsel for Petitioner—Dundas. Agents—Dundas & Wilson, C.S.