

the transfer illegal. Nor was the position of the company such as to make it the duty of its executive to refuse to alter the register. The company had not resolved to stop or to go into liquidation; in fact, it seems to have been, as it always had been, in low water, but not more. Accordingly, I think that in March 1892, when they asked it, the petitioners were entitled to have the transfers registered, and their names taken off the register. As this has not been done through no fault of theirs, I think they are now entitled to have it done.

If this should be the view of your Lordships, the prayer of each petition will be granted, and we may also order the registers to be rectified. It was admitted that in this event the petitioners' names must be put on the B list of contributories, should such a list be required.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court pronounced the following interlocutor:—

“Ordain the register of the ‘Feliciana’ Steamship Company, Limited, to be rectified by deleting therefrom the name of the petitioners Christopher Furness & Company as holders of 120 shares in said company, numbered 375 to 494 inclusive; also ordain the name of the petitioners, the said Furness & Company, to be removed from the A list of contributories of said Steamship Company in respect of said 120 shares, numbered 375 to 494 inclusive, and decern: Find the petitioners liable to the respondents in expenses, modified to one-half of the taxed amount thereof,” &c.

Counsel for the Petitioners—Lorimer—Dickson. Agents—John C. Brodie & Sons, W.S.

Counsel for the Liquidators—Guthrie—Younger. Agents—Morton, Smart, & Macdonald, W.S.

Friday, December 8.

## SECOND DIVISION.

### MAXWELL HERON v. DUNLOP.

*Entail—Disentail—Value of Next Heir's Expectancy—Proper Security—Duties and Liabilities of Curator ad litem—Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), sec. 12.*

By section 12 of the Entail (Scotland) Act 1882 it is, *inter alia*, enacted that no curator *ad litem* who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment or inadequacy of consideration, or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter.”

An heir of entail presented a petition for disentail of the estate. The Court appointed a curator *ad litem* to the heir-apparent, who was a minor. By minute of agreement with the heir of entail the curator *ad litem* agreed to consent to the disentail, in exchange for a bond for £16,000 granted to his ward over the estate to be disentailed, postponed to bonds for certain debts mentioned in the agreement.

Thereafter the estates were sold, and the price left no balance to pay the £16,000. On the heir-apparent reaching majority he brought an action against his former curator *ad litem* for the £16,000 and interest, averring (1) that the security accepted by the defender as the value of his consent was improper and inadequate; (2) that the security accepted was postponed to debts which were not mentioned in the minute of agreement, and that therefore the curator *ad litem* had failed to get the security for which he stipulated in the minute of agreement.

*Held* that the action was irrelevant—*diss.* Lord Rutherford Clark, who was of opinion that there ought to be inquiry as to the second of the pursuer's averments, because if the defender gave his consent without getting the consideration for which he bargained, that was a failure of duty on his part from which the statute did not protect him.

By section 12 of the Entail (Scotland) Act 1882 (45 and 46 Vict. c. 53), it is enacted—  
“In any application under the Entail Acts to which the consent of any person is required, where such person is disabled under the provisions of the Entail Acts or otherwise from consenting by reason of being under age, or subject to other legal incapacity, the Court shall appoint his tutor curator, . . . or another person to be curator *ad litem* to the person under disability, and such curator *ad litem* may consent on his behalf, and no curator *ad litem* who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any alleged error in judgment or inadequacy of consideration or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter.”

In 1883 Captain John Maxwell Heron presented a petition to disentail the lands of Heron and Kirrouchtree, in the Stewartry of Kirkcudbright. Captain Maxwell Heron was born prior to 2nd June 1851, and his eldest son, Guy Maxwell Heron, being a minor, it was necessary that the value of his consent to the disentail should be ascertained. George Dunlop, W.S., Edinburgh, was appointed in the process curator *ad litem* to Guy Maxwell Heron. As such he gave his consent to the disentail, and on 18th February 1884, in respect of that consent, the Court approved of and interponed authority to the instrument of disentail.

The terms on which Mr Dunlop gave his consent appear from a minute of agreement between Captain Maxwell Heron

and him as curator *ad litem* to Guy Maxwell Heron, dated 30th October and 1st November 1883, in the following terms:—"Whereas the said John Maxwell Heron, on or about the sixth day of March Eighteen hundred and eighty-three, presented a petition to the Lords of Council and Session for authority to record an instrument of disentail of the said lands and estate, upon which petition the usual procedure followed, and, *inter alia*, the said George Dunlop was appointed curator *ad litem* to the said Guy Maxwell Heron: And whereas the said George Dunlop, as curator *ad litem* foresaid, has agreed to consent to the said disentail on the terms hereafter set forth: Therefore the parties have agreed, and do hereby agree, as follows, *videlicet*—First, It is hereby agreed between the parties that the value in money of the expectancy or interest in the said entailed estate of the said Guy Maxwell Heron is Sixteen thousand pounds, for which sum the said John Maxwell Heron hereby agrees and binds and obliges himself to grant to the said Guy Maxwell Heron a bond and disposition in security in ordinary form, and containing all usual and necessary clauses. Second, In exchange for the said bond and disposition in security, the said George Dunlop as curator *ad litem* hereby agrees to execute and deliver to the said John Maxwell Heron a deed of consent to the disentail of the said estate. Third, the said George Dunlop, as curator *ad litem* foresaid, further agrees to the said John Maxwell Heron borrowing a sum not exceeding ten thousand five hundred pounds upon the security of the said lands, to rank preferably thereon to the said sum of sixteen thousand pounds, the said sum of ten thousand five hundred pounds to be applied as follows, *videlicet*—(1) Three thousand pounds to be applied in the redemption of one-half of the annuity of seven hundred pounds presently payable out of the said lands and estate to Mrs Charlotte Burgoyne Maxwell Heron, mother of the said John Maxwell Heron; (2) two thousand five hundred pounds to be applied in repayment to the petitioner of sums expended by him on permanent improvements on the said estate, or to be hereafter so expended; (3) in payment of any sums presently borrowed by the said John Maxwell Heron on the security of his life-interest on the said estate and policies on his life, and the expenses hereinafter mentioned; (4) the balance to be paid to the said John Maxwell Heron at such times and in such amounts as shall be fixed by James Howden and James Alexander Molleson, both chartered accountants, Edinburgh, and by the said George Dunlop, or by a majority of them in the event of their differing in opinion. Fourth, The parties hereto agree that the said sum of ten thousand five hundred pounds, to be borrowed as aforesaid, and the sum of six thousand pounds, being the provision to younger children contained in the first party's antenuptial contract of marriage, shall rank on the said estate preferably to the foresaid sum of sixteen thousand pounds, and that the whole other existing

debt amounts to the sum of thirty-seven thousand five hundred pounds, as will be shown by searches to be exhibited by the said first party to the said second party. Fifth, The whole expenses of the said application to the Court, the bond in favour of the said Guy Maxwell Heron, and of these presents, and incident thereon in any manner of way shall be paid by the said John Maxwell Heron."

By agreement between parties the valuation of the entailed lands for the purpose of ascertaining the value of the consent was £93,000.

On 8th June 1892 Guy Maxwell Heron attained majority. Thereafter he raised an action against Mr Dunlop for the sum of £16,000, with interest thereon at 5 per cent. from 30th October 1883 till payment.

The pursuer averred—" (Cond. 5) It was the duty of the defender as curator *ad litem*, if he consented to take security over the lands before they were disentailed instead of insisting on consignment of the value of the pursuer's consent, to see that the security was proper and adequate. The defender agreed by the said minute of agreement of 1st November 1883 to accept security over the said lands instead of consignment, but he, in breach of his duty, failed to see that the security he obtained was proper and adequate. (Cond. 6) By the 4th clause of said minute of agreement Captain Heron undertook to show to the defender that the debts on the lands at that time amounted to £37,500. The defender took no steps to satisfy himself of the accuracy of Captain Heron's statement. On the contrary, he, in breach of his duty to the pursuer, failed to make any adequate inquiry as to the burdens on the lands, and their sufficiency to afford a security for the value of the pursuer's interest. If the defender had made adequate inquiry he would have found that besides the said sum of £37,500 the lands were burdened with two annuities and a jointure, the capitalised value of which amounted to £9686, 3s. 9d. (Cond. 7) Not only did the defender not inquire as to the real amount of the burdens on the lands, but by the minute of agreement he, while accepting a bond and disposition in security over the lands in return for the consent of the pursuer, agreed that Captain Heron should burden the lands by bonds taking priority to that in favour of the pursuer to the extent of £16,500. . . . (Cond. 9) The result of the defender's action in accordance with the minute of agreement with Captain Heron and of the defender's omission to ascertain the burdens then existing on the lands was as follows—The said lands were burdened preferably to the bond in favour of the pursuer to the extent of £66,380, made up as follows:—(1) Burdens disclosed by Captain Heron, £37,500; (2) burdens not disclosed by Captain Heron (as set forth in condescendence), £10,200; (3) burdens which the defender consented should be ranked preferably to the pursuer, £16,500; (4) value of insurance premiums secured on the estates, £2180—£66,380. If to this amount the bond in favour of the pursuer be added,

the said lands valued at £93,000 were to be burdened to the extent of £82,475. (Cond. 10) Further, the defender, in breach of his duty foresaid, failed to make adequate inquiry as to the amount of the rent-roll of the said estates for the year 1882, being that immediately preceding the year in which the disentail petition was granted—the rents amounted to £3215, 13s. 8d. From that sum there fell to be deducted payments of interest on prior burdens and expenses necessarily incurred over the estates, and there was consequently left only £479, 7s. 4d. to pay the interest (£800) on the bond which the defender had accepted for the payment of the pursuer's interest in the said lands. (Cond. 11) On 11th July 1887 Captain Heron was sequestrated, and Mr J. A. Robertson, C.A., was appointed his trustee. The interest on the bond to the insurance company fell into arrear, and the premiums on the policies of assurance which the said company held were not paid. In these circumstances the said company forced the trustee to sell the lands, which he did by public roup at the price of £60,000. After paying prior burdens on the lands, only £488, 11s. 6d., subject to deduction of expenses, was left to meet the pursuer's bond for £16,000. . . . (Cond. 12) The pursuer has thus lost the whole of the sum payable to him for his consent to the said disentail. The defender is liable for said loss in respect that he failed to have the value of the pursuer's consent paid or properly secured, having accepted as a security for payment of the said sum of £16,000 what was manifestly an inadequate security. The defender failed to take care that the value of the pursuer's consent was properly secured on the estates. He could have insisted on consignation of the £16,000 instead of taking security for it. He allowed other bonds to be granted over the said estates in preference to the pursuer's bond. He failed to ascertain the amount of the burdens on the said estates, and he took as security on behalf of the pursuer a bond over the said estates which were already burdened to such an extent as to render these a totally inadequate security for payment of the pursuer's debt. In the circumstances condescended on said failure amounts to *culpa lata*." The pursuer did not aver that the defender acted culpably in consenting to the disentail.

The pursuer pleaded—"(1) The defender having, in breach of his duty as curator and guardian of the pursuer during minority, failed to obtain proper security for the said sum of £16,000, and the pursuer having in consequence lost the same, decree should be granted in terms of the conclusions of the summons."

The defender lodged defences, and, *inter alia*, "explained that the defender as curator *ad litem* to the pursuer under the Entail Acts, after due consideration of the whole circumstances, gave his consent to the disentail in consideration of the delivery of a bond and disposition in security by Captain Heron for £16,000 in favour of the pursuer, postponed to the burdens and provisions

then affecting the estate, and to the further burden of £10,500 to be charged on the estate and applied in terms of said agreement. Explained further, that this was the best course open to the curator *ad litem* in the ward's interest in the circumstances of the case."

The defender pleaded—"(1) The action is irrelevant and incompetent. (2) The action is barred by the Entail Acts, and in particular by section 31 of the Entail Amendment Act 1848 and section 12 of the Entail (Scotland) Act 1882. (3) The defender as curator *ad litem* in the petition for disentail was entitled to give his consent for such consideration as he thought proper, and the consideration in respect of which the consent was given having been fixed in *bona fide* by the defender as fair and reasonable under the whole circumstances, and having been duly obtained, the defender ought to be assolizied."

On 20th July 1893 the Lord Ordinary (KINCAIRNEY) pronounced the following interlocutor:—"Finds that the averments of the pursuer are irrelevant, and insufficient to support the conclusions of the summons: Therefore assolizies the defender from the said conclusions.

"*Note.*—[After the circumstances had been stated]—The argument was confined to the effect and application of the 12th section of the statute pleaded by the defender. The pursuer maintained that it did not apply. He maintained that the consideration for the consent of the curator *ad litem* was £16,000. He did not dispute that his interest was fairly estimated at that sum, and that it was, if paid, an adequate consideration for the consent. His objection therefore, he maintained, was not to the inadequacy of the consideration, but to the inadequacy of the security for it, and he maintained that in complaining of the inadequacy of the security he was not charging the defender with mere error in judgment, but with such carelessness and fault as had in various cases been held sufficient to subject in liability trustees who had invested trust funds on security which was manifestly insufficient.

"It was maintained for the defender that he was not in the position of a trustee who had invested trust funds, because, in the first place, the statute had conferred on him a much wider immunity than the law had accorded to trustees; and, in the second place, because he had never been in possession of any funds for investment; that the agreement must be read as a whole, and that, on a sound construction of it, it appeared that the consideration for the curator's consent was not the payment of £16,000, but the bond granted in terms of the agreement.

"On this argument my opinion is in favour of the defender.

"The main question is, what was the consideration obtained by the curator *ad litem* in respect of which he gave his consent? In considering that question it is important and instructive to distinguish between the duties imposed by the 13th section of the statute on the Court, in a case where

consent is refused, and the provisions of the 12th section which apply when consent is given. In the former case the Court is required to ascertain 'the value in money' of the interest of the heir, and to direct that the sum ascertained shall be paid into bank in name of the heir, 'or that proper security therefor shall be given over the estates.' The case of *Farquharson*, 14 R. 231, quoted by the pursuer, was a case where consent had been refused.

"But there are no such provisions in the 12th section relating to cases of consent. The curator *ad litem* is not required to ascertain the value in money of his ward's interest, or to see that the sum ascertained is consigned or invested. In such a case, as pointed out by the counsel for the defender, it may happen that no money consideration is involved as in the case—not at all unusual—where the object of a disentail is a re-settlement of the estates, and other less usual cases may be supposed where the consideration for a disentail might be something different from a payment of money; for example, an annuity or a disposition of a portion of the entailed estates, or again there might be reasons which might legitimately induce a curator *ad litem* to be moderate in his claims, as if (as is suggested in the present case) there was reason to doubt whether the entail was good against creditors. For such reasons a curator *ad litem* has a very wide discretion in regard to the grounds on which he shall consent to the disentail on behalf of his ward, and the Court is not concerned with these reasons, except with the view of ascertaining whether the transaction has been honest and corrupt.

"I am of opinion that on a sound construction of the agreement the consideration for the consent was not payment of £16,000, but a bond for that sum. That is expressed unequivocally in the second head of the agreement. Captain Maxwell Heron did not come under an obligation by the agreement to pay the £16,000 in money, and never did so, except indeed by the bond itself. It may be that the curator *ad litem* ought not to have accepted Captain Heron's bond, and ought to have refused his consent if he could not get the money, and so have thrown on the Court the duty and responsibility of ascertaining the sum and approving the security. But it is quite certain that he did not do so. He accepted a bond, and if it be said that that bond has proved an inadequate security, what is that but saying that the consideration was inadequate?"

"At first sight there is some difficulty in seeing how a security over an estate can be an inadequate security for a partial interest in it, and the 13th section of the statute seems to contemplate that the estate would be adequate security. But in this case the curator consented to new burdens being imposed on the estates, and it may be doubtful whether it was advisable to do that. Still I think it clear that the bond for which the curator stipulated was not a bond over the estate as it then stood, but a bond subject to the burdens mentioned in

heads three and four of the agreement. But that again resolves into a question of the inadequacy of the consideration, and from any liability on that score the curator *ad litem* is protected by the statute.

"I am of opinion therefore that the ground of liability here is really inadequacy of consideration, and that that ground of liability is excluded by the statute.

"It may be noticed that here the father who granted the bond was his son's administrator-at-law, and it rather appears to me that if he had paid £16,000 to the curator *ad litem*, he could have demanded it back as his son's administrator-at-law, or could have uplifted it from the bank in that character if it had been consigned in bank. It is true that in that case he would have held the money in a fiduciary character, and it might, if capable of identification, be safe from his creditors, and it was perhaps a different thing to lend him the money on his bond, but the consideration suggests how limited the duty of a curator *ad litem* in such cases really is.

"I decide this case on the footing that the whole question relates to the liability incurred by the defender in accepting the bond and disposition in security under the conditions specified in the agreement as a consideration for his consent to the disentail."

The pursuer reclaimed, and argued—The defender was liable for the loss of the £16,000. (1) The duty of a curator *ad litem* under statute was to ascertain the value of the expectancy of his charge, and pay over the sum to the proper guardians for behoof of the minor. If the curator accepted a security in place of a sum of money to the value of the minor's expectancy, he did it at his peril, it being outwith his office. (2) Even if the curator *ad litem* was entitled to take a bond in lieu of money, the defender was liable because he took a bad security. He had failed to ascertain the burdens already existing on the entailed estate at the time of the agreement, and he had also failed to ascertain the state of the rental. Besides, he had allowed certain sums, some of which were not mentioned in the minute of agreement, to be charged on the estate as preferential debts to the bond in favour of his ward. The defender had therefore (1) taken a security, the commercial value of which was inadequate, and (2) allowed other debts to be made preferential to that of his ward. A curator *ad litem*, if he did not pay the money into bank, was bound to see that the security received was such as a prudent lender would accept—*Farquharson v. Farquharson*, December 15, 1886, 14 R. 231. Proof of the pursuer's averments should be allowed.

Argued for the defender—The judgment of the Lord Ordinary was right. A curator *ad litem* was entitled to take a security in return for his consent; he was not bound to take money. Here the averments of the pursuer amounted to this, that the defender had taken a second-class security, and had not made adequate inquiry. But a second-

class security was simply an inadequate security, and so long as the curator *ad litem* acted as such and not as an agent he was protected by the statute. And if the curator had not made adequate inquiry then he had committed an error in judgment in not thinking an inquiry necessary, and the statute again protected him. No corruption being averred the action was irrelevant.

At advising--

LORD JUSTICE-CLERK—The pursuer is the son of Captain Maxwell Heron, who was in 1883 heir of entail in possession of certain lands in the Stewartry of Kirkcudbright. The pursuer was at that time in minority, and under a petition for disentail presented by his father the defender Mr Dunlop was appointed to be his curator *ad litem*.

The particulars in regard to the position of the estate and the defender's acting at the time when he gave his consent to the disentail for his ward are, as I hold—

1. That the estate was then valued as for a sale at £93,000.
2. That the debt then secured on the estate was £37,500.
3. That in addition to this sum there was further debt put upon the estate, which the pursuer puts at £18,680, and although this sum is not assented to by the defender it must be taken as correct in considering the relevancy. Thus the whole debt came in round figures to £66,000, leaving a margin of £27,000.
4. That the value of the pursuer's interest, which was to be the price of consent to disentail, was £16,000.
5. That the defender agreed to accept a bond over the estate to be disentailed for the £16,000, postponed to the bonds above referred to, in exchange for his consent to the disentail.
6. That the disentail was accordingly carried through.
7. That in 1887 Captain Maxwell Heron's estate having become insolvent, the trustee appointed upon his estate was under the necessity of selling it.
8. That it realised only £60,000, which price practically left no balance to pay the pursuer's £16,000.

In these circumstances the pursuer sues the defender for payment to him of £16,000, in respect, as stated in his first plea-in-law, that the defender has, in breach of his duty as curator and guardian of the pursuer during minority, failed to obtain proper security for the £16,000 fixed as the pursuer's interest, and that the pursuer has in consequence lost the amount. This plea is somewhat ambiguous as the expression curator and guardian is used, but it is plain that if the defender is to be made liable it must be in consequence of his acting as curator *ad litem*, appointed by the Court under the disentail proceedings, that the pursuer must succeed if he is to obtain decree.

The defender maintains that he is not liable, seeing that he was appointed as an officer of Court under the Entail Acts, and that he is protected from a claim stated on such grounds as are founded on by the pursuer by section 12 of the Entail Act of 1882, by which it is enacted—"That no

curator *ad litem* who may give any consent under this Act shall incur any responsibility on account of such consent in respect of any error of judgment or inadequacy of consideration, or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter." It is not alleged by the pursuer that there was any corrupt action, and therefore there can be no case for the pursuer unless he has a legal plea against the defender which cannot be met by any one of the three exemptions stated in the clause, viz., "error of judgment, inadequacy of consideration, or want of consideration."

The pursuer maintains that the defender agreed with the heir of entail in possession that £16,000 was to be paid for his interest, and that the defender in accepting the bond on the estate which he did accept for the amount was guilty of such carelessness and fault as would make a trustee liable for loss of property in his hands which he had invested without proper care. He further maintains that the defender failed to ascertain some of the burdens on the estate, which he might have ascertained if he had made more close inquiry than he did, and that this neglect made the investment worse by about £2000 than he knew it to be when he accepted it.

The defender maintains that the agreement must be read as a whole, his consent to the disentail being exchanged for the agreement, and that thus he was not at any time in the position of investing £16,000. He had to consider whether he would accept a bond for £16,000 as the consideration for his consent, and had no bargain with the heir of entail by which he became a holder of a sum of money for investment.

The curator *ad litem* in such a case as this is called upon to exercise his discretion, and to refuse his consent or give it on such terms as in his judgment in the circumstances it would be wise for the ward to consent to if he were major. Such exercise of discretion may depend upon a consideration of a great many complex circumstances. No rule is or can be laid down as to the extent to which investigation is to be made, or at what point a line is to be drawn as to adequacy of consideration. The curator is appointed as being a suitable person fully and fairly to consider the interests involved, and all the surrounding circumstances, making such investigation as he considers to be necessary. His action may prove afterwards to have been unfortunate from depreciation of property or some similar cause, but no rules are laid down for his guidance in judging of such matters. And it is certain that in some cases it might be in the interest of the negotiating heir to accept a less high class of security for his compensation for consent than would in the ordinary case be likely to be accepted.

In this case undoubtedly the security which the defender took was not what is called, in parlance applicable to heritable bonds, a first-class security. The margin

left over upon the valuation was not very great. But the question whether a security is to be accepted or not, having regard to the calculated or estimated margin, is essentially one of circumstances, and although in a case of this kind it might be said after the event, when it is proverbially easy to be wise, that there was an inadequacy or even a want of consideration for the consent, the clause of the Act precludes inquiry on such points unless a relevant averment be made of corrupt action on the part of the curator.

Taking the case upon the footing that the curator accepted a security of which it must be said now that it ought not to have been accepted, it must I think also be taken on the footing that the defender conscientiously believed that he had made such inquiry as it was his duty to make, and conscientiously arrived at the conclusion at which he did arrive, and acted upon it. If he erred in either of these branches of his duty, it appears to me that his error is described in the language of the statute by the words "error of judgment." It was his duty to exercise his judgment as to what inquiries he should make, and to exercise his judgment upon the information obtained as their result. It is not said that he corruptly failed to do either. But if he did not corruptly fail then, if he did what he ought not to have done, he did so through error of judgment. But it is just from liability in respect of such error of judgment that the 12th clause of the Act protects him.

I am of opinion that the pursuer's averments do not state against the defender any acts by which the pursuer may have suffered loss which are not fairly covered by the words of the statute, which exempt him from liability for alleged error of judgment, and that the interlocutor of the Lord Ordinary is right and ought to be adhered to.

LORD YOUNG—I am of the same opinion, and generally on the same grounds. In short, I agree with the Lord Ordinary. I think this is a case to which the provision of the statute applies, and that the defender who acted in the capacity of an officer of this Court is not liable unless it is established to the satisfaction of the Court he acted corruptly. I think there may have been here an error of judgment; probably there was in taking the security he did over the estate, even taking it to be of the value it was at the time, and that a prudent, cautious, and judicious man of business would probably have required better security to be given. But then I think there was here merely an error of judgment, and the provision of the statute applies to such a case. All one's inclination is to protect an officer of the Court, and it was in pursuance of that that the provision of the statute was enacted.

I must say I am not strongly favourable to the pursuer of an action such as this. It is really a question between father and son. The pursuer says that in consequence of his father becoming bankrupt and the estate

being sold at £3000 under its value, he, the pursuer, has lost the whole of the sum payable to him as heir of entail by his father for his consent to dis entail. The action is therefore brought to make Mr Dunlop pay the father's debt to the son.

On the whole matter, I am with the Lord Ordinary, and am of opinion that the defence must prevail, and that the defenders are entitled to absolvitor.

LORD RUTHERFURD CLARK—The case of the defender is that under the agreement of October 1883 the consideration for the pursuer's consent to the dis entail was the bond and disposition mentioned in that deed. There is great force in that view, for there is no evidence of any other arrangement, and the deed expressly states that the defender, as curator for the pursuer, has agreed to "consent to the same dis entail on the terms hereinafter set forth." It is true that it is stated in the first clause that the parties had agreed that the value of the pursuer's expectancy was £16,000. But I find it difficult to separate this clause from the rest of the deed, or to hold that this sum was fixed without reference to the manners in which it was to be satisfied. He must read the clause as a whole.

I agree with the Lord Ordinary in thinking that the just construction of it is that the bond therein mentioned was the consideration for the consent of the heir. On this footing, and apart from a question to which I shall hereafter advert, the defender is protected by the statute. He incurs no liability for inadequacy of consideration when, as here, there is no corruption alleged.

But I do not see that any other result can be reached if we assume that the value of the expectancy was fixed at £16,000, and that the bond was taken as a sufficient security for that sum. The curator's duty is not limited to fixing the value of the expectancy. He is entitled to give his consent to the dis entail, and therefore it is part of his duty to see that the price of the consent is paid or properly secured. For he cannot give his consent till that be done. If, then, the defender fixed the value of the expectancy at £16,000, and thereafter agreed to take the bond above mentioned as a sufficient security, he was in my opinion acting within his province. He gave his consent because he believed the security to be sufficient. Nothing more is or can be alleged against him than an error of judgment. By force of the statute he incurs no responsibility on that ground.

But in my opinion the defender was bound to use due diligence to see that he got the security for which he stipulated, or, in other words, that the security was not postponed to any debts other than those mentioned in the agreement. I do not think that the statute in this respect gives him any protection from negligence. I cannot hold it to be an error of judgment if he gave his consent without getting the consideration for which he bargained. It is simply a failure in duty. Nor does the

case fall within the other category mentioned in the statute, by which a curator incurs no responsibility on account of his consent in respect of any inadequacy of consideration or want of consideration. These words, in my opinion, refer to the consideration which is fixed for the consent. They do not protect the curator if he fails by negligence to obtain that consideration.

As I understood at the debate, the only charge not mentioned in the agreement which took precedence of the bond in question was an annuity in favour of Major Heron for £150. In my opinion there should be inquiry into this matter.

LORD TRAYNER—I concur in the result which the majority of your Lordships have arrived.

The Court adhered.

Counsel for the Pursuer—H. Johnston—Guthrie—Cooper. Agents—J. K. & W. P. Lindsay, W.S.

Counsel for the Defender—Sol.-Gen. Asher, Q.C.—Graham Murray, Q.C. Agents—Macandrew, Wright, & Murray, W.S.

Friday, December 8.

#### FIRST DIVISION.

[Lord Wellwood Ordinary.]

#### YOUNG v. THE TRUSTEE, ASSETS, AND INVESTMENT INSURANCE COMPANY, LIMITED.

*Insurance—Insurance of Deposit with a Bank—Default of Payment—Reconstruction of the Bank.*

An insurance company undertook to repay a depositor a sum deposited for a definite period with a bank "after default has been made in payment by the bank." Before the period for payment by the bank had arrived, it had stopped, and when that period arrived the depositor, being unable to get his money, claimed it from the insurance company, who declined to pay, on the ground that default had not been made as the bank was in course of being reconstructed.

Held that default had been made, and that the depositor was entitled to decree against the company for the sum claimed.

Upon 4th June 1890 John Young, Craigmellan, Pollokshields, deposited £500 with the Queensland National Bank, Limited, as a fixed deposit bearing interest at 4½ per cent., repayable in three years.

By an assurance policy, dated 6th June 1890 the Trustee, Assets, and Investment Insurance Company, Limited, Glasgow, guaranteed to Mr Young the payment of the principal sum, and the interest payable thereon, under the following condition:—

'1. So long as this policy shall continue in

force, and after fourteen days from the expiration of the notice recalling the money from deposit according to the terms of the receipt given for it by the bank, and after the expiration of fourteen days' notice in writing to the company from the assured requiring payment, and after default has been made in payment by the bank pursuant to the notice to them recalling the money, and upon a transfer being made to the company of the deposit note and the money due thereunder so as to place the company in a position legally to sue for such money as creditors of the bank, the company will pay to the assured the principal money for the time being due under the deposit, with any interest then due thereon for any period not exceeding six calendar months preceding the date of receipt by the company of the notice to them, and with subsequent interest up to the day of payment."

Upon 15th May 1893 the said bank stopped payment, and Mr Young being unable, upon 4th June 1893, to recover his £500, with interest amounting to £9, 11s. 1d., claimed the sum of £509, 11s. 1d. from the Insurance Company. The Insurance Company refused to pay unless the receipt for the money and the assignment of the deposit-receipt to them contained the following reservation of liability—"Which sum is so paid to me without any admission on the part of the said company that they are legally liable therefor, and on the express condition that if it shall be hereafter declared by a court of law that they were not liable therefor, the same is to be repaid by me, with interest, in exchange for a reconveyance of the deposit-receipt, or any other obligation or security which may have been substituted therefor."

Thereupon Mr Young brought an action for payment of the said sum of £509, 11s. 1d. against the Insurance Company, who stated in their answers—"The defenders believe and aver that the Queensland National Bank, Limited, after it stopped payment was reconstructed, and is at present carrying on business, and that default has not been made in payment by the bank in the sense of the first condition of the policy above set forth. The pursuer is called upon to state in detail the terms of the reconstruction scheme of the bank. Further, the defenders believe and aver that the pursuer is not in a position to transfer to them the said deposit-receipt and the money due thereunder so as to place them in a position legally to sue therefor as creditors of the Queensland National Bank Limited as it existed at the date of the said policy, and in terms of the said conditions therein."

The defenders pleaded—" (1) The pursuer's statements are irrelevant and insufficient to support the conclusions of the summons. (2) The defenders are entitled to absolver in respect (1) there has not been default in payment by the bank in the sense of the conditions in the said policy; (2) the conditions in the said policy, subject to the limitations of which the same was granted, have not been fulfilled; (3) the