

proper and normal procedure in Dean of Guild Courts is that which obtains in civil processes in the Sheriff Court. Mr Clyde also referred us to the Sheriff Courts (Scotland) Act 1907, which came into operation on 1st January 1908, and particularly to section 8 thereof. That section no doubt contains the latest word of the Legislature in regard to procedure in summary causes in Sheriff Courts, and would therefore, I apprehend, apply to a Dean of Guild Court petition concluding simply for a penalty exceeding £20 and not exceeding £50. But I do not think the section has any point in the present case, for this application was not, I apprehend, in any view, a "summary cause" (as defined by section 3 (i) of the 1907 Act), because, as originally brought, it included a conclusion *ad factum præstandum*. For the reasons stated, I am of opinion (1) that the procedure in the Dean of Guild Court was incompetent; and (2) that the normal procedure in Dean of Guild Courts in cases of this kind should be that of civil processes in the Sheriff Courts. It is desirable that substantial uniformity of practice should be observed throughout the country; and the information contained in Appendix I to the minute lodged in this case (which was further supplemented verbally from the bar) shows that in most of the larger burghs the practice in such cases has been to proceed by way of petition and answers with record, and not by way of complaint with minutes of procedure.

The Court pronounced this interlocutor—

"In conformity with the opinions of the Seven Judges, sustain the appeal, and recal the said interlocutor appealed against, as also the conviction of 5th May last and the interlocutors of 14th April 1908, and remit the cause to the said Dean of Guild to dismiss the complaint as incompetent, and decern," &c.

Counsel for the Complainer (Respondent)—Clyde, K.C.—Munro. Agents—Sibbald & Mackenzie, W.S.

Counsel for the Respondent (Appellant)—G. Watt, K.C.—Mercer. Agents—J. & A. Hastie, Solicitors.

Saturday, January 30.

FIRST DIVISION.

DARLING'S TRUSTEES v. JOHNSTON AND OTHERS.

Succession—Faculties and Powers—Appointment—Exercise of Power of Appointment—Objects of Exercise—Persons who might Prove not to be Objects of the Power—Postponement of Division—Appointment of Liferent to an Object of the Power.

A testator gave a liferent of £2000 to his daughter, and directed that after her decease it should be paid to any one or more of his other descendants in such

shares as she might appoint, and failing such appointment to his descendants equally among them *per stirpes*. The daughter appointed a liferent to a niece, a granddaughter of the testator, and directed that on the capital being set free on her death it should be divided in certain proportions amongst certain persons (all of whom were amongst the descendants of her father), whom failing to their respective heirs *in mobilibus*.

Held (1) that the appointment was bad, because (a) the appointees might prove to be outwith the power, *i.e.* not descendants of the granter, and (b) the appointment postponed the period of division; and (2) that the £2000 fell to be divided *per stirpes* among the testator's descendants at the time of the death of the appointing liferentrix.

Opinions reserved as to whether where there was a power of appointment of a certain sum it was a good exercise of the power to appoint a mere liferent.

Succession—Liferent and Fee—Bona fide perceptio et consumptio.

Held that the doctrine of *fruges bona fide perceptæ et consumptæ* did not apply to a liferent paid in error to the wrong person.

Hunter's Trustees v. Hunter, July 6, 1894, 21 R. 949, 31 S.L.R. 837, so far as laying down any rule to the contrary, *disapproved*.

William Darling, farmer, residing at Abbey Bank, Kelso, died on 26th July 1867, leaving a trust-disposition and settlement dated 17th February 1863, and registered in the Sheriff Court Books of Roxburghshire 12th August 1867. By it he conveyed his whole estate, heritable and moveable, to trustees for the purposes therein mentioned.

The third purpose of the said trust-disposition and settlement provided—"That my trustees shall at the first term of Whitsunday or Martinmas after my death lay out and invest in such manner as they may deem advisable two sums of two thousand pounds sterling for the respective behoof of my two daughters, the said Margaretta Elizabeth Darling and Jane Darling, and annually pay the interest or annual produce arising from the said respective sums of two thousand pounds to each of them respectively during all the days of their respective lives: Declaring that the said interest or annual produce is purely alimentary and not assignable by them, nor shall it be subject to the *jus mariti* or right of administration of any husband either of them may marry respectively, nor affectable by his debts or deeds, nor liable to the diligence of his creditors, but shall be paid to each of my said daughters on their own respective receipts allenary, and declaring further, that after the decease of my said two daughters respectively the said sum of two thousand pounds so provided for behoof of each of them shall be paid by my said trustees to the child or children and descendants of each of my said daughters

respectively so deceasing in such shares or proportions as she may direct or appoint by any writing under her hand, and failing such direction or appointment, to her said children and their descendants share and share alike *per stirpes*—that is to say, the descendants of such of the children of my said daughters respectively as may have predeceased their respective parents shall be entitled to, and draw among them equally, the share or shares of the said sum of Two thousand pounds to which their respective ancestors would be entitled to if in life, and in the event of both or either of my said daughters Margaretta Elizabeth and Jane dying unmarried or without issue, then and in that case the principal sum of Two thousand pounds to be liferented by each of them respectively shall be paid to any one or more of my other descendants in such shares or proportions as my daughter so deceasing may direct and appoint in manner foresaid, and failing such direction or appointment to my descendants equally among them share and share alike *per stirpes* as aforesaid, and in case I shall have no descendants alive at the time of their respective deaths, they shall have power to leave and bequeath the said sums to such other person as they shall respectively think fit: But declaring that in the event of both or either of my said daughters being married, the husband of such daughters or daughter shall after the decease of his wife be entitled to draw the annual produce of the foresaid sum of two thousand pounds provided to each of them."

Margaretta Elizabeth Darling died on 27th November 1904, and Jane Darling upon 22nd September 1907, both unmarried, and each leaving a trust-disposition and settlement dated 30th September 1899, and couched in exactly similar terms, excepting in so far as each sister's will was conceived in the other sister's favour.

By their said settlements each of the said sisters Margaretta and Jane Darling, after providing for the payment of her debts and the disposal of her furniture, directed her said trustees—To hold the whole residue of her estate in trust, and to pay the income thereof to her other sister, during her life, and, on the death of the latter if she should survive the testatrix, or at the death of the testatrix if her other sister predeceased her, the said trustees were directed to hold the said residue for behoof of her niece Mary Jane Robertson, and to pay the income thereof to her during her life. Each of these liferent provisions was in both settlements declared to include the interest on the sum of £2000 liferented by the testatrix under the said trust-disposition of her father the said William Darling. The trustees were then directed to pay and apply the capital of the said residue, on its being set free by the deaths of the said liferentrics—or by the death of the testatrix, if the said liferentrics both predeceased her—in the following manner, viz.—one half thereof to be paid to William Rutherford Darling, son of the testatrix' brother the said

George Rutherford Darling, whom failing to the heirs *in mobilibus* of the said William Rutherford Darling, and the other half thereof to the four children of the late Locke Rutherford Darling, also a son of the said George Rutherford Darling, equally among them, and to their respective heirs *in mobilibus*. It was further declared that the capital of the said residue should not vest until the deaths of the liferentrics, and finally there occurred in each settlement the following clause, viz.—"And considering that by the said trust-disposition and settlement executed by my said father I am entitled to the liferent of the sum of two thousand pounds, and that I have power to bequeath the said sum to such of his descendants as I may think fit, therefore I hereby leave and bequeath the said sum of two thousand pounds to the same persons who shall be entitled to the said residue of my means and estate as before provided, whether liferent or fee, in the same manner in every respect as is hereinbefore specified in regard thereto."

On the decease of Margaretta, and in accordance with the terms of her said settlement, the trustees acting under her father's settlement paid over the income of the £2000 liferented by her under the said settlement to her sister Jane in addition to the income of the £2000 liferented by the latter, and that up to her death on 22nd September 1907.

William Darling was survived by four children, viz.:—Mrs Mary Ann Darling or Robertson, wife of James Robertson, farmer, Ladyrig; the said George Rutherford Darling; the said Margaretta Elizabeth Darling; and the said Jane Darling. His descendants at the time of the said Jane Darling's death were (1) the said Miss Mary Jane Robertson; (2) Mrs Jane Pringle Robertson or Rutherford; (3) Mrs Ellen Margaretta Robertson or Harvey; (4) Mrs Agnes Christian Robertson or Henderson (all children of the said late Mrs Mary Ann Darling or Robertson); (5) the said William Rutherford Darling, a son of the said late George Rutherford Darling; and (6) the four children (all of whom were in minority) of the late Locke Rutherford Darling, another son of the said deceased George Rutherford Darling. The said descendants, along with Jane Darling, were also the whole descendants of William Darling at the date of death of Margaretta Elizabeth Darling on 7th November 1904. Mrs Rutherford, Mrs Harvey, and Mrs Henderson conveyed by their respective marriage-contracts all their right, title, and interest in the £4000 in question to trustees for the purposes of said contracts.

Questions having arisen as to the exercise of the powers of appointment conferred on Margaretta and Jane Darling by the third purpose of William Darling's trust-disposition and settlement, a Special Case was presented.

The parties to the case were (1) John Somerville Johnstone and Another, the trustees acting under the trust-disposition and settlement of William Darling, *first parties*. (2) The trustees acting under the

trust-disposition and settlement of Margaretta Elizabeth Darling, *second parties*. (3) The trustees acting under the trust-disposition and settlement of Jane Darling, *third parties*. (4) Mary Jane Robertson, *fourth party*. (5) The various trustees acting under the ante-nuptial contracts of marriage between (a) Mrs Rutherford and her husband, (b) Mrs Harvey and her husband, (c) Mrs Henderson and her husband; William Rutherford Darling, and the four minor children of Locke Rutherford Darling, *fifth parties*.

The fourth party contended (1) that the power of appointment over the said two sums of £2000 conferred on Margaretta Elizabeth Darling and Jane Darling respectively was validly exercised by each of them; (2) that Jane fell to be included, if necessary, in the class of descendants of William Darling to whom in the events specified in his trust-disposition and settlement the fee of the sum of £2000 liferented by Margaretta was destined; and (3) that in any event the estate of Jane was not liable to repay to the estate of the said William Darling any sums paid to her in respect of the sum of £2000 liferented by Margaretta. The second and third parties maintained the validity of the trust purposes set forth in the settlements of Margaretta and Jane, and to that extent accordingly they concurred in the contentions of the fourth party. The fifth parties maintained (1) that the aforesaid power of appointment conferred on Margaretta and Jane respectively had not been validly exercised by either of them, either in whole or in part; (2) that the two said sums of £2000 fell to be divided among the class of descendants of William Darling, to whom in the events specified in his trust-disposition and settlement the fee of the said two sums was destined; (3) that Jane did not, upon a sound construction of the said late William Darling's trust-disposition and settlement, fall to be included in the class of descendants called to the fee of the said sum of £2000, liferented by Margaretta, by the truster in the event of Margaretta dying unmarried or without issue, and without having validly exercised her power of appointment. They further maintained that in the event of its being held that Margaretta did not validly exercise the power of appointment conferred upon her, the estate of Jane Darling was liable to repay to the estate of William Darling any sums paid to her in respect of the sum of £2000 liferented by Margaretta. The first parties, being merely desirous of administering the estate of the said William Darling as the Court might direct, had no contentions to state.

The *questions of law* for the opinion and judgment of the Court were—“(1) Has the power of appointment over the sum of £2000 liferented by the said Margaretta Elizabeth Darling been validly exercised by her in her trust-disposition and settlement, and if so, to what extent? or (2) Did the said sum of £2000 on her death fall to be divided *per stirpes* among the descendants of the said William Darling then

alive? and if so (3) Was the said Jane Darling entitled to a one-third share of the capital of the said sum of £2000? (4) Has the power of appointment over the sum of £2000 liferented by the said Jane Darling been validly exercised by her in her trust-disposition and settlement, and if so, to what extent? or (5) Does the said sum of £2000 fall to be divided *per stirpes* among the descendants of the said William Darling alive at the date of her death? (6) In the event of it being held that the bequest to the said Jane Darling of a liferent of the sum of £2000 liferented by the said Margaretta Elizabeth Darling was invalid, are the third parties bound to repay to the first parties the sums representing the income of the said sum of £2000 received by her from and after the death of the said Margaretta Elizabeth Darling, and if so, are they liable in interest and at what rate?”

Argued for the fifth parties—The power of appointment given to her had not been validly exercised either by Margaretta or by Jane. As to the attempted appointments of liferents, a new appointment of a liferent was not good. To give a liferent was to burden the capital sum, not to appoint it. Moreover, the effect here would be to postpone the period of division. As to the attempted appointments of the capital sums, those also were bad, because those ultimately called, namely, heirs *in mobilibus* of certain of the testator's descendants, were not necessarily his descendants, and hence not objects of the power. Reference was made to the following authorities—*Mattheus Duncan's Trustees v. Mattheus Duncan*, February 20, 1901, 3 F. 533, 38 S.L.R. 401; *Neill's Trustees v. Neill*, March 7, 1902, 4 F. 636, Lord M'Laren at 640, 39 S.L.R. 426; *Lennox's Trustees v. Lennox*, October 16, 1880, 8 R. 14, 18 S.L.R. 36; *Warrand's Trustees v. Warrand*, January 22, 1901, 3 F. 369, 38 S.L.R. 273; *Mackenzie's Trustees v. Kilmarnock's Trustees*, December 4, 1908, 46 S.L.R. 217.

Argued for the second, third, and fourth parties—The appointments were good. An appointment to a mere liferent was a good exercise of a power of appointment—*Dalziel v. Dalziel's Trustees*, March 9, 1905, 7 F. 545, Lord President at 553, 42 S.L.R. 404; *Neill's Trustees v. Neill (cit. sup.)*, M'Laren on Wills, sections 2044-5. If the ultimate destination to heirs *in mobilibus* was *ultra vires*, then these words should be held *pro non scripto*. In support of the third contention of the fourth parties—*Hunter's Trustees v. Hunter*, July 6, 1894, 21 R. 949, 31 S.L.R. 837, was cited.

At advising—

LORD PRESIDENT—William Darling, farmer at Kelso, died in 1867, leaving a trust-disposition and settlement. Under the provisions of that trust-disposition and settlement, and of the third purpose thereof, he directed his trustees to lay out and invest two sums of £2000 sterling for the respective behoof of his two daughters Margaretta Elizabeth Darling and Jane Darling, and to pay to them the interest of

these two provisions as an alimentary fund during their lives. He then went on to provide as to what was to happen upon their death, and—passing over the provisions which dealt with the case of their having children, an event which did not happen—the direction proceeded as follows—“And in the event of both or either of my said daughters Margaretta Elizabeth and Jane dying unmarried or without issue, then and in that case the principal sum of £2000 to be liferented by each of them respectively shall be paid to any one or more of my other descendants in such shares or proportions as my daughter so deceasing may direct and appoint in manner foresaid; and failing such direction or appointment, to my descendants equally among them, share and share alike, *per stirpes*”; and then follows another provision for the case of there being no descendants, which I need not quote. Margaretta and Jane both survived their father, and while they lived each was paid the income of her £2000. Margaretta died in 1904; Jane died in 1907.

Now both Margaretta and Jane left trust-dispositions and settlements written in identical terms; and their trust-dispositions and settlements dealt with their own fortunes, and, so far as the residue was concerned, directed that the residue should be held for the liferent use of the surviving sister. That is to say, Margaretta provided for the liferent of her fortune being given to Jane, and Jane did the same for Margaretta. The trust-dispositions then went on to provide that when the said residue and remainder should be set free by the death of Margaretta—or Jane, as the case might be—there was to be a liferent in favour of a certain niece, Mary Jane Robertson; and at the end of her liferent the capital was to be divided—-one-half to a nephew by name of William Rutherford Darling, whom failing to his heirs *in mobilibus*, and the other half to the children of another nephew, Locke Rutherford Darling, and their heirs *in mobilibus*, with the declaration that the capital should not vest in these persons until the deaths of both liferentees; and then the dispositions continued—“Considering that by the said trust-disposition and settlement executed by my said father I am entitled to the liferent of the sum of two thousand pounds, and that I have power to bequeath the said sum to such of his descendants as I may think fit, therefore I hereby leave and bequeath the said sum of two thousand pounds to the same persons who shall be entitled to the said residue of my means and estate as before provided, whether liferent or fee, in the same manner in every respect as is hereinbefore specified in regard thereto.” Accordingly that last sentence is really just repeating in shorthand, with regard to the £2000, what had before been said in detail as regards the general residue. Margaretta, as I have already mentioned, died in 1904, and following out the provisions of her trust-disposition and settlement the interest of the £2000, which had formerly been paid to her, was after her death paid to Jane,

but only for three years, because Jane died in 1907.

Now Jane having died, the question has arisen as to what is to happen to these two sums of £2000. The whole point, of course, is—has there been or has there not been a good appointment of these two sums? If there has been a good appointment, then there is no question as to what happens at present, because Mary Jane Robertson must take a liferent of the interest of these two sums of £2000, and if Mary Jane Robertson takes the liferent, although we have been asked certain questions, it is quite clear that your Lordships would never determine *ab ante* who would take the fee, because that would occur at a period which may be long distant, and it would be quite impossible now to be perfectly certain that the persons who had the interest in the appointments were really before us. Therefore your Lordships would certainly not answer any such questions, but, of course, your Lordships will answer the question as to whether Mary Jane Robertson is entitled to the present liferent. If she is not, then, as everyone is before us who can immediately claim, your Lordships can answer that matter also.

The question has been often approached and mooted, but never decided, as to whether, where there is a power of appointment of a sum among a certain class or among certain people, it is a good exercise of the appointment to appoint a liferent. I do not think that that general question arises in this case or need be decided, and therefore I propose to reserve my opinion upon that until it does arise. But the general considerations that affect the exercise of a power of appointment are perfectly well settled. I had occasion to say something about them in the recent case of *Dalziel* (7 F. 545), and I do not propose to repeat what I then said. But it is quite clear that the appointment, to be good, must be to persons within the power. Now, here I do not think that there has been any appointment, that can be sustained, to persons within the power. There is no appointment to Mary Jane Robertson of the capital sum of £2000. She is only given the liferent, and when you come to the fee of the sum, it is given to a set of persons who are to be determined at an entirely future date, and among them are included persons who are certainly not necessarily objects of the appointment, because they are described as heirs *in mobilibus*. If you waited and found out, of course the heirs *in mobilibus* might prove to be persons who fell within the description in the power, because they might be descendants of Mr William Darling, but, on the other hand, they might not be, and I think therefore that the exercise of the power is bad for that reason.

But I think it is bad for another reason also. The cases vary in this way. A may give a power to B to exercise, and the power will be well exercised or not as it is exercised in favour of the objects of the power or not. A may say nothing more

about it if it is not well exercised, but, on the other hand, A may, if he likes, also provide for what is to be done with the fund in the event of failure of the exercise of the power, and if he does that then it is quite clear that the objects of his ulterior bounty, if I may so phrase it, have an immediate vested right to have it said if the power has been properly exercised or not, because, if not, they are entitled to immediate enjoyment of what A has given them. Now this case is of the latter class, for here William Darling did not leave it in doubt what was to happen if the power was not exercised. He provided for it, and he said, in the clause I have already read, that "failing such direction or appointment, to my descendants equally among them." The time at which these descendants are to be taken is not doubtful, because the whole of this provision must be taken with the sentence that it is to come into effect at the death of the liferentrixes. Accordingly, it seems to me that it is the descendants of William Darling at the death of each separate liferentrix who are designated, because I think that those two £2000, although in direction they are mixed up, must each be dealt with separately. The words are to be used *reddendo singula singulis*. The descendants of William Darling existing at the time of the death of one of the liferentrixes are entitled to immediate participation in and division of the fund in which she was interested unless the powers have been well exercised.

Now the moment you put the question in that form it decides itself, because it cannot be a good exercise of that power to put off the true exercise of the power for many years. I think this becomes exceedingly clear by an illustration. Supposing A, who died in, let us say, 1900, left a sum which he subjected to a power to divide among the issue or descending issue of somebody alive or the descendants of somebody dead, could anyone suppose that it would be a good exercise of that power for the person given the appointment of the power to say—"I direct that the persons to participate shall be the persons who shall have that character in the year 2000?" That of course would defeat itself; and in the same way here, though the time of course is not so ridiculous, yet the whole matter is proposed to be put off by introducing a young liferentrix, and it may be many years before Mary Jane Robertson dies.

Accordingly I think that there is no question here that the exercise of the power is bad. It cannot be brought into the category of cases where, there being a proper exercise of the power in favour of a certain person, the person exercising the power seeks in some way to clog the interest so given, in which case, as has been decided, the Court may hold that the power has been well exercised, the clogs that are merely hampering the direction flying off. It cannot be brought into that category, because here there is nothing to be given Mary Jane Robertson except a liferent.

That being so, what is the result? The

result, I think, is quite plain, that it is to fall "to my descendants equally among them, share and share alike, *per stirpes*"—that is, at the moment of the liferent ending. It follows from what I have said, therefore, that I think it was wrong to pay Jane the interest of the £2000 which was set free by the death of Margaretta; but that can, however, now be put right. Therefore the distribution of each £2000 must be taken as at the time it was set free by the death of each liferentrix. Taking Margaretta first, there was a division *per stirpes* among the descendants at her death; taking Jane second, then again there was a division *per stirpes* among the descendants at her death.

When we come to the particular shares that the persons take, all I need say is that as regards Mary Jane Robertson, who comes in I think as a representative of these ladies, she in taking her share of what Jane got must necessarily, in re-stating the accounts, allow for what was improperly given to Jane of Margaretta's £2000. An attempt was made to argue that she should not be made to pay rebate upon the doctrine of *bona fide percepta et consumpta*, and a certain case was quoted to us—*Hunter's Trustees v. Hunter*, 21 R. 949. That case was decided upon its own terms and conditions. I most respectfully say I am not to be held to agree with what it is said was there laid down as a general principle. I thought it was long ago settled, and indeed is clear law, that the doctrine of *bona fide percepta et consumpta* is a doctrine which deals with fruits. It deals only with the case where the subject is given to a wrong person in *bona fides*, which subject can be restored as a whole, and then the doctrine deals with the fruits while they were in the wrong hands, and by that doctrine such fruits are not bound to be repaid. It has no application whatsoever to wrong payments, not of fruits but of the subject itself. The liferent here paid was not a fruit—it was the thing itself. And accordingly I cannot imagine that this doctrine has any application whatsoever to a case of this class. Nor indeed here is there any equitable basis for it, for of course she will take more under her share of the capital than she would have taken under the liferent, and there is no reason she should have both.

Accordingly the questions categorically will be answered as follows—The first in the negative, the second in the affirmative, the third in the affirmative, the fourth in the negative, the fifth in the affirmative, and the sixth in the affirmative.

LORD M'LAREN—I concur in all that your Lordship has said upon the different points of the case, including the point as to the applicability of the doctrine of *fruges bona fide percepta et consumpta* in a case like this, where the question is not as to an estate of which the beneficiary has been getting the fruits, but as to an independent gift of annual income. I think also that it is right to add this, that I do not think our decision touches in any way the

point which has often been referred to, and which may possibly arise some day for decision, as to the effect of an appointment of a mere life interest to an object of the power. A donee of a power of appointment may appoint to one or more objects of the power the income for life, saying nothing about the capital, and then the question would arise whether, in accordance with the principle of *Carver v. Bowles*, 19th January 1831, 2 Russ. & Myl. 301, and the more recent decision of the House of Lords in *M'Donald v. M'Donald's Trustees*, June 17, 1875, 2 R. (H.L.) 125, it is to be taken as a gift of capital, but subject to limitations which the Court may disaffirm, or whether it is the gift of a life interest, or whether it would not receive any effect at all. But in the present case the testators have not been content with giving the life interests to objects of the power, but in each case the Misses Darling have gone on to deal with the fee in a manner which is bad for two reasons—first, that they postpone the period of division—and I agree with your Lordship that anyone claiming under the designation has a right to be heard on this point, and secondly, because persons are introduced in certain contingencies who are not objects of the power.

LORD PEARSON concurred.

LORD KINNEAR was absent.

The Court answered the first question in the negative, the second in the affirmative, the third in the affirmative, the fourth in the negative, the fifth in the affirmative, and the sixth in the affirmative.

Counsel for the First and Fifth Parties—W. J. Robertson. Agents—Ronald & Ritchie, S.S.C.

Counsel for the Second, Third, and Fourth Parties—Carnegie. Agents—Lindsay, Howe, & Co., W.S.

Tuesday, February 2.

FIRST DIVISION.

[Lord Dundas, Ordinary.

FORTH BRIDGE RAILWAY COMPANY v. DUNFERMLINE GUILDRY AND OTHERS.

Railway—Mines and Minerals—Whinstone—Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 70.

Held that whinstone is a mineral within the meaning of section 70 of the Railways Clauses Consolidation (Scotland) Act 1845.

North British Railway Company v. Budhill Coal and Sandstone Company and Others, November 24, 1908, 46 S.L.R. 178, followed.

Arbitration—Property—Disposition—Railway—Mines and Minerals—Railways Clauses Consolidation (Scotland) Act 1845

(8 and 9 Vict. c. 33), sec. 70—*Conveyance in Implement of Decree—Arbitral—No Express Mention of Minerals—Allegation that Minerals Purchased—Averments—Relevancy.*

In 1883 a railway company served notices to treat on the owners of certain lands required by them. In their claim the owners stated that one of the fields proposed to be taken contained very valuable whinstone rock, and under the heading of "land taken" they claimed, *inter alia*, a sum of £870 for the "rock value" of the field in question. They subsequently lodged an amended claim for a lump sum of £5000 for land taken. The oversman in the arbitration assessed compensation at a lump sum without itemising his award, and a disposition was thereafter granted to the company of the land taken. The disposition did not mention the minerals or refer to the whinstone.

In 1907 the company brought an action against the vendors, concluding, *inter alia*, that the whinstone rock in the land acquired by them in 1883 belonged to them, alleging that they had expressly purchased it or at all events actually paid for it. At the date of the action the arbiters, oversman, and all the chief witnesses were dead, so that no oral testimony (assuming it to be admissible) was available.

Held that as no oral evidence was available to explain the basis of the decree-arbitral, the disposition following thereon must be taken as the measure of the parties' rights, and as the disposition excluded, by virtue of the Lands Clauses Consolidation (Scotland) Act 1845, sec. 70, the rock in question, the action fell to be dismissed as irrelevant.

Question how far it is competent to refer to arbitration proceedings to interpret a formal conveyance which has followed upon a decree-arbitral.

The Railways Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 33), sec. 70, enacts—"The company shall not be entitled to any mines of coal, ironstone, shale, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug and carried away, or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

On 2nd December 1907 the Forth Bridge Railway Company brought an action against the Incorporation of the Guildry of Dunfermline, and Alexander Brunton & Son, quarrymasters, North Queensferry, and Adam Brunton, quarrymaster there, in which they concluded (1) for declarator that under the disposition after mentioned the pursuers were proprietors of the whole whinstone rock lying in or under and form-