Counsel for the Pursuer — Salvesen — Agents—Simpson & Marwick, W.S.

Counsel for the Defender—Crabb Watt. Agents—Douglas & Miller, W.S.

Thursday, March 14.

FIRST DIVISION.

[Lord Low, Ordinary.

MAIN *v.* LANARKSHIRE AND DUMBARTONSHIRE RAILWAY COMPANY.

Railway—Lands Taken under Compulsory Powers — Compensation — Deposit—Petition to Uplift Consigned Money—Reduction of Award—Default on Part of Railway Company—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *secs.* 84 *and* 86.

Section 84 of the Lands Clauses Consolidation Act enacts that promoters of an undertaking acquiring lands under compulsory powers may enter upon such lands before an award has been made fixing the amount of compensation to be paid by them for such lands, if they deposit by way of security such sum as may be fixed by a valuator to be the value of such lands, and, if required, grant a bond for a sum equal to the sum so to be deposited for payment of all such purchase money or compensation as may be determined to be payable by them. Section 86 enacts that, if the conditions of the bond shall not be fully performed, it shall be lawful for the Court of Session to order the deposit to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited.

A railway company, desiring to enter upon lands taken under compulsory powers before the amount of compensation payable therefor had been determined, deposited a sum fixed by a valuator in terms of section 84 of the Lands Clauses Act, and granted a bond for a like amount to the proprietor. An award was subsequently issued fixing the amount of compensation to be paid for the lands, but the railway company brought an action for reduction of this award. While this action was proceeding the proprietor presented a petition for authority to uplift the money deposited so far as found due by the arbiter.

The Court (*rev.* judgment of Lord Low) *dismissed* the petition on the ground that the railway company could not be in default until the action of reduction should be finally disposed of.

Fortune v. *Edinburgh and Bathgate Railway Company*, February 7, 1849, 11 D. 531, *distinguished.*

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), sec. 84, enacts—"Provided also that if the promoters of the undertaking shall be desirous of entering upon and using any such lands before an agreement shall have been come to or an award made or verdict given for the purchase money or compensation to be paid by them in respect of such lands, it shall be lawful for the promoters of the undertaking to deposit in the bank by way of security, as hereinafter mentioned, either the amount of purchase money or compensation claimed by any party interested in or entitled to sell and convey such land, and who shall not consent to such entry, or such a sum as shall by a valuator . . . be determined to be the value of such lands, . . . and also, if required so to do, to give to such party a bond . . . for a sum equal to the sum so to be deposited for payment to such party . . . of all such purchase money or compensation as may . . . be determined to be payable by the promoters of the undertaking in respect of the lands so entered upon, . . . and upon such deposit by way of security being made, . . . and such bond being delivered or tendered to such non-consenting party, . . . it shall be lawful for the promoters of the undertaking to enter upon and use such lands." . . .

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

The Lanarkshire and Dumbartonshire Railway Company, incorporated by Act of Parliament 1891, being desirous of entering upon ground occupied under lease by Thomas Main, market gardener, Milton, near Bowling, on 8th March 1893 deposited in bank the sum of £3668, 10s., being the sum fixed by a valuator in terms of the Lands Clauses Consolidation (Scotland) Act 1845. They also granted Main a bond for the like amount.

Upon 11th April 1894 the oversman (the arbiters having differed) found that the railway company were liable to the said Thomas Main in the following amounts of compensation in respect of his whole claims —(1) The sum of £2280 as the value of two acres taken (including the value of the stock therein); (2) £650 in respect of injurious affection of the remainder of the subjects held in lease; and (3) a sum alternatively of £1100, or £960, or £550, or £480, according to the nature of the accommodation works to be provided by the railway company.

Upon 15th May 1894 the railway company raised an action before Lord Low against Main for the reduction of the above award, upon the ground that the

arbiter had exceeded his powers under the reference by including in his estimate of the compensation due to Main an allowance for profits which he alleged he would have derived from the use to which he had proposed to put the ground.

Upon 6th December 1894 Main presented a petition for warrant to uplift the sum of £3668, 10s., or otherwise the sums of £2280 and £650 out of said sum.

Upon 17th January 1895—at which date an interlocutor in the action of reduction, assoilzieing the defender had been pronounced by the Lord Ordinary, but was under reclaiming-note to the Inner House—the Lord Ordinary (Low) granted warrant to uplift the sum of £2280 and the sum of £650 out of the sum of £3668, 10s. consigned, *quoad ultra* continued the petition, and granted leave to reclaim.

"*Opinion.*—The cases of *Fortune*, 11 D. 531, and of *in re Mutlow's Estate*, 1878, L.R., 10 C.D. 131, are authorities for the competency of this application.

"If the railway company had consented to make a moderate payment to the petitioner to account of the compensation to which he is entitled in respect of the lands taken, I understand that the petitioner would have been satisfied, as he alleges that all he wants is to be provided with sufficient funds to enable him to carry on the litigations which are pending between him and the railway company, upon the result of which his solvency or insolvency depends. As the petitioner must be paid for his interest in the lands taken, I think that it would have been reasonable if the railway company had consented to pay a few hundred pounds at once. As, however, they refuse to do so, and as I have disposed, so far as I am concerned, of the action of the oversman's award, I think that I must grant warrant to uplift the consigned money."

The respondents reclaimed, and argued—The petition should be dismissed or at least sisted until the action of reduction had been finally disposed of. The deposit was in security of the whole compensation to be paid. There was no provision in the Act for part payments to account out of the deposit. They were willing to pay the sum due when it had been fixed, which it could not be until the arbiter's award became final—at present it was under reduction. The award being challenged on the ground that the arbiter had exceeded his powers no part could receive effect. In *Fortune's* case the award received effect because its reduction was only threatened. There was no suggestion that the conditions of the bond had been violated.

Argued for the petitioner—The two sums for which the Lord Ordinary had given decree were due, and payment of them was not subject to any contingency. The award with respect to them should be given effect to. A further sum of at least £480 was due—it might be more. Nevertheless the railway company, although liable in at least £3410, refused to pay anything. They were seeking by delay and litigation to ruin the petitioner, and without funds he could not litigate with them. That the award was under reduction was really no answer; it stood until reduced. The case was ruled by those of *Fortune* v. *Edinburgh and Bathgate Railway Company*, February 7, 1849, 11 D. 531; and *in re Mutlow's Estate*, 1878, L.R., 10 C.D. 131. The Court could under the 86th section make such orders with respect to the deposited money as they thought fit.

At advising—

LORD PRESIDENT—I do not think that this interlocutor can be upheld. The money in question is consigned in bank, and it must remain there for the present unless there has been default in fulfilment of the conditions of the bond. The railway company have not, indeed, paid the amount of the arbiter's award, but they say that they have not paid because, though there has been what in form is an award, the powers of arbitration have not yet been duly exercised as the award has been illegally pronounced. There is in Court an action for reduction of the award at the instance of the railway company, and though the Lord Ordinary has decided against the pursuers, his judgment has been reclaimed against, and the cause is still *sub judice*. In these circumstances it seems to me impossible to hold that there has been default on the part of the railway company.

I observe that in *Fortune's* case there was this essential difference from the circumstances here, viz., that in that case there was no pending reduction of the award, but merely a threatened reduction. I do not think therefore that that decision is binding on us in deciding the present case.

LORD ADAM—I am of the same opinion. The whole matter here is regulated by statute. The land was originally taken by the railway company and as they wanted immediate possession they had recourse to the provisions of sections 83 and 84 of the Lands' Clauses Consolidation Act.

The value of the land to be taken was fixed by a valuator, and the sum named by him was consigned under the 84th section. Money so deposited is by section 86 to remain in the bank, by way of security to the parties, whose lands shall have been entered upon, for the performance of the bond to be given by the promoters of the undertaking, but at the end of that section comes the provision under which, and under which alone, the present application is made. It says "upon the conditions of such bond being fully performed it shall be lawful for the Court of Session upon an application to order the money so deposited . . . to be repaid or transferred to the promoters of the undertaking." That is the one condition of the Court's intervention, the other is this—"or if such conditions shall not be fully performed it shall be lawful for the Court to order the money to be applied in such manner as it shall think fit for the benefit of the parties for whose security the same shall so have been deposited."

Accordingly the only condition here upon which we can exercise our authority is if the conditions have not been fully performed—fully performed, that is, by the railway company. Now, have the railway company failed to fulfil the conditions of the bond "for payment of all such purchase-money or compensation as may in manner hereinbefore provided be determined to be payable by the promoters of the undertaking?" The facts are these—the arbiter pronounced his award, and, as I understand, fixed two sums, which were to be paid absolutely, and then named various other sums which were to be paid in certain contingencies. That was the position of matters, but the actual existing state of the facts is this, that an action of reduction of that award has been brought by the railway company, so that its validity or invalidity is at present *sub judice*. A reclaiming-note in this action is pending before us and yet we are now asked to say, while that award is still *sub judice*, whether or not the railway company are bound to pay the sums named in that award. If they are not bound to pay, then they are not in default and their default can only be established when their liability to pay has been finally determined.

These are the facts of the case, and on these facts I have come to the conclusion with your Lordship that we have no authority to grant the prayer of this petition, and indeed that the pursuers had no authority to present this petition.

In the case of *Fortune* referred to, an action of reduction of the award had only been threatened. There no question of liability to pay was actually *sub judice*, and therefore that case is not applicable here.

LORD M'LAREN — The only ground on which the petitioner can get up this deposit is, that the railway company is in default in not paying the compensation money awarded. But whether the company is or is not in default is a question of fact, not to be settled by the one fact that the company has not yet paid the money, but depending on all the circumstances of the case. The complaint of the petitioner is, that when he asked for his money he received instead a summons of reduction of the arbiter's award. Now, there is no appeal provided under the Lands Clauses Act from the arbiter's award, and I should hesitate to say that a party who has an award in his favour is to be kept out of his money pending inquiries into the conduct of the arbiter. But it has been explained to us that an action of reduction of the arbiter's award is depending, and that the grounds of that reduction are that the arbiter has gone beyond the terms of the reference, having included in his estimate of compensation certain hypothetical profits proposed to be derived from turning the ground into a vineyard or a horticultural establishment covered with glass. If the arbiter has exceeded his powers there can be no doubt as to the jurisdiction of the Court to set aside the award as being *ultra fines compromissi*, a jurisdiction which is in no way affected by the Act of regulations. In these circumstances I think there has not been a final determination of the amount due to the petitioner so as to put the company in default if they do not instantly pay the sum awarded. The Lord Ordinary at the end of his note says, that as the railway company had refused to pay anything meantime, and as his Lordship had disposed of the action of reduction of the award he must grant warrant to uplift the consigned money. That view would be quite sound if the Lord Ordinary's judgment in the action of reduction were final, but as the reclaiming-note against it has been presented this ground of decision fails. We have not yet applied our minds to the question raised in the reduction, and pending this reclaiming-note I think we cannot hold that the railway company is in default.

LORD KINNEAR—I am of the same opinion, and for the reasons which your Lordships have already expressed.

The Court recalled the interlocutor of the Lord Ordinary, and dismissed the petition.

Counsel for the Petitioner—R. V. Campbell — W. Thomson. Agents — W. & J. Burness, W.S.

Counsel for the Respondent — C. S. Dickson — James Reid. Agents—Clark & Macdonald, S.S.C.

Saturday, March 16.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

THE GLASGOW DISTRICT SUBWAY COMPANY *v.* ESSLEMONT.

Arbitration—Statutory Reference to Sheriff—Award—Suspension—Review—Proof to Show Grounds of Award—Glasgow District Subway Act, 1890 (53 *and* 54 *Vict. c.* 162), *sec.* 73—*Lands Clauses Consolidation (Scotland) Act*, 1845 (8 *Vict. c.* 19), *secs.* 21 *and* 22.

Section 73 of the Glasgow District Subway Act, which authorised the construction of a subway in Glasgow, provided that, if the construction of the subway should cause any "structural damage" to any buildings in the streets under which it was constructed, the company should make compensation to the owners or occupiers, and that such compensation should be ascertained in the manner provided by the Lands Clauses Consolidation (Scotland) Act. By section 21 of the Lands Clauses Act it is provided that, if the compensation claimed does not exceed £50, the amount due shall be settled by the Sheriff, and section 22 provides that the decision of the Sheriff shall be final and not subject to review.

The tenant and occupier of a dwelling-house applied to the Sheriff to fix the