

be taken as a precedent except under precisely similar circumstances.

The Court granted the augmentation craved.

Counsel for the Minister—A. J. P. Menzies. Agents—J. Douglas Gardiner & Mill, S.S.C.

## COURT OF SESSION.

Wednesday, January 6.

### FIRST DIVISION.

[Lord Ordinary in Exchequer Causes.

#### BALFOUR AND ANOTHER, PETITIONERS.

*Process—Jurisdiction—Exchequer—Petition to Uplift Parliamentary Deposit Efferring to Part of Undertaking not Completed—Jurisdiction of Lord Ordinary in Exchequer Causes to Entertain Petition—Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. c. 56), sec. 2.*

The Court of Exchequer (Scotland) Act 1856, which transfers the jurisdiction of the Court of Exchequer in Scotland to the Court of Session, and provides for the appointment of a Lord Ordinary in Exchequer Causes, enacts, sec. 2, that, “unless where otherwise expressly provided by this Act, all proceedings in Exchequer Causes under this Act shall be brought in the first instance before such Lord Ordinary.”

*Held* that section 2 was not limited to the class of causes initiated by that Act, but applied to all cases which would, but for the Act, have been brought in the Court of Exchequer, and that accordingly a petition to uplift part of a Parliamentary deposit efferring to a portion of an undertaking which had not been completed was competently presented to the Lord Ordinary in Exchequer.

*Statute—Construction—Petition to Uplift Parliamentary Deposit—Public Act Providing for Petition to Inner House—Private Act for Petition to Court of Exchequer—Application to Lord Ordinary in Exchequer—Competency—Parliamentary Deposits and Bonds Act 1892 (55 and 56 Vict. c. 27), sec. 1, sub-secs. (1) and (3), and sec. 3.*

The Parliamentary Deposits and Bonds Act 1892, sec. 1, sub-secs. (1) and (3), provides that where moneys have been deposited to secure the completion of any undertaking authorised by Parliament, and the undertaking has not been completed, “the High Court” may order that the deposit fund or any part thereof be paid or transferred to the depositors.

Sec. 3 enacts—“In the application of this Act to Scotland . . . ‘High Court’

shall mean the Court of Session in either Division thereof.”

A private Act (subsequent in date to the foregoing statute) provided that if the undertaking were not completed within the statutory limit of time, the deposit fund should be applied in payment of compensation “in such manner and in such proportions as to the Court of Exchequer in Scotland” might seem fit, and that if no such compensation were payable it should (subject to claims of creditors) be repaid to the depositors.

*Held* that as the provision in the Public Act as to the Court on whose order repayment was to be made was permissive in its terms, it was not inconsistent with that contained in the later private Act, and that accordingly a petition to uplift part of a Parliamentary deposit, efferring to a portion of the undertaking which had not been completed within the time limit, had been competently presented to the Lord Ordinary in Exchequer Causes.

The Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. c. 56), sec. 2, enacts—[*The material portion of the section is quoted supra, in rubric.*]

The Parliamentary Deposits and Bonds Act 1892 (55 and 56 Vict. c. 27), sec. 1, enacts—“Power to release deposits—(1) Where in pursuance of any general or special Act of Parliament, or of any rules made thereunder, moneys or securities have been deposited with, or are standing in the name of, the Paymaster-General”—[in Scotland the King’s and Lord Treasurer’s Remembrancer]—“to secure the completion by any company of any undertaking authorised by Parliament, and the undertaking has not been completed within the time limited in that behalf, the High Court may” . . . (after providing for compensation, &c.) . . . “(3) . . . order that the deposit fund or any part thereof be paid or transferred to the depositors. . . .”

Sec. 3—[*The section so far as material is quoted supra, in rubric.*]

The Dundee, Broughty Ferry, and District Tramways Order Confirmation Act 1904 (4 Edw. VII, cap. clxx), enacts, sec. 86—“If the company do not previously to the expiration of the period limited for the completion of the tramways, complete the same . . . then and in every such case the tramways deposit fund, or so much thereof as shall not have been paid to the depositors . . . shall be applied towards compensating any landowners or other persons whose property has been interfered with, . . . and shall be distributed in satisfaction of such compensation, as aforesaid, in such manner and in such proportions as to the Court of Exchequer in Scotland may seem fit, and if no such compensation is payable, . . . then the tramways deposit fund . . . shall be repaid or retransferred to the depositors. . . .” [Cf. General Orders under Private Legislation Procedure (Scotland) Act 1899 (62 and 63 Vict. c. 47), Order 107.]

On 15th October 1908 George Balfour, engineer, Cannon Street, London, and

another presented a petition to the Lord Ordinary in Exchequer Causes (JOHNSTON) for authority to uplift part of the fund deposited with the King's and Lord Treasurer's Remembrancer in connection with the construction of the Dundee, Broughty Ferry, and District Tramways.

At the date of the application most of the fund had already been uplifted. The remaining portions—(being the sums now sought to be uplifted)—consisted of (1) a sum of £88, 17s. 7d. effeiring to the last portion of the tramways constructed, and (2) a sum of £99, 4s. 3d. effeiring to a portion of the line which, owing to the expiry of the time limited by the Order for the completion of the tramways, could not be constructed under the existing powers.

On 6th January 1908 the Lord Ordinary in Exchequer Causes (JOHNSTON) reported the petition to the First Division. In doing so his Lordship stated that he was doubtful, looking to the terms of section 2 of the Court of Exchequer (Scotland) Act 1856, and the terms of sections 1 and 3 of the Parliamentary Deposits and Bonds Act of 1892, whether he had power to grant the prayer of the petition so far as regarded the sum of £99, 4s. 3d. His Lordship referred to the case of *Perth Quarter Sessions*, December 18, 1861, 24 D. 221.

Argued for petitioners—The petition was competently brought before the Lord Ordinary in Exchequer Causes, for section 86 of this Provisional Order impliedly provided that the deposit fund should be paid over on the Order of the Court of Exchequer in Scotland, and that meant in the first instance the Lord Ordinary in Exchequer Causes. That being so, the case of *Perth Quarter Sessions*, December 18, 1861, 24 D. 221, cited by the Lord Ordinary in reporting the petition, was inapplicable. In the case of *Mason*, May 24, 1899, 7 S.L.T. 25, a similar petition was held to be competently presented to the Lord Ordinary in Exchequer Causes.

LORD PRESIDENT—In this application, which has been reported to us by Lord Johnston, the petitioners crave power to uplift certain funds deposited in connection with the construction of certain tramways under the Dundee, Broughty Ferry, and District Tramways Order Confirmation Act of 1904. The tramways have all been constructed with the exception of a small bit, and from time to time part of the money deposited has been uplifted proportionate to the amount of the undertaking constructed. But now in the end of the day two fractions remain, namely, £88 odd and £99 odd. About the £88 no question arises, as the part of the line effeiring thereto has been completed. But there is a question as to the £99 effeiring to a small portion which has not yet been made, and which now cannot be constructed under the existing powers, for the time limit has expired.

The difficulty which has arisen is that the application to uplift the deposit was made to the Lord Ordinary in Exchequer, and the first question reported is whether any

such application could be made in view of the terms of section 2 of the Court of Exchequer (Scotland) Act 1856 (19 and 20 Vict. c. 56). By section 1 that Act transferred the jurisdiction of the Court of Exchequer to the Court of Session. By section 2 it provides for the appointment of a Lord Ordinary in Exchequer Causes, and enacts that, "unless where otherwise expressly provided by this Act, all proceedings in Exchequer Causes under this Act shall be brought in the first instance before such Lord Ordinary." The Act proceeds to deal with other matters, and initiates certain Exchequer procedure, and it might be possible to read the clause I have quoted so as to limit the provisions as to procedure to the class of causes initiated by that Act. I do not think that that is the just reading of the clause. Its true meaning is, I think, this, that, unless where otherwise expressly provided, all proceedings in causes which would have been brought in the Court of Exchequer, but are by this Act transferred to the Court of Session, must be brought in the first instance before the Lord Ordinary in Exchequer Causes. That is in accordance with long practice, and I think disposes of the first point that has been brought before us.

The other difficulty arises in this way. The Parliamentary Deposits Act of 1892 (55 and 56 Vict. c. 27), which deals with the case of money deposited or standing in the name of a Government official, after providing for the case of parties injured claiming compensation, and for the insolvency of the company, proceeds as follows:—"Subject to such application as aforesaid the High Court may, after such public notice as to the Court seems reasonable, order that the deposit fund, or any part thereof, be paid or transferred to the depositors;" and in the definition clause "High Court" is defined to be "the Court of Session in either Division thereof." That Act—which I may say, in passing, does not seem to be confined to deposits before its date—appears to limit the exercise of the powers conferred by it to the Court of Session in either Division to the exclusion of the Outer House. But the Provisional Order which we are dealing with here is later in date than the Act of 1892, and under section 86 of that Order it is provided that the deposit fund shall be distributed in satisfaction of any compensation that may be due "in such manner and in such proportions as to the Court of Exchequer in Scotland may seem fit," *i.e.*, the Court of Session; and then, after providing for payment to the liquidator in case of insolvency, it proceeds—"Subject to such application" the deposit fund "shall be repaid or retransferred to the depositors." The section does not say by whom the deposit fund is to be repaid, but there can be no doubt that it is the Court of Exchequer. Now, we would not readily hold that a public Act was repealed by implication in a private Act, but here there seems to me to be no repeal at all, for the Act of 1892 is permissive, and does not say that the same thing may not be done by Parlia-

ment in another way. And though I have a strong impression that the draughtsman of the Order overlooked altogether the phraseology of the 1892 Act, yet I think that he has drawn a code which is complete in itself, and is not inconsistent with that Act. I therefore think, keeping in view the terms of this Provisional Order, that the Lord Ordinary in Exchequer had jurisdiction to grant this petition.

LORD KINNEAR—I am of the same opinion.

LORD PEARSON—I agree.

LORD M'LAREN was absent.

The Court remitted to the Lord Ordinary in Exchequer Causes to grant the prayer of the petition.

Counsel for the Petitioners—Lyon MacKenzie. Agents—Guild & Shepherd, W.S.

Saturday, January 9.

#### FIRST DIVISION.

#### MACGREGOR'S TRUSTEES v. MACGREGOR AND OTHERS.

*Succession—Vesting—Liferent or Fee—Direction to Hold for Behoof of Testator's Children Equally, Share and Share Alike, Restricted in the Case of Daughters to Liferent with Fee to Issue—Daughter Surviving Testator but Dying Intestate without Issue—Accretion—Intestacy.*

A testator directed his trustees to hold the residue of his estate for such of his children as should survive him "equally, share and share alike, subject to the conditions following, viz., . . . in the case of my daughters I direct my trustees to retain and hold their shares, original and accreting, for their liferent alimentary use allanarly, . . . and for the issue of their bodies equally among such issue in fee. . . ." Power was conferred on the trustees to make advances to daughters out of the capital of the shares liferented by them.

Held that the one-fifth share of the residue of the testator's estate, liferented by one of his daughters who survived him but died intestate and without issue, had not vested in her, and that on her death it did not accrete to the residuary legatees but fell into intestacy.

John Nicholson, manager of the Clydesdale Bank, Limited, Edinburgh, and others, the trustees acting under the trust-disposition and settlement of the late Donald MacGregor, Ardgartan, Argyllshire (*first parties*); Gregor MacGregor, stockbroker, London, and others, beneficiaries and residuary legatees (*second parties*); Donald MacGregor, underwriter, Lloyd's, London, as an individual (*third party*); Mrs Euphemia Watt or MacGregor, the testator's widow (*fourth party*); and the

said Donald MacGregor, as executor-dative of the deceased Miss Effie Watt MacGregor, a daughter of the testator (*fifth party*), brought a Special Case for the determination of their rights in the one-fifth share of the residue of the testator's estate liferented by the said Miss Effie Watt MacGregor.

By his trust-disposition and settlement the testator provided as follows—"Tenth. As to the residue of my means and estate, including the part thereof which may be set aside to provide Mrs MacGregor's annuity, I direct my trustees to hold the same in trust for behoof of such of my children as shall survive me, or who having died shall leave issue surviving me who shall attain majority, equally share and share alike, subject to the conditions following, viz., subject to the condition and right to postpone payment hereinafter conferred on my trustees I direct my trustees to pay the shares of my sons to them as the same become available for distribution, but in the case of my daughters I direct my trustees to retain and hold their shares, original and accreting, for their liferent alimentary use allanarly, exclusive of their husband's *jus relicti*, *jus mariti*, and rights of administration, and for the issue of their bodies equally among such issue in fee, provided such issue attain the age of twenty-one years complete; declaring always, however, that notwithstanding the direction to my trustees to pay and hold the shares of my children in the residue of my estate as above written, such direction is subject always to the power hereby conferred on my trustees to postpone for such period or successive periods as they may think fit the payment of the shares of residue hereinbefore provided in the case of all or any of my children or of their issue, and to apply the interest or annual produce of the same during the period of such postponement for the alimentary use and behoof of such children or their issue as aforesaid, and should they see cause and think proper to exercise the power, my trustees are hereby authorised, instead of making actual payment to any one or more of my children or of their issue of their shares of my estate at the interim or final divisions thereof, to settle, limit, and destine the whole or any part of the share of any of my children or their issue by investing the same in the names of my trustees themselves or otherwise, so that the same may be enjoyed by such child or children or issue as an alimentary fund for their liferent allanarly, and their issue in fee, or in such other way and manner as my trustees shall deem right and proper, having regard to the position and circumstances of each child, of the expediency and the time and manner of exercising which power to limit the rights of my children and their issue as aforesaid my trustees shall be the sole and final judges. Further, I provide that my trustees shall have power to advance and pay to any one or more of my daughters from time to time out of the capital liferented by her or them such sums as my trustees may think neces-