Thursday, March 12.

SECOND DIVISION.

[Lord Gifford, Ordinary.

THE SOLWAY JUNCTION RAILWAY COMPANY *v.* JOHN JACKSON, &c.

Railway Company—Lease—Compensation to Tenant —Lands Clauses Consolidation (Scotland) Act.

The clay in certain lands was leased to a tenant who claimed compensation from a railway company for the clay sublying that portion of the lands traversed by their line. *Held* that the tenant had a sufficient interest to form the subject of a statutory submission under the Lands Clauses Consolidation Act.

Railway Company—Statutory Acquisition by Railway—Resumption by Landlord under Lease.

Held that the statutory taking by a railway company was not equivalent to a resumption or exclusion by the landlord under the lease.

This was a note of suspension and interdict presented at the instance of the Solway Junction Railway Company against John Jackson, Shawhill. near Annan, tenant of the brickwork and clayfield of Whinnyrigg there, and others, arbiters in an alleged submission between the railway company and Jackson. The complainers prayed the Court to interdict the respondents from assessing, under the Lands Clauses Consolidation (Scotland) Act, 1845, the compensation claimed by the respondent Jackson from the railway company in respect of clay said to be permanently covered by their line of railway since its construction and detour, for access to clay at the west side of the line. Jackson, on the ground that he had in 1859 leased from the proprietor of the lands of Whinnyrigg the whole common clay under these lands, and that these lands embraced the lands through which the defenders' railway passed, claimed that he had an interest and claim which might be made the subject of a statutory submission with the suspenders, under the Lands Clauses Consolidation (Scotland) Act and relative statutes; and further, that certain proceedings had been gone into in the way of such statutory arbitration, which it was partly the object of the present suspension to stop. The complainers pleaded that Jackson had no right or interest in the lands in respect of which he claimed compensation, and that they (the railway company) were therefore entitled to interdict, as craved. The parties differed (1) as to whether an expression in the clay lease, "lands of Whinnyrigg," embraced all the lands of Mr Halliday (the proprietor), or was confined to the portion of them formerly going by the names of Old and New Whinnyrigg; and (2) as to whether the statutory taking by the railway company was equivalent to a resumption or exclusion by the landlord under the lease.

The Lord Ordinary (GIFFORD) pronounced the following interlocutor:—

"*Edinburgh, 4th December* 1873.—The Lord Ordinary having heard parties' procurators, and having considered the closed record, proof adduced, and whole process: Finds it sufficiently instructed that the respondent John Jackson had, under his lease granted to him by the Rev. Walter Stevenson Halliday, dated 19th November 1859 and 11th March 1861, No. 51 of process, an interest in the whole common clay in the lands of Whinnyrigg which belonged to the said Walter Stevenson Halliday: Finds that, according to the true construction of the said lease, having regard to the circumstances in which it was entered into, the 'lands of Whinnyrigg' therein mentioned embraced, and must be held to embrace, the lands through which the defenders' railway passes, and accordingly Finds, in point of law, that the suspender had an interest and claim which might be made the subject of a statutory submission with the suspenders under the Lands Clauses Consolidation (Scotland) Act, and relative statutes: Therefore repels the reasons of suspension: Finds the statutory arbitration orderly proceeded, and appoints the same to be carried out, and decerns: Finds the respondent entitled to expenses, and remits the account thereof to the auditor of Court, to tax the same, and to report.

"*Note.*—The principal, and indeed the only, question in this case is, whether the respondent, as mineral or clay tenant under the lease No. 51 of process, had or had not such an interest in the lands through which the suspenders' railway passes as to be the subject of a statutory submission under the Lands Clauses Act and relative statutes? The Lord Ordinary answers this question in the affirmative, and accordingly he has repelled the reasons of suspension, and allowed the statutory submission to proceed. He decides nothing as to the nature or extent of the respondent's claim. He does not even attempt to define the jurisdiction of the statutory arbiters or oversman. It would be dangerous to do so. If the arbiters or oversman exceed their powers or jurisdiction, this must be rectified in another form. It is enough for the disposal of the present action to find that the respondent, as clay tenant, has an interest or possible interest in the lands taken by the suspenders.

"(1) The great dispute between the parties is whether the expression in the lease, 'lands of Whinnyrigg,' embraces all Mr Halliday's lands, or is confined to that portion of them which formerly went by the names of Old and New Whinnyrigg. On this point there has been a good deal of evidence, and somewhat nice questions arise as to the competency and effect of portions of this evidence.

"On the whole, the Lord Ordinary thinks it sufficiently proved that in the sense of the lease, and according to the true meaning of the contracting parties, the 'lands of Whinnyrigg' embrace Mr Halliday's whole lands, which were then all let to one agricultural tenant. No doubt the lands were acquired at separate times, and had originally a great variety of different names. But Whinnyrigg was the original acquisition of the Halliday family. The extent of Whinnyrigg, Old and New was greater than that of the other lands, and in some of the titles, which include Seafield and Walls, for example, in the precept of *clare constat*, No. 27 of process, the Hallidays are designed as 'Esquire of Whinnyrigg.' It was very natural that the new acquisitions should be added to the old, and fall under the old name.

"It is proved by the factor on the estate, who adjusted the lease, that he used the word 'Whinnyrigg' as embracing the whole lands, and that he used the word as synonymous with Seafield. It is also proved that the whole lands were pointed out o the tenant, and actually pitted for clay, as the ands the clay in which was to be let, and the clay

is reserved from the agricultural lease of the whole lands. The Lord Ordinary thinks this evidence competent, not as controlling or overruling the terms of the lease, but as explaining the meaning of a word or name used in the lease, and which word or name does not explain itself. If competent, the evidence leaves little doubt that the clay in the whole lands was let to the respondent. Certainly both lessor and lessee understood Whinnyrigg as comprehending the whole farm.

"(2) The Lord Ordinary does not think that the statutory taking by the Railway Company is equivalent to resumption or exclusion by the landlord under the lease. Taking by the railway was not the thing contemplated by the clauses of resumption; and the tenant was entitled to assume that the landlord resuming would not resume in the same way, or so prejudicially, as the railway has done. Besides, the landlord never in fact attempted to resume or exclude, and it is *jus tertii* to the Railway Company to say that he might have done so. The right to resume or exclude under the lease does not accrue to the Railway Company by the mere fact of their taking a stripe of ground through the farm."

The Railway Company reclaimed.

At advising—

Lord Benholme—My Lords, there are two points presented for our consideration in this case.

The first is, as to whether the ground in question is embraced in the lease to the respondent Mr Jackson. This I am for deciding not by a strict examination of the titles, but rather by endeavouring to ascertain what was the meaning and intention of the parties when they entered into the contract. Accordingly I have without difficulty arrived at the conclusion that this piece of ground did fall under the lease.

As regards the second point, I have felt some difficulty, but I have come to be of the same opinion as the Lord Ordinary, viz., that the statutory taking of the ground by the Solway Junction Railway Company is not equivalent to resumption by the landlord under the lease. This conclusion, I may add, I have arrived at for the same reasons as those stated by the Lord Ordinary at the end of his note.

The other Judges concurred.

Counsel for the Railway Company—Watson and Mackintosh. Agents—T. & R. B. Ranken, W.S.

Counsel for the Respondents—Solicitor-General (Millar) Q.C. and Reid. Agent—J. B. Mackintosh.

Thursday, March 12.

SECOND DIVISION.

[Lord Mure, Ordinary.

THE CALEDONIAN BANKING CO. *v.* FRASER, &C.

Succession—Liferent—Fee.

A truster having left the liferent of certain property in the first place to his daughters and the survivors of them share and share alike, and there being no evidence of any intention that these directions should be departed from in favour of the children of a predeceasing daughter—*Held* that the rents fell to be divided equally among the truster's surviving children, and claim put in for his grandchildren through a deceased daughter *repelled.*

Succession—Heritage — Liferent — Fee — Holograph Writing—Marginal Addition.

A father left by disposition certain property to his surviving daughters in liferent and their children in fee, but excluding the right of the children of any predeceasing sister to draw the rents of their *pro indiviso* share of the fee during the lives of the surviving daughters. There was also a clause reserving power generally to do everything thereanent as if he were sole and absolute fiar. Subsequently he made a holograph marginal addition to the disposition as follows:—"If any of my daughtrs deae and live childern, they fall into the mother shear of the rents, and so on whill any of there Ants live, after this it fall in equll share to all my grandchildren by my daugters, in eqal shears, meal and femal." One of the daughters having died, her children claimed the accumulations of her share of the rents since her death. *Held* that the terms of the marginal addition were sufficient without express words of recall to give the liferent of their mother's share to the children, and were good to the effect of conveying heritage.

Observed (*per* Lord Mure) that the fact of the alteration being made by a marginal addition and not by a separate writing could not prevent its being operative as a declaration of intention in a family settlement.

This multiplepoinding was raised to determine the succession to a portion of the estate of the late Alexander Fraser, tide-waiter in Inverness, who died in the year 1841, and possessed at that time two properties, the one in High Street and the other in Bridge Street, Inverness. The Bridge Street property was bought by Fraser in 1826, and the title was taken "to and in favour of the said Alexander Fraser and Mrs Janet Kay, otherwise Fraser, his spouse, in conjunct fee and liferent for the said Mrs Janet Kay, otherwise Fraser, her liferent use allenarly, and after the death of the said Alexander Fraser and Mrs Janet Kay, otherwise Fraser, to Isabella Fraser, Mary Fraser, Margaret Fraser, Janet Fraser, and Catherine Fraser, daughters procreated of the marriage between the said Alexander Fraser and Mrs Janet Kay, otherwise Fraser, and any other child or children, male or female, to be procreated of the said marriage, or of any future marriage into which the said Alexander Fraser shall enter, equally, share and share alike, and the survivor of them, in liferent, for their liferent use allenarly, and to the child or children of the said Isabella Fraser, Mary Fraser, Margaret Fraser, Janet Fraser, and Catherine Fraser, or any other child or children to be procreated as aforesaid, male and female, equally share and share alike, their heirs and assignees whomsoever, heritably and irredeemably, in fee."

The High Street property was conveyed by Alexander Fraser in trust to certain trustees, for the following purposes, *inter alia*:—"*In the third place*, I further direct and appoint my said trustees or trustee to pay over from time to time the free rents and profits of the foresaid burgage subjects in High Street to James Fraser and Alexander Fraser, my sons, and Miss Margaret Kay, my sister-in-law, equally between them, share and share alike, but in case the said Miss Margaret