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

Kay shall predecease the longest liver of me and my said spouse, then and in that event I appoint my said trustees or trustee to pay over to my said daughters, and the survivors of them, in equal proportions, the one-third share of the said rents hereby appointed to be paid to her, the said Margaret Kay: *In the fourth place,* In case the said Margaret Kay shall survive the longest liver of me and my said spouse, and shall also survive one of my said sons, it is my will and I hereby declare that she shall be entitled to the sum of £5 sterling yearly over and above her said third of the rents of the said property, which shall be paid by my said trustees or trustee out of the share of the said rents, &c., belonging to whichever of my said sons may happen to predecease her, and I direct and appoint my said trustees or trustee to pay to my said daughters, or the survivors of them, in equal proportions, the residue or balance of such share; declaring that in case she, the said Margaret Kay, shall survive both my said sons, she shall be entitled, after the death of the longest liver of them, to the just and equal parts of the said free yearly rents and profits, which I direct my said trustees or trustee in that event to pay to her accordingly, and upon the death of the said Margaret Kay it is my will that the share of the said rents hereby appointed to be paid to her shall in like manner be from time to time divided among my said daughters, and the survivors of them, share and share alike; and upon the death of the survivor of my said sons, the share of the said rents belonging to him in virtue of these presents shall likewise be paid over to and divided among my said daughters, and the survivors of them, in equal proportions: *In the fifth place,* In case my said sons, or either of them, shall leave lawful issue, I hereby direct and appoint my said trustees or trustee, upon the death of the longest liver of my said sons, to dispone, convey, and make over the said burgage subjects in High Street to the lawful child or children, whether male or female, of my said sons, or either of them, equally between them, share and share alike, in case there shall be more than one, whom failing, the said property shall fall and belong to my nearest and lawful heirs; but such conveyance shall be granted with and under the burden of the liferent right hereby created in favour of my said daughters and the said Margaret Kay, or such of them as shall survive the longest liver of my said sons; it being my wish and desire that my said trustees or trustee shall retain the management of the said property, and uplift and apply the rents thereof until the said liferent rights be completely extinguished."

The truster left two sons, one of whom died in 1834, the other being a defender in the present case; and five daughters, one of whom died unmarried and intestate in 1850, and another of whom married Alexander Rennie, solicitor in Inverness, and died in 1851, leaving three children (claimants in the action); three of the truster's daughters still survive, and are claimants, and the real raisers in the multiplepoinding. The rents of the two properties were divided without question among the truster's family claiming right thereto until 1862, when questions arose as to the disposal of the shares of the rents which, in the events which had happened, would have been payable to Mrs Rennie, if she had survived; and these shares had since been allowed to accumulate in respect of said questions, which the present action was raised to settle. The accumulation in this way of the rents of the Bridge Street property amounted to £143, 2s. 7d., and of the High Street property to £45, 14s. 5d.; these two sums together formed the fund *in medio.* The three surviving daughters of the truster claimed the whole fund, on the ground that under the deeds in question Mrs Rennie's liferent share in both properties devolved at her death upon them as her survivors. The children of Mrs Rennie, on the other hand, claimed their mother's share of the rents of the Bridge Street property, on the ground of a marginal note on the disposition in question, said to be holograph of their grandfather, in the following terms—"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 granchilden by my daugters, in eqal shears, meal and femal. (Signed) ALEXR. FRASER." And they also claimed her share in the rents of the High Street property, on the plea that under the trust-disposition they took as conditional institutes said share of the rents until they fell to be conveyed to the persons named in fee.

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

"22*d December* 1873.—The Lord Ordinary having heard parties' procurators, and considered the closed record and productions: 1*st*, Ranks and prefers the claimants, Mrs Isabella Fraser or Jack; Mrs Mary Fraser or Osborne, wife of William Osborne, and him for his interest; and Mrs Catherine Fraser or Aitchison, wife of John Aitchison, and him for his interest, each to one-third of the sum of £45, 14s. 5d., forming the second item of the fund *in medio,* with the interest due thereon, less a proportional share of the expenses found due by the interlocutor of 18th July 1873, and decerns: *Quoad ultra,* repels the claim of the said parties: 2*d*, Ranks and prefers the claimants, Alexander Rennie, John Rennie, and Jessie Rennie or Manhood, wife of Manhood, and him for his interest, in terms of the second head of their claim, to the sum of £143, 2s. 7d., forming the first item of the fund *in medio,* with the interest due thereon, less a proportional share of the expenses found due by the interlocutor of the 18th of July 1873, and decerns: *Quoad ultra,* repels the claim of the said parties, and finds no expenses due to or by either party in this competition.

"*Note.*—1*st.* As regards the claim made in this process by the children of the late Mr Rennie to the portion of the fund *in medio* which consists of the rents of the property situated in High Street, Inverness, which was settled in trust by the late Alexander Fraser in 1838, it appears to the Lord Ordinary that the provisions of the trust-deed are very express, to the effect that the free rents and profits of the subjects were, on the failure of any of the parties to whom they were in the first instance appointed to be paid, to go to the truster's daughters and the survivors of them in equal proportions, share and share alike; and that there is nothing in the terms of the trust to indicate that there was any intention on the part of the truster that these express directions were to be departed from in the case of a deceasing daughter leaving a family. Because not only are those rents so destined to the daughters throughout the clause founded on, but even when the truster comes to provide for the disposal of the fee of the estate, in the case of either of his sons, to whom in the first instance a

share of the free rents and profits was appointed to be paid, leaving lawful issue, the conveyance which is directed to be made in favour of those issue is expressly burdened with the liferent right created in favour of his daughters, 'or such of them as shall survive the longest liver' of his sons. The Lord Ordinary has therefore repelled the claim of Mrs Rennie's children to the share of these rents, which would have gone to their mother had she been alive.

"2*d*. The claim made by these children to the share of the rents of the Bridge Street property, which would have fallen to their mother, raises a question of considerable nicety; but after giving that question the best consideration in his power, the Lord Ordinary has come to the conclusion that the holograph alteration made by the late Mr Fraser on the margin of the disposition of that property, which was found with that alteration upon it in his repositories at his death, is sufficient to operate as a recal or exclusion of the liferent interest of the survivors of his daughters as regards the *pro indiviso* share of the rents which had been enjoyed by a deceasing daughter, in favour of the children of that daughter. For although there are no words of disposition in the holograph alteration, the circumstance that a *pro indiviso* share of the fee of the property was by the original deed conveyed to the children of that daughter, appears to the Lord Ordinary to be sufficient to obviate the conveyancing difficulties which might otherwise have been felt in considering whether effect should be given to that marginal addition.

"By the dispositive clause of the deed the property was conveyed to Alexander Fraser and his wife in conjunct fee and liferent, and after their death to their five daughters *nominatim*, share and share alike, and to the survivor of them, 'in liferent, for their liferent use allenarly,' and to the child or children of the said daughters equally, 'share and share alike, their heirs and assignees whomsoever, heritably and irredeemably in fee.' But although by the terms of this clause a gift is made to the survivor of the daughters of the liferent of any predeceasing sister's share of the rents, to the exclusion of the right of the children of that sister to draw the rents of their *pro indiviso* share of the fee during the lives of the surviving daughters, there is a clause of reservation in the disposition, which confers upon their father full power and liberty at any time in his life, and without the consent of his wife, or of their said children, to sell, or 'even gratuitously to dispone the subjects; and, generally, to do everything thereanent as if he were sole and absolute fiar, and as if there had been no conveyance' in favour of his wife in liferent, or of his children and their foresaids in liferent and fee.

Such being the nature of the power reserved in the disposition, and which is appointed to enter the infeftments, and the fee of the property having been distinctly conveyed to the children by the disposition, it appears to the Lord Ordinary that any duly authenticated holograph writing of Mr Fraser which either expressly or by necessary implication indicated a clear intention on his part to exclude the surviving daughters from the liferent of a deceasing daughter's share, and that the children of that daughter, who were by the conception of the deed the *pro indiviso* fiars of a portion of the property, should upon their mother's death, draw the rents of that share instead of their surviving aunts,—is a declaration of intention to which effect should be given in the matter of a family settlement, of which this deed is substantially a part—if that can be done, as it here in the opinion of the Lord Ordinary can, without any infringement of the rules applicable to the conveyance of heritable estate. If, therefore, the late Mr Fraser, in the exercise of the power of alteration, had by a separate holograph writing made a declaration of similar import to that in the marginal addition, of his wish and intention relative to the disposal of the share of the rents which he had gifted to any of his daughters who died leaving children, that declaration would, it is thought, have been sufficient without any actual words of recal, or any words disponing the liferent interest of the predeceasing mother to her children, to entitle these children, as fiars, to draw the rents of the *pro indiviso* share of the property belonging to them in fee. And if the Lord Ordinary is right in this view, he does not think that the circumstance that the alteration in question was not made by a separate writing, but upon the margin of the deed, although in a somewhat rough way, by the party himself, is sufficient to entitle the Lord Ordinary to refuse to allow effect to be given to it, in favour of the parties for whose benefit it was plainly intended to operate."

The daughters, Mrs Jack, and others, reclaimed, and argued—

The marginal addition, if it be holograph of the granter, is not good to the effect of conveying heritage. [Lord Neaves—Was the marginal addition there at the date of infeftment?] We do not know; but it is not in the infeftment. This is not a habile way of conveying the liferent to the children.

Authorities—*Richmond's Trs.*, 3 Macph. 395, 2 Bell's Lect. 866; *Ross*, 1779 Exch. Dec.; 1 M'Laren 492 and 963; *Govan*, 20th Jan. 1812, F.C.; *Henderson*, M. 4141.

The pleas in law for the claimants were as follows:—"(1) On a sound construction of the disposition of the Bridge Street property, the claimants on the death of their mother became entitled to the share of the rents which would have fallen to her if in life, and the same are payable to them until the time arrives for their receiving a conveyance of the fee. (2) The memorandum on the said disposition being holograph of the deceased and authenticated by his signature, is a valid testamentary writing, and in accordance therewith the claimants ought to be preferred in terms of their claim. (3) The writing is at least admissible as an aid to the construction of the deed. (4) Under the trust-disposition and settlement of the deceased the claimants take as conditional institutes their mother's share of the rents of the High Street subjects until the same fall to be conveyed to the persons named in fee, and they therefore ought to be ranked and preferred in terms of their claim."

At advising—

Lord Justice-Clerk—The Lord Ordinary is right; the objections taken to the effect of the marginal addition to the deed are not well founded. Fraser does not dispone to his children, but purchases the property and takes conveyances of the property so purchased. He dispones so that he and his wife are to have the liferent and the grandchildren the fee. He reserves powers to

himself in full terms to do everything as if he were the full fiar.

Infeftment was taken upon the deed, so that there is a valid disposition. Nothing remains but the question whether the disponer had the power to make this alteration. I think he had the power necessary to do so. This is an alteration not requiring feudal forms, merely a common provision, and one competent. This is practically the same case as if the parties were trustees.

LORD BENHOLME—I am substantially of the same opinion. The last consideration stated by your Lordship is quite satisfactory to me. These persons were trustees in the interest of the children.

LORD NEAVES—I am of the same opinion. There is no conveyancing difficulty here, the granter had distributed the full fee and liferent, he only altered the proportions of the conveyance. I am by no means convinced that he might not have altered the conveyance of the whole liferent.

LORD ORMIDALE—I am of the same opinion, on the grounds stated by your Lordships.

The Court adhered to the interlocutor of the Lord Ordinary.

Counsel for the Reclaimers—H. J. Moncreiff. Agent—Charles S. Taylor, S.S.C.

Counsel for the Claimants Alex. Rennie and Others—Guthrie Smith and R. V. Campbell. Agents—Douglas & Smith, W.S.

Friday, March 13.

SECOND DIVISION.

IRWIN AND MACGREGOR, PETITIONERS.—(RENFREWSHIRE ELECTION.)

Election Petitions Act (31 *and* 32 *Vict. c.* 125)—*Ballot Act* (35 *and* 36 *Vict. c.* 33)—*Enumeration of Votes—Specific Averment—Relevancy.*

Certain electors having presented to the Court a petition praying for a recounting of the ballot papers in a parliamentary election on the general averment that a mistake or mistakes had been made by the Returning Officer in his enumeration,—*held* that such a petition was relevant, that questions as to counting of the ballot papers might competently be tried by the Election Judges, and that the averments were sufficiently specific; and prayer of a note for the respondent *refused.*

This was a petition presented to the Court by Charles Edward Irwin, 62 Maxwell Street, Glasgow, and James Macgregor of Pollockshiels, timber merchant, electors in the county of Renfrew, against the election of Colonel Mure of Caldwell as Member of Parliament for that shire. The election took place on February 5, 1874, and Colonel Mure was returned as duly elected by a majority over his opponent, Colonel Campbell of Blythswood. The grounds of the petition were set forth in articles 3 and 4, as follows:—"3. And your petitioners say that they believe and aver that the majority of the votes was in favour of Colonel Campbell, and they believe and aver that a mistake or mistakes were made in the counting of the voting papers at the said election. 4. And your petitioners further say, that the mode of procedure at the counting of the voting papers at said election was unsatisfactory, inasmuch as the counting of the different enumerators, of whom there were twelve or thereby, was in no way checked, and in this respect the said counting was differently conducted from the counting at the previous election for the said county in September 1873, when Colonel Campbell was returned by a majority of one hundred and seventy-six votes or thereby against the said Colonel William Mure." The petition further stated that the agent present at the counting on Colonel Campbell's behalf requested the Returning Officer to check the votes by recounting them, and that he refused this request. The prayer of the petition was thus expressed:—"Wherefore your petitioners pray that it may be ordered that the voting papers used at the said election be recounted, so that the correct numbers voting for each candidate be ascertained; and that it may be determined that the said Colonel William Mure was not duly elected or returned, and that the said Colonel Archibald Campbell Campbell was duly elected, and ought to have been returned." On behalf of Colonel Mure, a note was presented to the Lord President of the Second Division of the Court, as follows:—"My Lord Justice-Clerk,—The said petition, which was presented of this date [March 2, 1874], does not contain any statements relevant or sufficient to support the prayer of it; and, *separatim*, the prayer for an order to have the voting papers recounted is not warranted either by the said Parliamentary Elections Act, 1868, the Ballot Act of 1872, or any other statute law or practice. May it therefore please your Lordship to move the Court to dismiss the said petition as irrelevant, and as containing a prayer not warranted by any law or practice."

Argued for Colonel Mure—We must notice the allegations contained in the petition and the prayer with which it concludes. The third article is the most important one, as being the only one in which any averment warranting this complaint is made. In the fourth article, relating to the procedure, there is no alleged violation either of any statutory direction or of any rule of procedure made by the judges, nor is it said that anything in the procedure led to injustice or to error. The only remaining portion of this article sets forth that the procedure on this occasion was different from that adopted at a previous election, when Colonel Campbell was returned. That certainly is no ground of complaint, as both modes may be right; and further, the former mode may have been, for ought that is stated, wrong. [LORD ORMIDALE—It was not checked on this occasion; that is the difference.] We are not told what sort of checking was used or to be used, or that checking was essential to a true result. Article five is yet more irrelevant, as all that is there said is, that there was a request for recounting which was refused. Every one, under this view, might say, "Count over again;" and it is impossible to tell when this would stop. The whole question, then, turns on article three. As regards mistakes, it does not say what these were; whether against, or, for ought we know, in favour of Colonel Campbell. [LORD ORMIDALE—It does not say that Colonel Mure was returned in consequence of these mistakes?] No. It is not said that the mistakes were such as to influence the result. That is a very important consideration. In criticising the