

erected, the value of which was stated to be £2500.

Counsel for the petitioner stated that it was not desired to transfer the manse and offices, but only the glebe round about them.

In these circumstances the petitioner pleaded that he was entitled to have a glebe transferred from the united parish of Hoddam, a portion thereof being part of the *quoad sacra* of Brydekirk. The Act was not to be construed as applying only to the case where the portion disjoined had by itself been erected into a *quoad sacra* parish; to do so would render it imperative. It was not contended that any portion of the united parish would be sufficient; it must be a reasonable portion, which this was.

The respondent pleaded—That the petitioner was not entitled, under the provisions of the United Parishes Act 1876, to obtain the transference sought, in respect the *quoad sacra* parish of Brydekirk was formed by the disjunction of portions of various parishes, and not by the erection of a portion of the parish of Hoddam alone into a *quoad sacra* parish.

The comparers, the heritors, adopted the answer for the respondent.

At advising—

LOED PRESIDENT—This is a petition under the 4th section of the Act 39 Vict. c. 11. The petitioner is the minister of the *quoad sacra* parish of Brydekirk, and asks to have a glebe transferred from the benefice of Hoddam to the benefice of the parish of Brydekirk in the following circumstances:—

Under the Act 1609, c. 23, the parish of Hoddam was composed of the old parishes of Hoddam, Ecclefechan, and Luce.

The *quoad sacra* parish of Brydekirk was erected under the provisions of 7 and 8 Vict. c. 44 (commonly known as Sir James Graham's Act), and was composed of portions of the parishes of Annan, Cummertrees, and Hoddam.

Section 4 of 39 Vict. runs thus—"If a portion of a united parish in Scotland has, under the provisions of the recited Act been created into a parish *quoad sacra*, and it shall appear in the course of any proceedings taken under this Act that there is more than one glebe forming part of the benefice of such united parish, it shall be lawful for the Court of Teinds . . . to decern and declare that one of such glebes . . . shall be transferred from the minister of such united parish to the minister of such parish *quoad sacra*." The petitioner maintains that his parish being composed of a portion of the united parish of Hoddam, he is entitled to one of its glebes under this section.

Now, in construing it, regard must be paid to the preamble and previous sections of the Act.

The part of the preamble which is important in this question is this—"And whereas it is expedient that where an application is presented under the recited Act (7 and 8 Vict. 44) for the disjunction of a portion of a united parish having more than one glebe, and its erection into a parish *quoad sacra*," it shall be lawful to transfer a glebe, &c. Section 3 is also important, and is as follows:—"If in the course of any proceedings under the recited Act, for the disjunction of a portion of a united parish in Scotland and for its erection into a *quoad sacra* parish, it shall appear

that there is more than one glebe forming part of the benefice of such united parish," it shall be lawful to transfer, &c.

Now, reading section 4 in the light of the preceding parts of the Act, I am of opinion that the intention of the Act was to give a right to a glebe from the united parish only in the case where the portion taken from it had by itself been erected into a *quoad sacra* parish. Upon the question whether it might not be extended to the case of a *quoad sacra* parish composed of portions of several parishes, whereof the part taken from the united parish is the largest, I give no opinion—it is not the case here. Parties are not quite at one as to the facts stated in the answers of the heritors; but taking the admissions of counsel for the petitioner made at the bar, it is evident that only a small part of the united parish of Hoddam forms part of the parish of Brydekirk, and that by far the greater portion of that parish has been formed of parts of the parishes of Annan and Cummertrees. I am therefore of opinion that to this case the Act does not apply, and the petition must be dismissed.

LORDS DEAS, MURE, SHAND, and CLARK concurred.

The Court pronounced this interlocutor:—

"Refuse the prayer of the petitioner: Find the petitioner liable in the expense of a single appearance for the respondents; allow an account thereof to be given in, and remit," &c.

Counsel for Petitioner—Balfour—Mackintosh. Agent—Chas. S. Taylor, S.S.C.

Counsel for Minister and Heritors—Kinnear—R. Johnstone. Agent—Mackenzie & Kermack, W.S.

Tuesday, June 5.

SECOND DIVISION.

[Lord Adam, Ordinary.]

CALEDONIAN RAILWAY CO. v. SMITH AND NIMMO.

Lease—Power of Resumption—Limestone Quarry—Mineral Tenant.

A proprietor leased for nineteen years certain lime-works, limestone quarries, and the adjoining coal, and also some land. The lime-works were adjacent to a railway siding at which the tenants loaded their lime. The lease contained a power to the landlord to resume "land" to the extent of several acres. It also contained a stipulation that in the event of the siding being used by others than the tenants, the tenants should have the exclusive access thereto at the east end. The lands having been subsequently feued to a railway company, they proposed, under the power of resumption, to take, *inter alia*, the accesses to the lime-works, and the siding, substituting therefor others equally good as they alleged, but not exclusive.—*Held* that

they were not entitled to take the said accesses, in respect that (1) the power of resumption applied only to "lands," while the accesses were fairly part of the lime-works; and (2) that the exercise of the power of resumption could not be allowed to override the stipulation for exclusive access.

This was a suspension at the instance of James Smith, lime-burner, Craigenhill, Lanarkshire, and William Nimmo, farmer, Cleugh, Lanarkshire, of a decree pronounced in the Sheriff Court of Lanarkshire in an action of removing raised against the suspenders by the Caledonian Railway Company.

The following narrative is taken from the note of the Lord Ordinary:—"The complainers are tenants of the Craigenhill lime-works, kilns, and other works and lands connected therewith, under a lease for nineteen years, entered into between them and Sir Simon Macdonald Lockhart, dated 12th, 14th, and 17th January 1867. The kilns and other works let to the complainers are situated close to the lines of the Caledonian Railway. Between the kilns and the railway, where there is a loading-bank and siding, there is a yard for storing coals and other materials for the use of the works, and the road leading to the works from the public road between Kilncadzow and Lanark runs close along the side of the railway. The respondents, the Caledonian Railway Company, by feu-contract in their favour, dated 30th November 1874, acquired from Sir Simon Macdonald Lockhart the ground from which, by the decree under suspension, they now seek to remove the complainers. This ground includes the whole of the road and yard for storing materials above mentioned between the kilns and the railway. The object of the Railway Company in acquiring the ground is to enable them to shut up and divert a portion of the public road between Kilncadzow and Lanark and another (private) road which here cross the railway on the level; to carry them over the railway by a bridge; and to improve their siding accommodation. The railway company, in seeking to remove the complainers from the subjects let to them in order that they may carry out the above-mentioned operations, are not acting in virtue of any statutory powers, but simply as proprietors of the ground. They maintain that they have right to resume possession of the ground in question in virtue of a power to that effect reserved to Sir Simon Macdonald Lockhart by the complainers' lease, and by him transferred to them in virtue of the feu-contract by which they became proprietors of the portion of the subjects let."

The following are the important clauses of the lease:—"Reserving also to the said Sir Norman Macdonald Lockhart and the other tenants on his estates, and to such other person or persons as may be authorised by him or them, or by those acting for him or them, right to the use of the siding on the Caledonian Railway at the Craigenhill Works hereby let, in common with the said William Nimmo and James Smith and their foresaids, for every purpose of traffic for which they or any of them may require the same, it being hereby declared and distinctly understood that the said William Nimmo and James Smith and their foresaids shall not be entitled to any exclusive right thereto, but shall have a mere permission to use the same; with full power to the pro-

prietor and his foresaids, and their tenants, and those authorised as aforesaid, to bring to and remove from the said siding metals, minerals, farm produce and stock, manure, and every article or thing which the said railway may bargain or be willing to carry for them, or which they or any of them may require to remove from or bring to the said siding, and the said William Nimmo and James Smith and their foresaids shall not be entitled to exact or demand any sum whatever in name of dues, damages, or way-leave on any other ground or pretence." The lease contained further the following declaration with reference to the road or access to said siding:—"Declaring that, in the event of such use thereof (the siding) being taken by the proprietor or his tenants other than the said William Nimmo and James Smith and their foresaids, the proprietor shall be bound to contribute towards the maintaining of the present road, or, in his option, he shall be entitled to make a new road or approach to the siding; and for such or any other way or approach to the siding, although the same or part thereof be formed through the lands now let, the said William Nimmo and James Smith or their foresaids shall not be entitled to claim surface-damage or any other compensation whatever; and it is hereby agreed that the entry to the said siding for all traffic connected with the said lime-works hereby let shall be exclusively at the east end of the said siding, and that the entry for all traffic not connected therewith shall be at the west end thereof." The said lease also reserved power to the proprietor, and his heirs and successors, to resume land from the tenants, in the following terms:—"Reserving also "power to the proprietor and his foresaids to resume, for further building, or any other purpose as he or they may think proper, ground in any one or more parts of the lands hereby let, not exceeding in all eight acres in any one part, and four acres in any two or more separate places, for which, however, the tenants shall have such allowance as shall be ascertained by two neutral persons, to be mutually appointed by the proprietor and tenants as arbiters for that purpose, or, in the event of their not agreeing, by an oversman to be named by them, whose decision shall be final; and failing such appointment of arbiters or oversman, then by arbitration under the authority of the Sheriff of Lanarkshire, in terms of the clause hereinafter written."

The complainers, *inter alia*, pleaded—" (3) The power of resumption descended on us, on a sound construction thereof, a power reserved for the benefit of the estate, and cannot be exercised to the complainers' prejudice by feuing off a portion of the subject of their possession. (4) On a sound construction of the said power of resumption it is applicable only to land, and does not in any view entitle the proprietor to resume ground which he has allowed to be occupied by the complainers' lime-kilns and accommodation works and accesses. (5) Under the said lease the complainers contracted for an exclusive right of access to the railway siding at the east end thereof, opposite to which their lime-kilns have been erected, and they cannot be deprived of said exclusive access under colour of the exercise of said power of resumption."

The respondents, *inter alia*, pleaded—" (3) The respondents, as proprietors of the ground in

question, are entitled, under the reserve power contained in the complainers' lease, to resume possession thereof, they being ready and willing to implement all the conditions of said lease with regard thereto. (3) The interests of the complainers being fully protected by the lease and feu-charter foresaid, and the respondents being ready and willing to implement all the conditions contained therein, the note of suspension ought to be refused."

The Lord Ordinary pronounced the following interlocutor:—

"*Edinburgh, 16th December 1876.*—The Lord Ordinary . . . suspends the decree of the Sheriff of Lanarkshire, mentioned in the note of suspension, and threatened charge, and whole grounds and warrants thereof, and decerns: Finds the complainers entitled to expenses," &c.

"*Note.*—(After the narrative given above.)—It is in virtue of the powers thus reserved to the proprietor that the Caledonian Railway Company assert a right to resume the ground in question, and to remove the complainers therefrom. It has been already pointed out that upon this ground is situated the road forming the present access to the works, and the railway company assert their right to take the road, to close it, and to throw it into their railway. That the decree of removing is intended to give them power to do so there can be no doubt, because it is thereby reserved to the complainers right to use the road in question 'until the statute labour road leading from Kilncadzow to Lanark and Cartland be diverted by the Statute Labour Road Trustees or the respondents,' implying of course that they are not to have right to use it any longer.

"The question therefore comes to be, whether the Caledonian Company, having become proprietors of a part of the subjects let to the complainers, have right under the clause of the lease before quoted to take from the complainers the road which was at the date of the lease, and has since been, the existing access to the works, and to compel the complainers to accept other accesses in lieu thereof upon paying compensation for any loss the complainers may suffer.

"It was maintained for the railway company, that having power to resume any part of the ground let, they had power to do so irrespective of what might be upon the surface, and therefore, having power to resume the ground over which the road passes, they had power to resume possession of the road itself. In like manner, they maintained that they had power to resume, if so advised, the ground on which the works stood, and therefore the works themselves, and that it all resolved into a question of compensation. The Lord Ordinary is not prepared to adopt a construction of the lease which it appears to him would enable the lessors to put an end to the lease altogether. He does not think that it was within the contemplation of the parties that the lessors should have right to interfere with the works themselves, or to shut up or divert the roads and accesses leading thereto. The roads and accesses which the Caledonian Company propose to substitute may or may not be equally convenient. The complainers maintain that their business will be greatly injured by the operations of the company, but however that may be, the Lord Ordinary thinks that the railway

company cannot without statutory authority compel the complainers to accept the particular roads and accesses which they propose to give merely upon paying such compensation as the complainers may be able to satisfy an arbiter or arbiters that they are entitled to. The Lord Ordinary thinks that the clause of reference in the lease does not extend to such a case. The arbiters there named are simply to ascertain the allowance to be made to the tenants for ground resumed, but they have nothing to do with assessing the amount of compensation for roads diverted or injuriously interfered with by the railway company.

"The lease contains special stipulations as to the use of the road in question, which appears to the Lord Ordinary to imply that it was intended to be maintained during the lease.

"On the whole matter, the Lord Ordinary is of opinion that the use which the Caledonian Railway Company propose to make of the power of resumption contained in the lease was not within the contemplation of the contracting parties, and is not justified by the terms of the lease."

The Caledonian Railway Company reclaimed.

Authorities—*Murray v. Brodie*, March 1806, Hume 825; *Ross v. M'Finlay*, 1809, Hume 832; *Hunter, Landlord and Tenant*, vol. ii. 115, 215; *Ross' Leading Cases (Land Rights)*, i. 50.

At advising—

LORD JUSTICE-CLERK—In this case the Lord Ordinary has, I think, come to a right conclusion, for the Caledonian Railway Company are here proposing to make of this reservation contained in the lease a use never intended by the parties between whom the lease was originally entered upon.

To show the grounds upon which my opinion is based it is only necessary to refer to the tack itself. The words describing the subjects let are as follows:—"All and Whole the Craighenhill Lime-works, sometime possessed by Daniel Hamilton, together with the kilns and other works erected thereon, and that part of the land on the farm of," &c. There are here two things let—the kilns and a certain portion of land; what that portion is we do not know, as the plans are in the possession of the landlord; the Caledonian Company, however, who are suing in place of the landlord, should have produced these plans. Then the tack goes on—"as also the limestone," which it describes; then follows, such coal as may be found in working the limestone or immediately underlying it. After this come a variety of provisions, somewhat confused in their character, and these are followed by the powers granted "to them or their foresaids," which I think take up the provisions as to the limestone and coal already referred to, and are powers to the tenants, not to the landlord; but even if they have reference to the latter, it is only to the effect of preserving the right to search for minerals, and this the Railway Company are not doing. The next matter of importance is the clause under which this question has arisen; it is in these terms—"And it is hereby agreed that the entry to the said siding for all traffic connected with the said limeworks hereby let shall be exclusively at the east end of the said siding, and that the entry for all traffic not connected therewith shall be at the west end thereof; reserving also power to the proprietor

and his foresaids to build a dwelling-house and enclose the garden ground at or near to the said siding, and to take off from the lands hereby let such ground as may be necessary for these purposes, for which the tenants shall not be entitled to any compensation whatever; and also power to the proprietor and his foresaids to resume for further building or any other purpose, as he or they may think proper, ground in one or more parts of the lands hereby let, not exceeding in all eight acres in any one part, and four acres in any two or more separate places, for which, however, the tenants shall have such allowance as shall be ascertained by two neutral persons to be mutually appointed by the proprietor and tenants as arbiters for that purpose, or, in the event of their not agreeing, by an oversman to be named by them, whose decision shall be final."

These, then, are the facts of the case. Sir Simon Lockhart has not exercised his power of resumption, but has feued to the Caledonian Railway Company a portion of the land. Then the Company propose to shut up the tenants' access, close the level-crossing, and throw a bridge over their line. The question comes to be, whether they have power to do this? and I think they have not. There may be a question even as to whether there has been here any resumption at all in the sense of the lease?

But without deciding that point, I am of opinion that the power of resumption here only extended to the unworked part of the lands, and not to the mineral workings or parts occupied by manufactures. Such a power would have enabled a landlord at any time to put a stop to all the works and mining operations, and no tenant would have taken a lease upon such a footing.

One consideration, however, appears to me to be sufficient. It is expressly stipulated that there shall be a certain access. Now with that access the proposed operations of the Caledonian Railway Company would clearly interfere. This is only another illustration how far from the contemplation of the contracting parties such an exercise of the resumption clause would be. I am therefore for adhering to the Lord Ordinary's interlocutor.

LORD ORMDALE—I have come to the same conclusion, and without difficulty. In the first place, I am satisfied that the Railway Company may be held to stand in the place and in the right of the landlord as regards the power of resumption. They have not any greater power than their predecessor, and could not have—where the one could not have interfered the other cannot.

In the second place, I am quite clear upon a full consideration of the terms of the lease that an obvious distinction is therein drawn between the kilns and the works on the one hand and the land on the other. As to the former, I think it is manifest that there was no intention to reserve or to concede a power of resumption. Supposing this, however, the Railway Company here say they are not interfering with the works, but only with the accesses. Now, are they entitled to do that? It rather seems to me that the accesses are really part of the works, looking to their peculiar and special description in the lease and the exclusive rights conferred upon the tenants as regards them. Accordingly, upon the whole

matter, I am for adhering to the Lord Ordinary's interlocutor.

LORD GIFFORD—I am of opinion that the judgment of the Lord Ordinary is well founded to this extent, that the attempt on the part of the Caledonian Railway Company to resume from the suspenders is in excess of the powers of resumption contained in the lease between the factor and commissioner for Sir Norman Macdonald Lockhart and the suspenders, dated in January 1867.

How far the attempt of the Caledonian Railway Company to resume land from the suspenders is in excess of its power to do so I am not in a position to say without further information or further inquiry, but I think we have enough before us to enable us to find that the decree of removing in its present form cannot stand, and must be suspended.

I shall explain in a few words what I think is the legal position of the Caledonian Railway Company, and what are their rights under the fair interpretation of the lease or tack to Messrs Smith and Nimmo.

I think it is clear that the Caledonian Railway Company, under the feu-contract which they have obtained from Sir Simon Macdonald Lockhart of Lee in 1874, are in no better position in any respect than Sir Simon Macdonald Lockhart himself, or his author Sir Norman Macdonald Lockhart, would have been supposing the feu had never been granted. The Railway Company can only exercise the power of resumption which Sir Simon Macdonald Lockhart could have done, and no otherwise and to no greater extent.

The real question therefore is, What is the true interpretation, meaning, and effect of the clause of resumption contained in the lease of 12th Jan. 1867? and I am willing to assume with your Lordships that the granting of the feu to the Railway Company, whenever it was intimated to the tenants and followed by an action of removing, was equivalent to a notice of resumption by Sir Simon Macdonald Lockhart; and the question is, Is this notice warranted by the lease.

The terms of the lease must be attended to. There is thereby let to Messrs Nimmo and Smith, for 19 years from Whitsunday 1865, several separate subjects, which may be, and which indeed appear to be, in separate positions and of a separate nature. The subjects let are, first, the Craigenhill Lime-works, as possessed by Daniel Hamilton, with the kilns and other works erected thereon. This is the first subject let, and apparently it is separate from the others. The second is "that part of the land on the farm of _____, as the same is delineated on a plan signed by the respective parties as relative hereto." The third subject is the limestone "within that portion of the lands lying to the north-east of the Caledonian Railway Company,"—meaning, I suppose, the railway,—"and within the boundary marked on said plan, and which land, within which the limestone is hereby let, is marked off by pit-stones." And then the fourth subject let is "the ball coal lying immediately beneath the said limestone." Then the proprietor reserves the other mines, minerals, and stone other than the limestone quarry, limestone,

and ball coal specially let, and in this connection the lessor reserves power to make new roads and shut up old ones. The lessor then reserves a right to the use of the siding on the Caledonian Railway "at the Craighenill works hereby let, in common with the tenants Messrs Nimmo and Smith;" and then there are stipulations regulating the joint use of the siding. These stipulations seem to imply that the siding at the date of the lease was at least to some extent the property of the lessor, but how this matter stands has not been even explained by the parties, much less established by any evidence, although it is not immaterial to the present dispute, for if the siding be in any sense a part of the works it has a material bearing on the construction of the power to resume.

Then comes the power to resume, upon which this question directly depends. Its terms are extremely important, and require to be minutely examined, for I need scarcely say that such clauses of resumption are, in general, strictly interpreted against the lessor, and, although the old rule was a little relaxed since the decision in *Stewart v. Lead* in the House of Lords, 25th March 1825, 1 W. and S. 68, and fair play must be given to such clauses, still, the lease being absolute, the landlord, in order to resume, must bring himself fairly within the terms of the reserved power. The words of the power are—*(reads clause quoted above.)*

Upon this power I remark that it is a power relating only to the lands let. Nor is this a critical construction, but I think it is the true and real meaning of the clause. The first power, to build a cottage and to take garden ground near the siding from the "lands let," and that without paying any compensation whatever or giving any deduction of rent, plainly means that the lime-works proper, the main subject let, and the limestone and coal specially let, or the use of the sidings, are not to be interfered with by such gratuitous resumptions, and I think I am entitled to infer from this that the power to resume additional ground for further building or any other purpose is of the same nature, although the tenants are to have an "allowance" for it—it is expressly said that such resumption is to be "in the lands hereby let"—that is, as I read it, in the second subject specially let, that is, part of the land on the farm of _____ delineated on the plan.

Now, applying a fair construction to this, I do not think it was contemplated or could be contemplated that the landlord should have power to resume the lime-works themselves or any part of the lime-works proper, that is, any of the kilns, buildings, or works forming necessary parts thereof, but only parts of the lands of the farm of _____. In like manner, the landlord could not resume the siding, assuming it to be his property, or the access thereto, or the limestone, or the ball coal, unless indirectly by their happening to be under part of the farm let and incapable of being wrought without the use of the surface. In short, I read the power of resumption as a mere power to resume vacant land let, and which it was taken for granted would continue vacant. I cannot read the clause as empowering the landlord to resume at pleasure any part of the whole subjects let. He must be confined to the farm land let.

Now, applying this interpretation to the cir-

cumstances before us, I observe that the land feued to the Caledonian Railway appears to include a part of the lime-kilns themselves—it is said to the extent of six feet. Plainly this is *ultra vires* of the landlord. He cannot resume what is a proper part of the lime-works themselves any more than he could resume the whole lime-works or the lime quarry or the ball coal. His right is limited to the farm land alone.

In like manner, the Railway Company, as in right of the landlord, propose to resume the ground immediately in front of the lime-kilns, and lying between the lime-kilns and the railway. Now, it appears to me that this is really part of the lime-works, essential to their being worked, and without which the lime-kilns would be useless. Nor is it any answer that the Railway Company offer to allow the suspenders still to use this ground for the purposes of their work, only not exclusively, but converting it into a public access to the railway and siding. Such an arrangement might be come to by special agreement of parties, but it is not within the lease. The Railway Company have no right to touch it unless they can shew that they have power to resume it out and out.

Again, the proposed new arrangements of the Railway Company will, it appears, have the effect of subverting the very special bargain contained in the lease as to the use of the siding, for, as I understand the explanations of parties, it is no longer to be the case that the entry to the siding for lime-work traffic shall be exclusively at the east end thereof, and the entry for other traffic not connected with the lime-works shall be at the west end thereof. I am of opinion that the landlord cannot, under pretence of resuming land, alter this arrangement, which is made an express condition of the lease, and which may be, as is alleged, of the utmost importance to the lime tenants.

I am therefore of opinion, that the attempt to resume from the tenants the whole land embraced in the feu, is in excess of the powers reserved in the suspenders' lease, and therefore I am for suspending the present decree of removal. It may be that the Railway Company, although not entitled to resume their whole feu from the suspenders, are yet entitled to use the power of resumption to some extent. But they must do so strictly in terms of the suspenders' lease. And they will best do so by beginning *de novo*, and defining exactly what part of the "lands hereby let" they intend to resume. It will require much greater precision on the part of the Caledonian Railway Company than they have chosen to apply and use in the original action of removing, the decree in which we are now to suspend. Possibly the Railway's right to use by themselves or through the landlord the power of resumption to some more limited extent may be reserved; but probably such right reserves itself, and is no way injured by the present judgment, which only negatives the Railway's right to resume the whole ground and subject marked red.

The Court adhered.

Counsel for Suspenders—M'Laren—Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for Respondents—Lord Advocate (Watson)—Johnstone—Pearson. Agents—Hope, Mann, & Kirk, W.S.