COURT OF SESSION.

Tuesday, November 29.

FIRST DIVISION.

[Sheriff of Forfarshire.

FERGUSON *v.* HOOD.

Landlord and Tenant—Compensation—Abatement of Rent—Railway—Where Lands taken and Lease for One Year only—Procedure—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 114.

Held that a tenant whose lands have been in part acquired for the purposes of a public undertaking, and who has "no greater interest therein than as tenant for a year, or from year to year," has no claim against his landlord for abatement of rent in respect of the lands of which he has been deprived, his case falling under section 114 of the Lands Clauses Consolidation (Scotland) Act 1845, and his sole remedy being against the promoters of the undertaking.

Landlord and Tenant—Compensation—Railway—Procedure—Tenant for Residue of a Term having less than One Year to Run—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 112 *and* 114.

A five years' lease of land provided for a break in favour of either party at the end of three years on giving the requisite notice. Before the time for giving this notice came, a railway company gave the statutory notice to treat for the purchase of a portion of the subjects leased. Thereafter the tenant intimated his intention to take advantage of the lease, and after this intimation, but while the lease as broken had still some months to run, the railway company required the tenant to give up possession of the lands compulsorily purchased. The tenant sought compensation.

Question—Whether the case fell under section 114 of the Lands Clauses Consolidation (Scotland) Act 1845, as relating to lands in possession of a "person having no greater interest therein than as tenant for a year, or from year to year?"

On 2d March 1880 the North British Arbroath and Montrose Railway Company, in virtue of the powers conferred upon them by their Acts of Parliament, entered upon and took permanent possession of 1·798 acres of the lands of Redfield, which belonged to the pursuer and were let to the defender. These lands were about 10 acres in extent, with houses, &c., and were held under an informal lease (which the parties agreed should be considered binding) at a yearly rent of £85, for five years from Martinmas 1877, but with a break in favour of either party at the end of three years on giving nine months' notice. The defender took advantage of this break, and left the lands at Martinmas 1880. The railway company gave notice to treat about July 1879, but they actually entered into possession of the lands after the defender had given the nine months' notice of his intention to take advantage of the break.

On May 26 and July 12, 1880, a submission was entered into between the railway company and the pursuer, in terms of the Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19), secs. 117–119, for the purpose of determining the compensation to be paid by the railway company to the pursuer, *inter alia*, for the 1·798 acres of Redfield. Compensation was paid in terms of this submission, with interest at the rate of 5 per cent. per annum from the date of the company's entry into the lands. In the landlord's claim the rights of the tenant were expressly reserved.

The 112th section of the Lands Clauses Consolidation (Scotland) Act 1845 provided—"That if any lands shall be comprised in a lease, or missive of lease, for a term of years unexpired, part only of which lands shall be required for the purposes of the Special Act, the rent payable in respect of the lands comprised in such lease, or missive of lease, shall be apportioned between the lands so required and the residue of such lands; and such apportionment may be settled by agreement between the lessor and lessee of such lands on the one part, and promoters of the undertaking on the other part; and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by the Sheriff; and after such apportionment the lessee of such lands shall, as to all future accruing rent, be liable only to so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the Special Act; and as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of rent as previously to such apportionment he had for the recovery of the whole rent reserved by such lease or missive of lease; and all the obligations, conditions, and agreements of such lease, or missive of lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the lands which shall not be required for the purposes of the Special Act, in the same manner as they would have been in case such part only of the land had been included in the lease or missive of lease."

The 113th section of the same Act provided that "Every such lessee as last aforesaid shall be entitled to receive from the promoters of the undertaking compensation for the damage done to him in his tenancy, by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works."

The 114th section of the Act further provided that "If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain; or if a part only of such lands be required, compensation for the damage done to him in his tenancy by the severing of the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by the Sheriff in case

the parties differ about the same ; and upon payment or tender of the amount of such compensation, all persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the Special Act."

The defender claimed against the railway company for loss of profits and damages arising from severance and other injury caused by the execution of the company's works, and this claim was adjusted and settled, but the defender made no claim against the company in respect of deduction from rent. At Martinmas 1880 he tendered to the landlord the half-year's rent due at that term, under deduction of £15, 5s. 7d., being the proportion of the rent for the lands taken by the company. The landlord declined to allow this deduction, and on the defender's final refusal to pay the full rent raised this action.

The defender pleaded, *inter alia*—"The defender having been deprived of the possession for crop and year 1880 of 1·798 acres of the lands and others let to him by the pursuer in the manner above set forth, is entitled to receive from the pursuer an abatement of £15, 5s. 7d. from his rent, being the proportion thereof applicable to the said 1·798 acres."

The Sheriff-Substitute (ROBERTSON) pronounced this interlocutor :—"Finds in law that the rights of parties must be adjusted in terms of the Lands Clauses Act (8 and 9 Vict. cap. 19): Finds that under a sound construction of that Act, as applied to the admitted facts of the case, the defender is liable for the rent sued for," &c.; and added the following note :—"When land is taken by a railway company in terms of their compulsory powers, the lessor or lessee of such land must adjust their claims *inter se*, and also with the railway company, in terms of the Lands Clauses Acts, unless, indeed, there is a private Act of Parliament or some other disturbing element, which is not the case in the present case.

"If the land is under a lease for more than a year, then the 112th section applies; whereas if the land is under a lease for a year, or the tenant has one year's interest in the land, then the 114th section applies. Now, as it happens, the land in dispute, strictly speaking, was under a five years' lease, with a break at the end of three, but as the break was acted on, the defender had only one year's interest in the land when the railway gave their notice to take it. It is puzzling, therefore, to ascertain under which section of the Act the present case falls. At the same time, the Sheriff-Substitute has the satisfaction of feeling that according to his view of the case it makes no difference under which section the case falls ; for whether the one section applies or the other, he thinks the full rent is due.

"First, If the defender is under section 114, having only one year's interest in the land, it is quite clear from the terms of that section that he must pay the rent. He can only claim compensation from the company, and it would strengthen his claim to plead that he had still the rent to pay. Mr Deas in his book on railway law (p. 165) points out this, and illustrates the position by some English cases.

"Secondly, If the defender is under section 112, as being tenant of land under a lease for more than one year, then he has not taken the proper steps to avail himself of the privilege of that section. His duty was to have had the rent apportioned between the lands required by the railway company and those not required. And after this is done he may refuse to pay rent for the portion of land required by the railway. Now, the defender has not done this, or rather he has not insisted on the company doing it. This apportionment is settled either by agreement or by the Sheriff—on the one side are the landlord and the tenant, on the other side is the railway company ; and after this is done, and not till then, can the tenant claim an abatement of rent.

"Now, the defender has not done this ; he has chosen to go straight to the company for compensation, which is quite a distinct matter from apportionment, and he has disregarded the terms of the 112th section altogether. Indeed, most probably in his claim for compensation he may have urged the fact that he had the rent to pay. If this is so, he would, on the one hand, get compensation for having his rent to pay, and, on the other hand, refuse to pay the rent. In other words, he puts himself under the 114th section in his claim for compensation, and under the 112th section in his defence to the present action.

"This is absurd, so the Sheriff-Substitute has no hesitation in saying he must pay the full rent."

The Sheriff (TRAYNER) on appeal recalled this interlocutor, and found that the pursuer was only entitled to payment of the rent sued for, under deduction of the sum of £15, 5s. 7d.

The following was the Sheriff's note :—"The material facts in this case, which are not in dispute, seem to be these—'The defender was the pursuer's tenant in the lands of Redfield, which were about 10 acres in extent, and the terms under which he held his tenancy are set forth in the document called a lease. That lease (I call it so for the sake of convenience) was never executed by the pursuer, and indeed does not appear to have been duly executed by the defender ; but this is of no moment, as the parties have admitted that it truly sets forth the bargain between them, and the terms on which the defender became the pursuer's tenant. The term for which the lands were let was five years from 22d November 1877, but either party was at liberty to put an end to the lease on the expiry of the first three years on giving nine months' previous notice. The defender took advantage of this, and left the lands at Martinmas 1880. In the meantime, however, the North British Arbroath and Montrose Railway Company, under the powers conferred by their Act of Parliament, took possession of part of Redfield occupied by the defender. The extent of land taken was 1·798 acres, and the date on which they took possession was stated at the bar (both parties agreeing) to be 2d March 1880. From that date until he left the lands the defender was dispossessed of the ground so taken. The half-year's rent due by the defender at Whitsunday 1880 was paid without any deduction, but at Martinmas following the defender claimed from the pursuer a deduction from the rent then due of the

sum of £15, 5s. 7d., as the proportion of rent effeiring to the lands taken by the railway company for the period during which the railway company had possessed the same. The pursuer refused to allow this deduction, and hence the present action, in which the pursuer sues for payment of the whole half-year's rent due at Martinmas 1880. The Sheriff-Substitute holds that the defender is precluded from seeking any deduction of the rent, because he has not had an apportionment of the rent effeiring to the land taken fixed in terms of the Lands Clauses Act. I cannot adopt this view. I take it that the circumstances of the present case fall within the 114th, and not the 112th section of that Act. But the 114th section seems to me to have reference entirely to the claims of a tenant against a railway company, and not to any claim competent against the landlord, and as the railway company is not in the present case, that clause may be dismissed from further consideration. Besides, as matter of fact, the parties are agreed as to the apportionment, and it is unnecessary to resort to any means to ascertain that beyond the agreement or admission of parties. The landlord's present claim is for the full rent which he would have been entitled to claim had the tenant remained in possession of the whole lands let to him. Confessedly, however, the tenant has been deprived of a portion of the lands, and it is difficult to see why he should pay rent for what he did not get. The landlord's answer is, that it was through no act of his that the tenant had been dispossessed, and this is quite true. He could not have prevented what has happened. If he could, however, or if by his act the tenant had been dispossessed, the tenant would have had a twofold claim against his landlord—(1st) for abatement of rent, and (2d) for damages for breach of the contract of lease,—and it is because the tenant was dispossessed without the act or consent of the landlord that the claim for damages does not lie. The claim for damage arising from severance, loss of profit, or otherwise, is what the railway company has to pay, but the claim for abatement of rent still remains good against the landlord. And justly so, for this reason—the landlord gets payment of the price of his land as at the date when possession thereof is taken, for if payment of the price is postponed beyond that date he gets interest thereon. If he gets the price of his land as a subject he has parted with in March, how can he draw rent therefrom for six or eight subsequent months? It is not his after March to let or otherwise to deal with it, and what is not his he can neither give to another or make profit out of. In fact, to admit the landlord's present claim would be to give him two rents for the period in question. He would get rent from his tenant for the land, and interest on the purchase-money of his land, which is just the rent derivable from the money.

"I see neither law nor equity in that result. Suppose the landlord, under the terms of the lease, had resumed part of the lands for feuing, could he have asked rent for the land resumed? Clearly not, and that simply because he had taken from the tenant the subject for which rent was payable. The same principle applies here—no rent where land is not given. The pursuer further urges that this claim for abatement of rent should have been made by the defender against the railway company as a part of the damage he suffered through being dispossessed. I have a difficulty in seeing any reasonable ground for such a contention; and I am satisfied that any such claim by the tenant, if made, would at once have been rejected. He would have been told—'That is a question with your landlord. We have paid him all he can claim for the land, and he cannot ask from you what we have already given him.' Besides, in such casés, according to both law and practice, a tenant's claim for abatement of rent is kept distinct from his claim for damages for severance, loss of profit, &c.—(Deas on the Law of Railways, pp. 166 and 248). On the whole matter I have formed a decided opinion in favour of the defender's claim, and have accordingly given effect to it. No interest has been allowed the pursuer beyond bank interest on the sum decerned for, because the sum he has now been found entitled to was tendered before the action was raised."

The pursuer appealed, and argued—The railway company had given notice to treat for the acquisition of the lands in question before the tenant had intimated his intention to take advantage of the break; but notice to treat was not equivalent to requiring possession—*The Queen* v. *Stone*,—and the railway company had not required possession until after the tenant had given notice that he was going to take advantage of the break. Consequently he had "no greater interest than as tenant for a year"—*The Queen* v. *The Great Northern Railway Company* — that is, he was under section 114 of the Act, and under this section his only remedy was against the company. Nor was this inequitable; the landlord had settled with the company on his own account only, and had presumably got no more than the just value of what had been compulsorily taken from him. Interest was agreed to be paid from the date of entry, but this was merely in order to obviate a deposit in terms of section 86 of the Act.

Argued for defender—It was admitted that the case fell under section 114, but that section did not deal with the question of the abatement of rent. It was not any part of "the value of the tenant's unexpired term or interest," nor was it "any just allowance which ought to be made to him by any incoming tenant," nor was it "any loss or injury he may sustain." That being so, his only remedy was against the landlord, who otherwise would practically be getting his rent twice over—once as rent, and once as interest.

Authorities—*The Queen* v. *Stone*, May 31, 1866, L.R., 1 Q.B. 529; *The Queen* v. *Great Northern Railway Company*, November 8, 1876, L.R., 2 Q.B. Div. 151; *North British Railway Company* v. *Renton*, January 15, 1864, 2 Macph. 443; *Hunter* v. *North British Railway Company*, November 13, 1849, 12 D. 37; Deas' Law of Railways, 166 and 248.

At advising—

LORD PRESIDENT—The subject possessed by the respondent in this case—the defender in the Sheriff Court—is ten acres of land at a rent of £85. It is held under what the parties have agreed to consider equivalent to a lease for a period of five years, but there was a break at the end of three years—at Martinmas 1880—of which

the tenant availed himself. The North British Arbroath and Montrose Railway, in the execution of the works authorised by their Act, had occasion to take a portion of the ground, and on 2d March 1880 entered on the land and took possession. Now, the consequence of this proceeding on the part of the company was that there arose two claims—a claim to the landlord, and also a claim to the tenant. The claim to the landlord arises under the 117th and following sections of the Lands Clauses Act, and the claim of the tenant depends on the sections of the Act which deal with such claims, namely, sections 112 to 116. In the present instance the parties are agreed that the case falls within the 114th section, and not within the 112th, because the tenant has taken advantage of the break in the lease. Whether they are right in this view I give no opinion. It is a matter of some difficulty, but we must take the case on the footing that it is a case under the 114th section of the Act as of a lease for one year only. Now, that section gives the tenant a clear right to obtain full compensation for the loss of the ground which has been taken from him. As we are not under the 112th section, there is no room for any apportionment of rent, because no apportionment of rent is to take place when the lease is for one year only. But it is not unimportant to contrast the two cases, because that makes the judgment we are going to pronounce proceed on very clear grounds.

In cases in which there is a lease for a term of years unexpired, and part only of the subjects is required by the company, it is provided by the 112th section that there shall be an apportionment of the rents between the part of the ground taken away and the part left in possession of the tenant, and this having been done, the tenant for the future is to be bound to pay rent for that portion only which remains in his hands, and not for the portion taken by the company. And over and above this, it is provided by the 113th section that every such tenant "shall be entitled to receive from the promoters of the undertaking compensation for the damage done to him in his tenancy by reason of the severance of the lands required from those not required, or otherwise by reason of the execution of the works." Now, therefore, in the case of a lease for a number of years there arise two separate and distinct rights to the tenant—the one for an abatement of rent, as in a question with the landlord, corresponding to the part of the ground taken by the company; and the other a claim against the company for severance damage and for other damage caused by the execution of the works." But in the case of a tenant who holds only for a year, or who has no greater interest than as tenant for a year, there is no such separation of these two claims; they are thrown together, and what the tenant is entitled to demand is "compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by any incoming tenant, and for any loss or injury he may sustain;" and in the case of part only of the lands being required, the tenant is entitled to get "compensation for the damage done to him in his tenancy by the severing of the lands held by him, or otherwise injuriously affecting the same." Now, does not this comprehend everything which a tenant can possibly demand as compensation in respect of the subjects taken from him for the value of his unexpired term or interest in the lands? How is it possible after that for him to demand that he should receive an abatement of rent in addition? "The value of his unexpired term or interest in such lands," and "any loss or injury he may sustain," seem to me to comprehend everything that the tenant is entitled to receive as compensation for the loss of the lands. And all this the tenant is very plainly directed to claim from the railway company, because it is only on payment or tender of the compensation that the railway company are entitled to enter into possession of the lands taken, or if the company should be desirous of entering before the purchase is completed, on granting security for payment.

Well, then, what has actually happened? The landlord entered into an arbitration with the railway company to have his claim for compensation settled, and if he had taken his tenant along with him, or had made a claim on behalf of his tenant, then the landlord would have been bound to account with the tenant. It would be very difficult in such circumstances to maintain that the landlord was not bound to communicate to the tenant the advantage he had obtained. But here the landlord entered into the arbitration on his own account only, and settled for his own behoof only, and in his claim he has made an express reservation of the tenant's rights. It is said that the landlord has made too good a bargain. Be it so. We have nothing to do with that. The landlord may have made a particularly good settlement with the railway. It may have been quite unconscionable and utterly exorbitant. That does not give the tenant a right to claim against his landlord, for his claim is against the company. His claim is a statutory claim, and if people will not take the trouble to frame their claims in accordance with the Act of Parliament they must take the consequences. If they are betrayed into any loss by the omission it is entirely their own fault. The omission will not give the tenant a claim against his landlord. I therefore think that this claim by the tenant for a deduction from the rent cannot be allowed, and that we must revert to the interlocutor of the Sheriff-Substitute.

Lord Mure—The parties are agreed that the case is to be taken on the footing that the lease is a lease for one year only. There is a break in the lease, and the tenant having taken advantage of the break, there were only some nine or ten months to run at the time when the land was taken by the company. The English authorities which have been cited apply pretty clearly to this case, and although the construction of section 114 and of 121 of the English Act certainly gives rise to questions of some nicety, the parties have agreed to abide by the English authorities, and we must so take it.

The 112th and the 114th sections relate to totally different matters. The 112th section relates to regular lease with a period of years still to run; the 114th expressly applies to the case of compensation to tenants under a lease for not more than a year. In this case the right of the tenant to claim against the railway company was evidently in view of the landlord, because in the claim he made against the company the tenant's rights are all expressly reserved. Now, what is

the nature of the tenant's rights? He is entitled to demand "compensation for the unexpired term or interest in such lands"—that is, the lands taken. That is what the statute gives him, and it also gives him compensation for severance damage to the lands where only part of the lands is taken. Here a part of the lands was taken, not by any act of the landlord, but by the railway company under the authority of Parliament, and he is entitled to get compensation for the loss or the profit he might have made out of the lands. He is directed to make his claim for this compensation against the railway company, but he has not done so, and he now seeks to have a deduction made from the rent he has to pay to the landlord. It is hard that he should be in the position of a party who cannot plead such a set-off to his landlord's claim for rent, but we are here dealing with a statutory matter, and the statute gives the tenant no such redress as he now seeks.

LORD SHAND—In the recent case of *The Queen* v. *Great Northern Railway Company*, in the Queen's Bench Division, it was held that although the lands were held under a written lease for a period of years, yet if at the date when the lands were taken the tenant's interest was no greater than for one year, the case falls under section 121 of the English Act, which corresponds to section 112 of the Scotch Act. I see great reason and convenience in this result, and I am not prepared to express any doubt here. Taking the case so, the tenant has a claim for a just allowance for any injury he has sustained through the loss of the lands, and he has also a claim for severance damage. That is the substance of his claim. It is quite clear that it is a claim which the tenant may make against the railway company—which he is just as much entitled to make as the landlord is entitled to make his claim for compensation for the loss he has suffered from the lands having been taken away. The view of the Sheriff is that the landlord has got the price of the lands purchased, and having got that he is not entitled also to have the rent of these lands, and that the tenant is entitled to a corresponding abatement of rent, and for any just profits he might have made. And it is further said that the landlord has got too much by way of compensation from the railway company. I am not at all sure that he has got too much, for besides what he gets himself he expressly reserves to the tenant all his rights. Even, however, if it could be shown that the landlord has got too much, that would not entitle the tenant to receive any part of it. I do not think that under the 114th section the tenant is entitled to make any claim against the landlord, but only against the railway company, unless, indeed, it could be shown that by arrangement the landlord has made a claim against the company, not only for himself, but also on behalf of the tenant. But here, on the contrary, the landlord, as I have said, expressly reserves the tenant's claim. On the whole matter, therefore, I think we should revert to the judgment of the Sheriff-Substitute.

The Lords recalled the interlocutor of the Sheriff, and of new found in terms of the interlocutor of the Sheriff-Substitute.

Counsel for Appellant—Guthrie Smith—Dickson. Agents—Henry & Scott, S.S.C.

Counsel for Respondent—R. Johnstone—Wallace. Agents—Welsh & Forbes, S.S.C.

Wednesday, November 30.

SECOND DIVISION.

[Lord Adam, Ordinary.

HEWAT *v.* ROBERTON.

(Before the Lord Justice-Clerk, Lords Craighill, and M'Laren.)

Agreements and Contracts—Residue—Jointure—Construction—Acquiescence.

A widow who had right to a certain jointure and to the income of the residue of her husband's estate, in virtue of various deeds of settlement executed by him, lived for nineteen years after her husband's death with her son, having executed a deed of agreement whereby she undertook to pay him one-half of the income of the residue of the estate to which she had acquired right from her husband, and paid him one-half of her whole income arising from all sources. An action raised twelve years after her death by a daughter against the said son for count and reckoning, on the footing that the terms of the agreement did not include the jointure provision, *dismissed*, in respect of the terms of the agreement and the actings of parties.

John Roberton of Lauchope died in the year 1850, survived by his wife, who died on 15th Dec. 1869 in her ninety-eighth year, and by four children—William, his eldest son, who succeeded him in the estate of Lauchope, and who died on 30th December 1856; by a daughter Helen, who became Mrs Perston, and died shortly after him; by his younger son James; and by a daughter Catherine, who became Mrs Hewat. By antenuptial contract of marriage entered into between Mr and Mrs Roberton, of date 21st June 1805, Mrs Roberton was provided, in the event of her surviving her husband, with an annuity of £100 and the liferent of the mansion-house and furniture of Lauchope. These provisions, however, were superseded by the provisions subsequently bequeathed to her by her husband in his disposition and settlement and codicils thereto. By disposition and settlement, dated 20th Dec. 1830, Mr Roberton disponed and conveyed to his eldest son William his whole means and estate, heritable and moveable (except the moveable furniture in Lauchope House, which he conveyed to Mrs Roberton in liferent in the event of her surviving him), but *inter alia*, under the burden of paying an annuity of £400 to Mrs Roberton and of providing to her the free liferent of the mansion-house, offices, and garden of Lauchope, or, in his option, of paying to her an additional annuity of £100. The provisions contained in the settlement in favour of the younger children of the marriage were not to come into effect during their mother's widowhood, and accordingly it was provided that Mrs Roberton should maintain them at bed and board in her own house during her lifetime, but that should they decline to live with her or marry, she should not be bound to contribute to their