that the residue would be a mixed estate, partly heritable and partly moveable, and I do not think that the use of this word is of much materiality.

The circumstances, accordingly, founded on by the pursuer, as indicating an intention that this will was to apply to moveable estate only, appear to me to be insufficient to overcome the fact that the testator has nominated executors and administrators, and in effect conveyed to them his whole estate and executry, which in my opinion includes his heritable estate, for administration. I therefore differ from the Lord Ordinary, and I think that the error into which his Lordship has fallen is that he has omitted to notice that Mrs Grant and Mr Morren were appointed administrators as well as executors, and has failed to take that fact into consideration.

LORD M'LAREN—In all cases like the present it should be kept in view that the object of the 20th section of the Titles Act was to prevent the intentions of testators being defeated by our rule which prevented a proprietor from transmitting heritage otherwise than by words of *de præsenti* conveyance. After much dispute it had been settled that heritable property could only be disposed of in two ways, either by using the word "dispone," or by granting a procuratory for resigning the lands for new infeftment. The new legislation on this matter introduced by the Titles Act of 1868 was to the effect that where a testator made a will giving and granting his estate, that should take effect according to the ordinary meaning of the words. A will giving and granting estate in general terms would be subject to the provisions of the 20th section; it would be a case of using, with regard to heritage, words which would in any case be sufficient to pass moveables, and it would take effect on both.

The settlement in this case is not a will in the ordinary form; it is a testament proper—that peculiar form under which a testator, by naming an executor, disposes of his estate. The effect of such a testament as constituting a trust in favour of the next-of-kin is a purely statutory effect, depending on a statute of the Scottish Parliament which made it a trust to the extent of two-thirds of the estate, and in the Moveable Succession Act, which constitutes it a trust to the full extent. It is not to be supposed that in framing a will in this form the testator had heritage in view. If the maker of a testament introduces the words "heritable estate" or equivalent words, I should give effect to them; but if he speaks of "estate" only, I should take it that he refers only to such estate as can be passed by a proper testament. I therefore agree with your Lordship in the chair.

LORD KINNEAR—It is very difficult in this case to know what the testator meant, and I think he had no clear idea in his own mind. I concur with your Lordship in the chair and with Lord M'Laren. I desire to add that I do not think our judgment decides anything else than that the will, taking its whole effect, carries moveables only. It would not rule other cases unless the settlement were in exactly the same terms.

The Court affirmed the interlocutor of the Lord Ordinary, with expenses.

Counsel for Defender and Reclaimer—Cullen. Agents—J. & A. F. Adam, W.S.

Counsel for Pursuer and Respondent—Kemp. Agents—Dove & Lockhart, S.S.C.

Wednesday, February 22.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

NORTH BRITISH RAILWAY COMPANY *v.* R. & J. GARROWAY.

Process—Diligence and Recovery of Documents from Parties not in the Action—Limitation of Specification—Railway.

A firm of chemical manufacturers being sued by a railway company for a balance alleged to be due for the carriage of goods, averred that the company had, in breach of a traffic arrangement between the parties, given preferential rates to rival traders, and charged higher rates than were exacted by competing railway routes. They asked a diligence to enable them to recover or examine the business books of the competing companies, and invoices, receipts, &c., of certain rival traders. The companies compeared by minute, and stated objections to producing in terms of the specification lodged by the defenders. *Held* that the party asking a diligence must limit his specification to what is strictly necessary, and that havers are not bound in the first instance to show that special prejudice will be occasioned to them by the recoveries.

Form in which a restricted specification was allowed by the Lord Ordinary.

By agreement, dated 14th and 21st October 1880, the North British Railway Company leased for fifteen years a piece of ground adjoining the Camlachie Station to Messrs R. & J. Garroway, chemical manufacturers, Camlachie, Glasgow, for the purpose of a goods' siding, and stipulated that "the whole of Messrs Garroway's railway traffic to and from their works shall be conveyed by the routes of the company, at the rates in force from time to time, to and from Camlachie Station, and not higher than the rates in force by any competing railway route." By another agreement between the same parties, dated 28th January and 6th February 1886, the lease of the siding was extended for thirty years from Martinmas 1885, and the following traffic arrangement was entered into—"(Fourth). The whole of the said Messrs R. & J. Garroway's railway traffic to and from

their works shall be conveyed by the routes of the first parties, at the rates in force from time to time and exacted from traders, whether under contract or otherwise, to and from Camlachie Station or other stations of the first parties in Glasgow, and where the first parties carry a greater distance to and from such other stations at a lower rate they shall apply such lower rate to the traffic of the second parties, all such rates not being higher than the rates in force to and from Glasgow by any competing railway route."

In March 1891 the North British Railway Company sued Messrs R. & J. Garroway for payment of £3625, 15s. 4d., being the amount of the balance alleged to be due by them as at 31st July 1890, in respect of carriages for the period from 1st January 1885.

The defence was in substance that the pursuers had, in breach of the above agreement, granted preferential rates to other traders, and charged the defenders higher rates than the rival railway companies did to rival traders. Statements 6, 7, 8, and 9 for the defenders contained examples of such preferential rates alleged to have been granted by the North British Company to other traders mentioned therein, and of lower rates said to have been charged to other traders by the Caledonian and Glasgow and South-Western Companies.

On 11th June 1892 the Lord Ordinary (KYLLACHY) allowed a proof. By interlocutor dated 20th July 1892 the Lord Ordinary granted diligence against havers, in terms of articles 1 and 2 and 8 to 12, inclusive of a specification put in by the defenders. These articles were as follows—"1. The rates-books, exceptional rates-books, invoice-books, day-books, ledgers, cash-books, or other books kept by the pursuers, by the Caledonian Railway Company, and by the Glasgow and South-Western Railway Company, that excerpts may be taken from them of all entries relating to the traffic mentioned in statements 6, 8, and 9 for defenders, of the traders mentioned in said statements, between the stations mentioned in said statements, and to the rates charged therefor during the period from 1st January 1885 to 31st July 1890, and all accounts and invoices rendered by the pursuers or either of the said other railway companies to such traders relating to or containing rates for such traffic. 2. All receipts granted by the traders mentioned in statement 7 for the defenders to the pursuers or to either of the said other railway companies for drawbacks, rebates, or allowances relative to the charges for the traffic referred to in the said statement, and all accounts containing or referring to rates or charges from or in respect of which such drawbacks, rebates, or allowances were given or paid or allowed to the drawbacks, rebates, or allowances themselves, and all business books kept by the pursuers or by the said traders or railway companies in which such drawbacks, rebates, or allowances are entered, that excerpts may in the case of such books be made of all entries relating to those given to the said traders during the said period. . . . 8. All agreements between the pursuers and any of the traders mentioned in statements 6, 7, 8, and 9 for defenders with regard to rates and charges, and rebates on rates and charges, for the traffic referred to in said statements. 9. All agreements between the Caledonian Railway Company and any of the traders mentioned in statements 6, 7, 8, and 9 for defenders with regard to rates and charges, and rebates on rates and charges, for the traffic referred to in said statements. 10. All agreements between the Glasgow and South-Western Railway Company and any of the traders mentioned in statements 6, 7, 8, and 9 for defenders, with regard to rates and charges, and rebates on rates and charges, for the traffic referred to in said statements. 11. All agreements or correspondence with regard to 'through traffic' on the routes mentioned on record between the pursuers and the Glasgow and South-Western and Caledonian Railway Companies, or either of these companies. 12. Failing principals, copies of drafts of any of the foregoing documents."

It appeared from an interim report of the commissioners appointed under the above diligence that the havers, the Caledonian Railway Company and the Glasgow and South-Western Railway Company, were willing to produce or exhibit the whole rate-books, general and special, called for under article 1 of the specification, but refused to produce the other documents called for in that article, or to make any production under articles 2, 9, and 10 of the specification, and the commissioner reported their objections to the Lord Ordinary for instructions.

By interlocutor dated 26th October 1892, the Lord Ordinary, after hearing counsel for the objectors, remitted to the commissioner, *inter alia*, in order that the Caledonian and Glasgow and South-Western Companies and the compearing traders, Messrs Charles Tennant & Sons and others "may state in a minute or minutes the special prejudice which they allege will result from their producing in terms of the specification."

The minute of compearance lodged for the railway companies and other traders, stated the following grounds of objection—"*First*, because the minuters are entitled to refuse production of the said books and documents without reason assigned (more especially in view of the great labour and annoyance which would be necessarily caused to the minuters), the said action being one to which the minuters are not parties, and which deals only with matters in which they are in no way involved, and which does not contain any suggestion against the minuters of unfair or illegal dealing. *Second*, because the said recovery, which is alleged to be necessary to ascertain the 'rates in force' by the minuters for the traffic of the said traders is vexatious and unnecessary, the whole of the said rates, including those applicable to special contracts, being readily accessible, free of charge, to the defenders, at the

minuters' stations, in accordance with the provisions of the Regulation of Railways Act 1873, section 14. *Third*, the said recovery would be seriously prejudicial to the minuters' interests, in respect it would disclose to rival companies and their canvassers the names of the minuters' customers, together with the nature and extent of the traffic carried for them."

The minute of compearance for Messrs Charles Tennant & Company and other traders stated the following grounds of objection—"*First*, Because the minuters are entitled to refuse production of the said books and documents without reason assigned, the said action being one to which the minuters are not parties, and which deals only with matters in which they are in no way involved, and which does not contain any suggestion against them of unfair or illegal dealing. *Second*, Because the said recovery which is alleged to be necessary to ascertain the 'rates in force' by the said railway companies for the traffic of the minuters is vexatious and unnecessary, the whole of the said rates, including those applicable to special contracts, being readily accessible free of charge to the defenders at the stations of the said companies, in accordance with the provisions of The Regulation of Railways Act 1873, sec. 14. *Third*, The said recovery would be seriously prejudicial to the minuters' interests in the following respects—(1) It would to a greater or less extent disclose the nature, extent, and returns of the business carried on by the minuters to those who are rivals in trade as well as indirectly to the public, because it would involve production, examination, and making excerpts from books and other documents, showing (*a*) the names of those who sell to and buy from the minuters; (*b*) the nature, proportions, and extent of the raw material purchased by the minuters, which might at least in the case of some of the minuters lead to the knowledge and discovery of some of their secret processes of manufacture; (*c*) the extent of the minuuters' sales to customers and amount of profit derived therefrom."

On 28th January 1893 the Lord Ordinary, after hearing counsel on the above minutes, pronounced the following interlocutor—"Finds that the havers, the Caledonian Railway Company and the Glasgow and South-Western Railway Company have produced or exhibited the whole rate-books, general and special, called for under article 1 of the specification: Finds that they are not bound to produce further under article 1 or 2 thereof; reserving all questions as to their liability to produce under any more limited call that may be afterwards made upon them.

"*Opinion.*—As regards the matters which are brought up by this interim report, I may say in the first place that I do not think any question need be decided with respect to the call under article 11 of the specification. The correspondence there called for has been produced; and with regard to the agreements called for, I understand that the Glasgow and South-Western Railway Company undertake to produce all the agreements mentioned, these agreements being, all of them, according to their statement, agreements scheduled to Acts of Parliament.

"The important question however is, whether the Caledonian Railway Company and the Glasgow and South-Western Company and the compearing traders, are liable to be called upon to produce the traffic agreements called for under articles 9 and 10, and whether the two railway companies are bound to produce the invoices and accounts relative to the traffic of those traders. The railway companies admit that they are bound to produce their rate-books, including their exceptional rate-books, and I understand the fact to be that there has been a full production of those rate-books for the period in question. But the companies contend that beyond that production they are not bound to go. They say that to produce the particulars of their transactions with the various traders who are their customers would be prejudicial to them in their competition with each other and with the North British Railway Company; and the traders on the other hand say that the disclosure of the extent and the description and sources of their traffic would be injurious to them with their rivals in trade, as showing the nature and course of their business.

"The question which I have to decide is whether the objections thus urged are well-founded. Now, I understand it to be conceded that the principle which regulates this matter is the principle expressed in the case which Mr M'Clure quoted at the last calling—*Graham* v. *Sprot*, 9 D. 545—that principle being, that a witness or haver is bound to answer all questions pertinent to the cause, whether he is himself interested in the cause or not, provided always that no substantial prejudice to him is to be anticipated from such answer. Applying that principle here, I am not able to say that these railway companies and these traders are unreasonably apprehensive of prejudice from a disclosure of these transactions. I think they have stated enough to shew that prejudice to them may reasonably be anticipated. They state deliberately, and upon their responsibility, that they apprehend such prejudice; and I do not see my way to disregard the statement which they so make. That being so, I do not see my way to let the defenders have the order which they ask. They have already got the rate-books. If these rate-books are correctly kept, it is conceded that they have no interest to ask anything more. Their claim to anything more must depend upon the suggestion that the rate-books are incorrectly kept. Now, here again the railway companies assert that their rate-books are correctly kept, as by statute they are bound to be; and I have nothing before me to justify the assumption that that assertion is contrary to the fact.

"I therefore, on the ground that the defenders have already got the rate-books, which *prima facie* contain everything they want, and that their further call as made

would probably be prejudicial to the havers, refuse the order which the defenders ask. But I wish to state that my judgment is with reference to the call as made. The specification is somewhat wide, and the defenders have not seen their way in making calls under it to limit the calls. They have made their calls (as probably for their purpose they required to do), simply in terms of the specification; and all I at present decide is that the railway companies and the traders are not bound to produce in terms of the calls thus made."

The defenders reclaimed, and argued—The defenders were suffering damage if in fact other traders were getting lower rates, and they were entitled to get access to the accounts, invoices, &c., of rival traders for whom the Caledonian and Glasgow and South-Western Companies carried in order to establish the fact. A railway company had a monopoly and was under special legislation, and was therefore precluded from taking objections to the production of its books, &c., which a private individual might with more reason take. *Graham* v. *Sprot* established that two contracting parties were entitled to obtain a diligence to inspect the books of one who was not a party in the action if the justice of the case required it, subject to whatever restrictions might be necessary to prevent any prejudice arising from the production. The Lord Ordinary had not followed that precedent; for it appeared from the interlocutor in that case that the only parties present when the diligence was obtained were the parties to the cause, and it was reserved to the haver to explain before exhibition to the commissioner the nature of the documents in his possession, and to state any special objections to their inspection or any prejudice that might be occasioned to his private interests, in order that the commissioner might limit the production as he should see fit and cause the excerpts to be taken, with such omissions and precautions as would secure against any publicity being given to the contents of the writings exhibited. The proper time to protect the haver was when he appeared, and the proper course was to give him protection through the commissioner so far as might be necessary—not to throw out the specification. No sufficient reasons had been stated by the railway companies why they should not produce in terms of the specification; there was no substance in the objections stated by them. The traders' objections were also unsubstantial; the recoveries would contain nothing prejudicial to the havers. The defenders, however, would be satisfied to restrict the call in any way, so long as they recovered the actual rates of carriage from the books of the companies and from the accounts and invoices they sent out; they were quite willing that quantities and customers' names should be suppressed in making the excerpts.

Argued for the compearers—The Regulation of Railways Act 1873 (36 and 37 Vict. cap. 48), sec. 14, provided—"Every railway company . . . shall keep at each of their stations . . . a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage . . . including any rates charged under any special contract. Every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee," under a penalty of £5 a day for non-compliance. These rate-books contained whatever rates were in point of fact charged even under special contracts. The parties to the agreement on which this action was founded had no information or means of knowledge as to the rates in force except what was published in virtue of the section above quoted. There had already been a full production or exhibition of all the rate-books to the commissioner. Nothing else was necessary or relevant to the cause. The railway companies objected to producing their accounts and invoices, because if the volume of traffic by a particular route were disclosed, the canvassers of other railways might be set on to pick up a share of it. The traders apprehended prejudice from the publication of the quantities and nature of the raw materials carried for them giving a clue to their trade secrets, and generally from the disclosure of their business.

At advising—

LORD PRESIDENT—We have to deal here with a demand for the recovery of documents. My opinion is that the Lord Ordinary is quite right. We are not to consider beforehand all possible demands that may be made. Till they are made, certainly I do not think that we should leave over, for the commissioner to settle, questions which the party asking the diligence may and should make up his mind upon, when he tables his specification for the recovery of the documents. Therefore I am for refusing the reclaiming-note.

LORD ADAM—I am of the same opinion. I do not think there is any obligation, in the first instance, on the part of havers to show special damage when it is admitted on the part of the pursuer that what he wants is of no use to himself, for that is the way in which Mr Johnston put it. I agree that the first duty of the person calling for the specification is to make it clear, and specify what he wants.

LORD M'LAREN—I agree with your Lordships on the same ground. I would add this, that I have always been strongly opposed to those stupendous examinations of books which have too much come to be matter of practice in the Outer House trials. Anyone can see that the proper way to get at the rates a railway company really charges is to examine the goods manager of the company and his assistant as to the rates the railway company charge. It is not to be supposed that these gentlemen will give false evidence, but when they are cited they can be asked to bring with them such books, papers, and schedules as are necessary to corroborate and support

the evidence they are to give before the Lord Ordinary.

LORD KINNEAR—I agree with your Lordships. I think, upon Mr Johnston's own statement, it is perfectly clear that the specification as presented to the Lord Ordinary was a great deal too wide. The Lord Ordinary decided nothing except that it is too wide, because he has reserved to the pursuer the right to make any more limited call upon which different questions may arise.

The Court refused the reclaiming-note, with expenses.

Counsel for the Defenders and Reclaimers—H. Johnston—M'Clure. Agents—Drummond & Reid, W.S.

Counsel for the Compearers the Glasgow and South-Western Railway Company—Guthrie. Agents—J. C. Brodie & Sons, W.S.

Counsel for the Compearers the Caledonian Railway Company and Charles Tennant & Company and Others—Clyde. Agents—Hope, Mann, & Kirk, W.S.

On 24th February 1893 the Lord Ordinary (KYLLACHY) granted diligence at the instance of the defenders in terms of the following restricted specification—"1. The invoice-books, day-books, ledgers, cash-books, or other books kept by the Caledonian Railway Company and the Glasgow and South-Western Railway Company, that excerpts may be taken therefrom of all entries relative to the rates charged by the said companies respectively against the traders mentioned in statements 6, 7, 8, and 9 for the defenders for the carriage between the stations mentioned in said statements, and relative accounts of the following articles, viz.—(1) Sulphuric acid, hydrochloric acid, and nitric acid in loads of (*a*) 1 ton and under, (*b*) over 1 ton and under 2 tons, (*c*) over 2 tons and under 4 tons, and (*d*) 4½ tons and upwards respectively; (2) Sulphate of soda, caustic soda, and soda ash in loads of (*a*) from 3 cwts. up to 2 tons, and (*b*) from 2 tons upwards respectively; (3) Iron ore and pyrites in loads of (*a*) from 4 to 10 tons, (*b*) from 20 to 30 tons, and (*c*) from 50 to 100 tons respectively, during the period from 1st January 1885 to 31st January 1890, said excerpts being limited always to what is necessary to show the dates, the class of goods carried, the class of load as above specified, and the rate charged. 2. All invoices, accounts, and other written statements rendered by said railway companies, or either of them, to said traders, that excerpts may be taken therefrom of all entries relating to the rates charged by the said companies respectively to said traders for the traffic specified in the last article, or relating to the drawbacks, rebates, or allowances from said rates given by said companies respectively to said traders, or any of them, said excerpts being limited always to what is necessary to show the date, the class of goods carried, the class of load as above specified, and the rate charged for the weights, and, if any given, the drawbacks, rebates, and allowances."

Friday, February 24.

FIRST DIVISION.

[Lord Stormonth Darling, Ordinary.

GILMOUR *v.* NORTH BRITISH RAILWAY COMPANY.

Railway—Question whether Statutory Obligation to Stop all Ordinary Trains at a Certain Station was Temporary or Permanent—Title to Sue.

A railway company were taken bound by a clause in their Act in 1855 to "erect and maintain a temporary goods and passenger station" at a point to be agreed on on an estate which was to be intersected by their line of railway, on the narrative that the then proprietors of the estate had laid out a portion of it for feuing. The clause proceeded thus—"At the said station all ordinary trains shall stop for the purpose of traffic;" then came a proviso that if on the expiry of five years the traffic proved unremunerative the company should no longer be bound to maintain the said station, and that the question of the maintenance or abandonment of the station should be determined by arbitration.

A station was erected in accordance with the above enactment, and no proposal to abandon it was ever made.

In 1858 the same parties arrived at an agreement, which proceeded on a recital of the above clause, and provided that in consideration of certain prestations in favour of the railway company they should complete the station as a permanent station, and should thereafter maintain it in all time coming at their own expense.

Subsequently the estate was sold. In 1892 the then proprietor brought an action against the railway company to have it declared that they were bound to stop all ordinary trains, and in particular certain specified trains, at the said station on his estate.

The Lord Ordinary (Stormonth Darling) repelled the defence of no title to sue, and allowed a proof.

Held (*rev.* the Lord Ordinary) that the above clause did not contain a permanent and subsisting obligation to stop all ordinary trains at the station in question.

The estate of Lundin, in the parish of Largo, and county of Fife, is intersected by a line of railway which was constructed by the Leven and East of Fife Railway Company in virtue of the Leven and East of Fife Railway Act 1855 (18 and 19 Vict. cap. 45).

Section 36 of the Act provides as follows—"And whereas the Standard Life Assurance Company, the owners of the estate of Lundin, in the parish of Largo, have laid out a portion of the said estate on the proposed line of railway to be let in lots or