clear, and almost beyond the possibility of doubt. It was unnecessary to go into the consideration of any of the other pleas, the third plea of *bona fide* perception and consumption being an effectual bar to the claim on the part of the Crown. It was clear from the whole tenor of the lease that it was conceived as much in favour of each individual heritor of the Lordship of Dunfermline as of those who were appointed trustees. Each heritor was therefore truly a tenant under the lease of his own teind and feu-duties, holding them from the Crown under the obligation of paying his quota of the rent. The term of the lease expired in March 1799, but the Crown took no step to interrupt the tacit relocation which undoubtedly followed until the year 1838, when they raised and executed an inhibition of teinds, which was admittedly null. In the same year an action of removing was raised in the Sheriff Court of Fife against Lord Elgin, the sole surviving trustee, and, after various procedure, a judgment was pronounced that an end was put to the tack as at March 1839, so far as it related to subjects other than teinds. Since the date of that judgment the Crown have received payment of the feu-duties from the respondent and other vassals of the Lordship of Dunfermline, but they have taken no steps whatever until the present action to enter into possession of the surplus teinds. They did not even make the respondent aware that there was such a claim against him until 1868. There being such perfect ignorance on the part of the respondent and his predecessors of the claim now made, and there having been perfectly *bona fide* perception and consumption of what in England they would style the mesne property, he had no hesitation in holding that the judgment of the Inner House of the Court of Session was a correct one, and ought to be affirmed, and the appeal dismissed, with costs.

Lord Chelmsford expressed his concurrence. He doubted the competency on the part of the respondents to plead tacit relocation, but, however that might be, the third plea of *bona fide* consumption was quite sufficient. During the whole period, from the commencement of the lease in 1780 down to the present time, no change took place, so far as the respondent or his authors were concerned, in the state of possession of the teinds in question. No one claimed or intromitted with them. Had the Crown proceeded to collect the feu-duties, the respondent would at once have put an end to all right or interest on the part of the Crown on the teinds of his lands by purchasing them, as he has now done, at nine years' purchase of their amount, after deducting stipend, while in the event of the Crown's claim in the present being sustained, he would be practically compelled to pay nearly forty years' purchase.

Lord Selborne also concurred.

Judgment affirmed.

Counsel for the Appellant — Lord Advocate (Gordon). Agent—D. Beith, W.S.

Counsel for the Respondents—J. Pearson, Q.C., and Gibson. Agents—Mitchell & Baxter, W.S.

Friday, April 24.

(Before Lord Chancellor Cairns, Lords Chelmsford, Hatherley, and Selborne.)

CALEDONIAN RAILWAY CO. *v.* WEMYSS BAY RAILWAY CO.

Railway—Assessment—Arbitration—Reference.

Circumstances in which *held* (aff. judgment) that a dispute between two Railway Companies, whether the working out of an agreement into which they had entered, as to the disposal of nett revenue, could be reconciled with the rights of mortgagees was a difference as to the mode of carrying out the agreement, and so fell under a clause of the incorporating Act of Parliament, referring all such cases to arbitration.

The defenders in this action, the Greenock and Wemyss Bay Railway Company, were incorporated by the Act 25 and 26 Vict., c. 160, 17th July 1862. The share capital of the company was fixed at £120,000, and the borrowing powers at £40,000. By an agreement, dated 1st and 2d April 1862, entered into by the pursuers, the Caledonian Railway Company, and the provisional directors of the Greenock and Wemyss Bay Railway Company, and afterwards confirmed by the latter company's Act (1862), it was agreed that the Caledonian Railway Company should contribute and hold in perpetuity £30,000, or one-fourth of the capital stock of the Wemyss Bay Company, but that only under the conditions, stipulations, and provisions thereinafter written. It was also provided that the Greenock and Wemyss Bay Company should make and maintain the line, and that when completed the Caledonian Company should supply the necessary rolling stock and work it on the terms set forth in Article 8th of the said agreement, which is as follows:—"That the cost of working the traffic upon the said railway and pier, and of the stock and plant to be provided by the said Caledonian Railway Company as aforesaid, shall be borne and defrayed by the said Caledonian Railway Company, in respect whereof the said Caledonian Railway Company shall be entitled, from time to time, to receive and retain for their own use £50 out of every £100 of the gross amount of money earned, realised, and levied on the said railway and pier, until, from time to time, the said gross receipts shall so far exceed £8000 in the year, as at £45 per cent thereof to yield for the said working a sum not less than £4000, in which case £45 out of every £100 of the said gross receipts shall be received and retained by the Caledonian Railway Company for the said working, instead of £50 per cent. as aforesaid, and the remainder of the said gross receipts shall belong to the Greenock and Wemyss Bay Railway Company.

The charges upon the balance of the gross receipts, after paying the working expenses in terms of Article 8th, and the manner in which the residue is to be divided, are thus settled by Article 9th of the said agreement:—"That out of the said Greenock and Wemyss Bay Railway Company's share of the gross receipts there shall be paid by them—*First,* The whole charges and expenses of maintaining the said railway, pier, and other works, and also all public and parish burdens, including poors-rates, county rates, prison assess-

ment, and taxes generally that may be chargeable upon the said railway and pier in respect of the said line and works, also the government-duty on passengers, and all payments, if any, to be made for land to be held by the said Greenock and Wemyss Bay Railway Company in feu or lease. *Second*, The 'general charges' to be incurred in conducting the ordinary directorial and financial business of the company; and *Third*, After providing for these payments, one-fourth of the balance shall belong to and be paid to the Caledonian Railway Company, in respect of their said contribution of £30,000, as further provided for in Article 14th hereof, and the remaining three-fourths of the said balance shall belong to the other shareholders in said Greenock and Wemyss Bay Railway Company." And it is further provided by Article 14th:—"That in respect of the payment of the said £30,000 of capital, and the other provisions above-written, the Caledonian Railway shall, in perpetuity, have right to one-fourth part or share, neither more nor less, of the nett revenue, as defined in Article 9th hereof, of the proposed company, whatever may be their expenditure in making the intended railway, pier, and works connected therewith, or otherwise; and the said first parties shall be bound to provide for all excess of cost beyond the amount of capital above specified necessary for completing the said undertaking; and the interest or dividend payable in respect of the said excess of expenditure, and the interest on all money borrowed, shall form a charge on the remaining three-fourths of the nett revenue of the said company, but that, subject to the above condition, the proposed company may borrow on mortgage of the whole of the proposed undertaking any sum not exceeding £40,000."

The foresaid sum of £30,000 was contributed by the Caledonian Company to the capital stock of the Wemyss Bay Company, and the line was opened in the first half of 1865, and has since been worked by the Caledonian Company in terms of the foresaid agreement. For the half-years ending 31st July 1865, 31st January 1866, and 31st July 1866, there were paid by the Wemyss Bay Railway Company to the Caledonian the several sums of £317, 13s. 5d., £351, 7s. 6d., and £440, 0s. 7½d., "being one-fourth of nett receipts, after deducting working expenses, in terms of Act and agreement." In the reports and accounts of the Wemyss Bay Company, from half-year ending 31st January 1867 to half-year ending 31st July 1869, there were similarly brought out various sums, amounting in all to £2498, 1s. 3½d., as due to the Caledonian Company as one-fourth of the nett revenue. Although thus credited to the pursuers, these sums were never paid. The present action was brought to recover payment of the said sum of £2498, 1s. 3½d., as also of £428, 11s. 4d., and £538, 19s., being the one-fourth of the nett revenue for the half-years ending 31st January and 31st July 1870.

The defenders stated that the payments made as averred by the pursuers in 1865 and 1866 were made in error, and that the sums credited to the pursuers in the accounts for 1866 to 1869 were erroneous entries, and that the sums sued for were not due, as during those years there was truly no available revenue out of which the pursuers could claim one-fourth—as the working expenses, maintenance, passenger-duty, rates, and taxes, payments on account of land, and interest, exceeded the gross receipts of the line. The dispute between the parties thus depended upon the reading of Articles 9th and 14th of the agreement.

By Article 18th of the said agreement it was provided that "all differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration, in terms of the Railways Clauses Consolidation (Scotland) Act, 1845, and the provisions with respect to the settlement of disputes by arbitration contained in such Act shall be held to be incorporated with this agreement, and be operative in the same manner as if they were *verbatim* inserted therein."

The defenders accordingly pleaded, *inter alia*—"(1) The present action is excluded by Article 18 of the agreement libelled; (2) The defenders ought to be assoilzied, in respect that in none of the half-years in question did any balance of revenue remain after meeting the requisite charges, and that thus there was no sum divisible between the pursuers' and the defenders' shareholders, in terms of Article 9th of the said agreement."

The Lord Ordinary (ORMIDALE) sustained the defender's first plea in law, and dismissed the action.

On a reclaiming note the First Division recalled the interlocutor of the Lord Ordinary, and appointed the case to be argued before seven Judges upon the question, "Whether the question raised by the defenders' second plea, in the circumstances disclosed on the record, and in the accounts produced by the defenders, falls to be settled by arbitration, under the 18th article of the agreement libelled." After hearing, their Lordships gave judgment answering the question in the affirmative.

The pursuers appealed to the House of Lords.

In giving judgment—

The LORD CHANCELLOR said that the question raised in this case was whether the defenders in the Court below were well founded in their plea, which alleged that the action against them in this matter was ruled by the agreement entered into between them referring all disputes to arbitration. The agreement referred to was made by the promoters of the Glasgow and Wemyss Railway on the one part, and the Caledonian Company on the other part. Such an agreement would not have been binding on the Glasgow and Wemyss Railway Company when afterwards constituted, unless it had been afterwards sanctioned and rectified by an Act of Parliament. But that was done, and when the Wemyss Railway was authorised to be made, the agreement was put in the schedule of the Act, and made as such part of the Act, and all its provisions had been expressly enacted by the statute itself. Then that agreement stated that all differences arising between the parties respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall from time to time, so often as any such questions or differences arise, be referred to arbitration, in terms of the Railway Clauses (Scotland) Act, 1845. Now, this was not a mere voluntary contract to refer, but it was made part of the statute

itself, and it was thus obligatory and compulsory to refer differences only not to the ordinary tribunals, but to the arbiters. Then there remains the question whether the particular difference now pending between the parties was such a difference as the statute contemplates. The nature of the difference was this—When the Caledonian Company agreed to lease the Wemyss Railway, they agreed to raise £30,000 of the capital, and the Wemyss Railway Company the other £90,000. Then, for the trouble of working the line, the Caledonian Company were to have half of the gross earnings and the Wemyss Company the other half. Out of this half belonging to the Wemyss Company certain expenses were first to be deducted. Up to that point both parties were quite agreed. But then the balance was to be dealt with as follows:—The Wemyss Company were authorised to borrow £40,000, and after paying interest and other expenses, the residue was to be divided as net revenue between the Caledonian Company, who were to have the fourth, and the Wemyss Company the other three-fourths. The mortgagees who lent the £40,000 could of course enforce their rights against the Wemyss Company and sweep away all this surplus of net revenue, while, on the other hand, if any net revenue was left, then it was to be divided as already mentioned. The great dispute therefore is, whether the working out of the agreement as to the disposal of the net revenue could be reconciled with the rights of the mortgagees. Surely that was a difference as to the mode of carrying out the agreement and nothing else. Then, also, it was clearly a matter to be referred to the arbiters, and it did not fall at all to be disposed of by a Court of law. This was what the Court of Session decided, and it was obviously a right decision, and he (Lord Chancellor) proposed that it should be confirmed, and that the appeal should be dismissed, with costs.

LORD CHELMSFORD said his noble friend had so clearly stated his views of this case, and with every point of that judgment he so entirely agreed, that he would not add a single word to what had been already so well said.

LORD HATHERLEY—I say the same.

LORD SELBORNE—I also say the same.

Affirmed with costs.

Counsel for Appellants — Solicitor-General (Haggallay). Agents—Hope & Mackay, W.S., and

Counsel for Respondents — Lord Advocate (Gordon) and Mr Cotton, Q.C. Agents—M'Ewen & Carment, W.S.

Monday, April 27.

(Before Lord Chancellor Cairns, Lords Chelmsford and Selborne).

GLEN AND OTHERS *v.* STEUART.

(*Ante* vol. x. p. 92.)

Succession—Testament—Destination—Heritable and Moveable—Conversion—Heir and Executor.

A testatrix left to trustees her whole property, consisting principally of heritage, with directions to sell and dispose of it, and after payment of legacies to pay over the residue "to my heir-at-law, whom failing, to my next of kin." These instructions were carried out, and in a competition between cousins of the testatrix claiming as her next of kin, and a cousin's child claiming as her heir-at-law, *Held* (aff. judgment of Court of Session) that the testatrix did not by "heir-at-law" mean her heirs *in mobilibus*, but her heir in heritage—her intention being to give the residue to the person who would have succeeded to it had a sale not been necessary.

By trust disposition and settlement, dated 15th May 1852, Mrs Grant, afterwards Mrs Sillars, "gave, granted, assigned, and disponed to the Reverend Peter Gardiner, chaplain in the prison, Ayr, John C Haldane, surgeon, Ayr, and William Pollock, writer, Ayr, and to the survivors or survivor of them, all and whole her *pro indiviso* half of certain subjects in St Enoch's Wynd, and others, in the burgh of Glasgow; as also her *pro indiviso* half of the lands of Davidston, in the county of Ayr, all therein specially described; as also, her whole estate and effects, heritable and moveable, pertaining to her at her death. She also thereby appointed her said trustees to be her executors, but in trust always for the ends, uses, and purposes therein mentioned; and she directed them, immediately after her decease, to sell and dispose of her whole means and estate, and after paying her debts, deathbed and funeral expenses, and the legacies and annuities therein named (all of which have been paid and settled), to pay over the residue of her estate to her heir-at-law, whom failing, to her next kin, and that at the first term of Whitsunday or Martinmas that should occur six months after her death, as the said trust-disposition and settlement in itself more fully bears." On 5th June 1852 Mrs Grant executed an antenuptial contract of marriage with Thomas Sillars, whereby, under certain burdens and reservations, she disponed to herself, whom failing the children of her intended marriage, whom failing to herself and her heirs and assignees whomsoever, the subjects therein described, (being the same as those specially described in and conveyed by her said trust disposition and settlement), but excluding her said husband's *jus mariti*, right of courtesy, and right of administration in relation to the said subjects, and the rents and proceeds thereof, which the said Thomas Sillars thereby renounced. It was, however, thereby provided and declared, that in the event of Mrs Jean Oswald Calder Glen or Grant predeceasing the said Thomas Sillars, he should have the liferent enjoyment of the whole rents and profits of her means and estate thereby conveyed, and the foregoing conveyance was burdened with the said liferent accordingly." The testatrix died in June 1853 without issue, and in 1859 the lands left by her were sold, the debts, legacies, and annuities paid, and her husband received a sum equivalent for his liferent until 25th March 1872, when he died. The residue of the said trust estate, amounting to £2300, constituted the fund *in medio* in this action. The claimant, William Steuart, as heir-at-law served to the testatrix, claimed the whole fund, which was also claimed by the Rev. John Glen, Miss Margaret Glen, and Mr Wilson, as next kin of the testatrix at the time of her death.

The Lord Ordinary (ORMIDALE) held that the words were to be read as meaning next of kin, but