authorities as to the giving or withholding effect to the rent of mills. In a division of *cumulo* valuations, I think there is considerable concurrent authority to the effect that when it is clear that a mill had been erected subsequent to the date of the valuation, it should not be taken into account in a sub-division. Wight, the leading authority on such subjects, expresses himself clearly enough on that question. He says (p. 199)—"In dividing *cumulo* valuations according to the real rents, regard must be had to such subjects only as by the Acts of Parliament or convention introducing this mode of apportioning the land-tax, are appointed to be valued. . . . It has been much questioned, whether in such divisions any part of the *cumulo* ought to be allotted to mills. . . . When certain evidence can be brought of their having been once valued, they ought to receive a proportion of the *cumulo* to be divided, and if it be uncertain whether they were originally valued or not, the distinction between those which have a regular thirlage and others which are not entitled to any, but depend entirely upon voluntary employers, seems to be reasonable." Mr Bell on Election Laws also says—(p. 51) "If, again, the claimant has right to the mill, and he be dividing a *cumulo* valuation, he ought—if it be an old mill—to put part of the *cumulo* upon the mill. If, on the other hand, it has been erected since the valuation, then of course no part of the *cumulo* can be allotted to it," and Connell on the same subject (p. 123) expresses himself in such a way as to intimate a concurrence in Mr Bell's views.

Now, it appears to me that the authorities, as far as they go, are in favour of the contention of the railway company, and I think we must regard the question not merely with reference to the present case, which is one of burdens leviable according to the valued rent, but with reference to the privileges which attach to a larger allocation of valued rent. Formerly the contention was more generally for a larger allocation. People contended as for a benefit, and not to avoid an evil, as the right to vote depended on the amount of valued rent; and up to the present time the extent of the right of a party to share in a commonty is dependent on it, and if it had been the law that the erecting of a manufactory affected the valued rent of the different lands embraced within a *cumulo*, by increasing the valued rent to be allocated to the lands on which the manufactory has been erected, the proprietor of the much larger portion of the property might have been deprived of a vote, and might still be deprived of a share in a commonty corresponding to the true proportion of his property,—which would involve a result unjust and not easy to reconcile with any principle. The case of *Campbell* (Jan. 17, 1755), where we have the very valuable opinion of Lord Kaimes on the subject, is instructive. Lord Kaimes says that the rule of the real rent is only to be adopted in the absence of evidence of the actual rent at the original valuation, or of payment of cess. As a rude mode of reaching the truth, in the absence of direct evidence on the subject, he says—"there are three methods of dividing a *cumulo* valuation; 1. The real rent of the several parcels at the time when the valuation was made; 2. The use of paying the cess; 3. The present rent. The first is undoubtedly the most accurate method, and is always to be preferred when evidence can be had." The use of payment leads to an inference of an allocation, the real rent supplies a means of approximation where better evidence is awanting. In this case, as it appears to me, the best mode of approximating, in the absence of other evidence to the true relative value of the portions of ground included in the *cumulo* valuation at the date of the original valuation, is to take the real rent of the land viewed as an agricultural subject. That may not afford a perfectly true result, but to take the rent of the railway land, arising from the wholly adventitious circumstances of a new trade and profits made by it, is not to reach an approximation to the truth, but to adopt an element which necessarily excludes the possibility of approximation. If the rule of agricultural value, estimated as at the date of the application, be adopted, it will operate according to principle; it will be fair in itself; and, from the reports which we have received from the clerks to the Commissioners of Supply, who have reported upon the practice for our information, it will not be in disconformity, but rather in conformity, with that practice. The result of their reports is that in no instance, hitherto, has there been any division in the case of lands applied to railway purposes, but that the general practice has been, in cases of manufactories, to take the agricultural value, excluding the estimated rental of the buildings appropriated to purposes of manufacture.

On the whole matter, whether we have regard to the principle or the practice, we are in a position tof ollow a rule which will do justice, and that is to take the agricultural value of the land. We now know, from information which was not before the Ordinary, that the adoption of the rule of taking the real rent, irrespective of all consideration as to the source from which the rent is derived, is not truly in accordance with practice far less binding as an inflexible rule, and are enabled, I think, to give effect to considerations leading to a sounder and more equitable adjustment of the rights and interests of the parties.

The result will be a reduction of the disputed allocation.

LORDS COWAN, BENHOLME, and NEAVES concurred.

Agents for Pursuers—Henry & Shiress, S.S.C.
Agent for Defenders—James Webster, S.S.C.

Saturday, July 17.

CALEDONIAN RAILWAY CO. *v.* CITY OF GLASGOW UNION RAILWAY CO.

(*Ante*, p. 616.)

Railway—Lands Clauses Act, sec. 120—*Superfluous Lands—Railway Clauses Act—Extraordinary purposes. Held* that certain lands had been purchased by a railway company under the provisions of the Railway Clauses Act, empowering it to acquire lands for extraordinary purposes of the railway, and not under the clauses entitling it to acquire lands by compulsion, and therefore that the statutory limitation of section 120 of the Lands Clauses Act, as to superfluous lands, which was applicable to lands of the latter kind, did not affect the lands in question.

In a former action between these parties the Court held, in regard to certain lands, the price of which the defenders objected to pay on the ground that they were superfluous lands in the sense of the

120th section of the Lands Clauses Act, that a contract of sale had been concluded between the parties before the period for the sale of superfluous lands had expired. The present action between the same parties is one in which the pursuers conclude for the price of certain lands in regard to which the defenders say that some of them are superfluous and some are not. The defenders had consigned the price of the lands falling under the latter head, and when the case was last before the Court they were appointed to pay it over to the pursuers. The question still remained in regard to the lands alleged to be superfluous, whether they had not vested in the neighbouring proprietors, in respect they had not been sold within the period prescribed by the statute. The Lord Ordinary (BARCAPLE) held they had so vested. The Court desired further argument on the following points:—

1. Who are the "neighbouring proprietors" in the case of the land in question? In particular, can a public street be a "neighbouring proprietor" to the effect of acquiring lands by forfeiture?

2. Does the fact that these lands were originally taken from Sir John Maxwell by agreement, and not under the compulsory powers of the Act, make any difference in the application of the statutory forfeiture?

3. With regard to the contention of the pursuers, that their Act of August 1866 must be held to have a retrospective effect, so as to draw back to the Act expiring in May 1866, the Court wished to know whether there were any other Caledonian Acts to which the Act of August 1866 might apply, without giving it any such retrospective effect?

SOLICITOR-GENERAL, SHAND and JOHNSTONE for pursuers.

CLARK and LANCASTER for defenders.

At advising—

LORD COWAN—The question remaining for decision under the record in this, the second action between these parties, relates to the portion of land, consisting of 12,750 square yards, referred to in the record as lying to the south of the Canal, and coloured red on the plan. This ground was with other lands purchased from the pursuers by the defenders, and the price having been fixed by arbitration at £12,750, the summons concludes *inter alia* for payment of that amount. The defence stated to the action has been sustained by the interlocutor under review, which finds—first, that the lands were superfluous lands, subject to the provisions of the Lands Clauses Act, section 120, by which it was provided that in default of the same not being sold within the prescribed period, the lands should become the property of the adjoining heritors; second, that prior to the contract of sale between the parties to this action, the prescribed period for the sale of superfluous lands had expired; and, third, that in these circumstances the pursuers were not *in titulo* to give a valid title to the lands, or to demand their price. Under the reclaiming note these findings were the subject of an elaborate argument; but in advising the case it appeared to the Court that there were questions of greater or less moment which seemed not to have been sufficiently brought before the Lord Ordinary, and not to have received that full consideration in the argument which their bearing on the case and their importance deserved. An additional hearing was in consequence ordered on these points, and this led to the very able pleading recently addressed to the Court. The basis of the interlocutor under review is, that the lands which are the subject of the action, assuming them to be superfluous lands, and not to have been sold within the prescribed period, fall within the operation of the 120th section of the Lands Clauses Act. On this assumption, it was essential to inquire whether the lands were superfluous in the sense of the statute, and whether the sale was effected before the prescribed period expired within which such lands could be validly disposed of. It was only on these two matters being affirmed, as has been done by the findings in the interlocutor, that the forfeiting provision of the statute could be held applicable to the case. But if the lands do not fall within the scope of the 120th section it will be unnecessary to consider whether the finding in the interlocutor was well-founded or not. The essential and primary inquiry is, whether these 12,750 square yards of ground are not, from the mode in which they were acquired by the pursuers, and the purpose for which they were held by them, outwith the operation of the statutory provision on which the defenders rested the conclusions of this action. Or, to state the matter for consideration in more general terms, whether the 120th section of the Lands Clauses Act applies to and includes lands purchased for extraordinary purposes under the powers conferred by the Railway Clauses Act. This was admitted at the bar to be a new question, on which no light could be thrown by any decision of the English Courts or of our own; but it is manifestly one the answer to which in the main must be conclusive of this case; and, after repeated consideration of the argument, I have arrived at the conclusion that it must be so answered. Laying aside therefore all the other points that have been argued, I shall now state, as briefly as possible, the grounds upon which my opinion has been formed. By the 6th section of the Lands Clauses Act it is made lawful for the promoters of the undertaking to agree with the owners of any land by the special Act authorised to be taken, and which shall be required for the purposes of the Act, for the absolute purchase of the same; and by section 17 and subsequent sections it is provided that when the promoters shall require to purchase or take any of the lands by the special Act or this Act authorised to be taken or purchased, notice shall be served on the parties interested therein in the manner and to the effect prescribed by the statute for the purchase and taking of lands otherwise than by agreement. These provisions of the Act have regard to the acquisition of land for the formation and maintenance of a railway; and it is to such lands that the terms of the 120th section have special reference. The preamble of this and all the sections which follow is —"and with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows." Such lands are to be absolutely sold and disposed of within the time prescribed, and if remaining unsold at the expiration of that period, such lands, as superfluous lands, are thereupon to vest in and become the property of the owners of the lands adjoining thereto. And by the 121st section there is given a right of pre-emption to the persons then entitled to the lands, if any, from which the same were originally severed; and in the event of their refusing to purchase them, then an offer is to be made to those persons whose lands shall immediately adjoin the lands proposed to be sold. The sale to such parties, or, on their refusal, to others,

must, however, be effected within the prescribed period; otherwise, the lands are forfeited by the company, and become the property of the adjoining heritors. The object of this stringent provision of the statute, to use the words of Justice Blackburn in *Moodie's* case, "appears to be that where lands are taken from proprietors by a compulsion of law, in order that particular works may be executed, if they are not executed, the lands shall first be offered to the persons then entitled to the lands, if any, from which they were originally severed," and so forth. The words of the provision, as well as the reason of the thing, very strongly appears to confine the provision to lands acquired under the compulsory powers conferred by the statute, whether by agreement with the owners or under notice, as enacted by the 6th and 17th sections and other relative provisions. Although the acquisition of such lands may have been by private agreement, still, being lands within the compulsory powers, and which the owners, on requisition of the company, must part with, they are certainly lands which, if not required for the purposes of the railway, must be held within the operation of the statutory enactment. But can the same be predicated of lands not required for the purposes of the railway in the sense now explained—that is, lands not within the compulsory powers of the Act, but acquired by voluntary agreement and purchase under the powers conferred, not by the Lands Clauses Act, or the special Act, but by the Railway Clauses Act—that is, acquired for the extraordinary purposes specified in that Act? By the 38th section of the Railway Clauses Act it is declared lawful for a railway company, in addition to the lands authorised to be compulsorily taken by them under the powers of this or the special Act, to contract with any party willing to sell the same for the purchase of lands adjoining or near to the railway, not exceeding the prescribed number of acres, for extraordinary purposes. The purposes are then specified, and it is most material to observe that those purposes are of such a nature as require to be met from time to time during the whole subsistence of the railway. Additional stations may come to be required, and yards, wharves, and places for the accommodation of the traffic, and for making convenient roads or ways; and, in the words of the enactment, it is for the use of the railway as well as for its formation. A power to meet the exigencies of the undertaking in respect to the matters enumerated it was plainly indispensable to confer on the company. The wants of the undertaking in these respects cannot be foreseen at the outset of it, so as to be met by purchases made within the period for taking lands compulsorily, or within the period fixed for the completion of the railway. It is only after the undertaking has been in operation that the exigency may arise for the acquisition of lands to meet the shifting state of the traffic at the various stations and districts along the line. The Lands Clauses Act itself, however, contains provisions as to this matter having a material bearing on the question of construction. Distinct provision is made for railway companies originally acquiring by voluntary purchase, and from time to time disposing of such lands and purchasing other lands to meet the exigencies of the undertaking as regards extraordinary purposes. By the 12th section of that Act power is conferred on the promoters, having permission by their special Act to purchase lands for extraordinary purposes, to contract for the purchase of such lands with all parties with whom they may contract for the lands which they are entitled to acquire under their compulsory powers; and by section 13th of the Lands Clauses Act it is declared lawful for them to sell such lands—that is, lands acquired for extraordinary purposes—or any part thereof, in such manner, and for such considerations, and to such persons, as they may think fit; and again, to purchase other lands for the like purpose, and afterwards to sell the same, and so on. No limitation whatever is here prescribed as to the period either for the purchase of lands for such purposes or for their sale. On the contrary, the sale may be made to any person, and the power to purchase, sell, repurchase, and resell, lands thus acquired is expressly permitted to be exercised from time to time—that is, as I read it, at any time during the subsistence of the railway. One condition only is attached to the power and liberty thus conferred, and it is quite corroboratory of the views thus stated:—"But the total quantity of the lands to be held at any one time by the promoters of the undertaking for the purposes aforesaid shall not exceed the prescribed quantity." Now, that the portion of ground in question was acquired for extraordinary purposes is made clear from the statements in the record, and the proof led by parties. It forms part of a triangular piece of ground of considerable extent and large marketable value, lying to the south of the Canal, exhibited on the plan in process. This ground was purchased from Sir John Maxwell of Pollok in 1851 by the General Terminus Railway Company, incorporated in 1846, in whose right the pursuers, under the Amalgamation Act of 1854, now stand. The disposition by Sir John in implement of that contract of sale is dated January 1852, and is in process. By the Terminus Company's Act 1846, the powers of the company for the compulsory purchase of land expired on the 3d July 1849, being three years from the passing of the Act, but was extended to 1850 by the subsequent Act of 1847; and by the 22d section of the Act the company were allowed to purchase by agreement, and to hold lands for extraordinary purposes to the extent of 13 acres, enlarged by the Act of 1847 to the extent of 20 acres additional. The original acquisition of the lands by the Terminus Company thus was not under the compulsory powers of the statute. It could not be so, not only because the period for the purchase of the land within the deviation line had expired in 1849, or at least in 1850, but because the lands were beyond the deviation line. To some extent, indeed, the defenders alleged that these lands were not so, but might have been taken to some extent under the compulsory powers. The purchase, however, was made by voluntary agreement, and the Terminus Company had power to make it, and to hold the lands purchased for extraordinary purposes under the express provisions of the Railways Clauses Act and Lands Clauses Act to which I have referred. On this part of the case the proof adduced by the pursuers, although it might not have been of much weight or importance had the question turned, as the Lord Ordinary held, upon the lands being superfluous or not, is not immaterial in the view I present. It establishes that a purchase of the lands was *de facto* made for extraordinary purposes, to serve which the statute permitted the company to purchase and hold lands in addition to those they had power to take compulsorily. The defenders contended that the power conferred by section 38 of the Railway Clauses Act, so far as this company was concerned, fell with the expira-

tion of five years from the passing of the Act of 1846, being the period prescribed by the 24th section for the completion of the railway. By that section it is enacted that, at the expiration of such period, the powers by this or the recited Acts, granted to the company for executing the railway, or otherwise in relation thereto, shall cease to be exercised except as to so much of the railway as shall then be completed. The power of the Terminus Company to make the purchase they did must in this view be held to have expired before the disposition of the lands so granted—a very strange result certainly, were the defenders right in their argument. The statutory provision, however, plainly has reference to the compulsory powers for executing the railway and completing it, and in relation thereto, which had been granted to the company. These were to cease to be exercised except as to so much of the railway as should then be completed. All the powers given to the company were left untouched in so far as they were required for the management and use of the completed railway. Every power conferred with a view to the convenient and profitable management and administration of the undertaking was left untouched by this agreement; and if it has been successfully shown that the power to purchase and hold lands for extraordinary purposes conferred by the Railway Clauses Act is of this character, there is obviously no weight in the fact that after the completion of the railway all the compulsory powers held by the company should cease. Holding, then, the original purchase of the lands to be free of question, it appears to be almost a necessary sequence that such lands are beyond the operation of the 120th section of the Lands Clauses Act. If the power to purchase them in 1852 be clear, the purchase might have been delayed and as validly exercised in 1862, by which time the prescribed period of ten years was at an end. The fair reading of the statute is that only those lands which the company were empowered to take compulsorily within the three years were within the operation of the 120th section. The power to purchase under the Railway Clauses Act, and to hold lands after the expiration of the period prescribed for completion of the railway, is in a manner, indeed, conclusive that such lands are not within the operatian of the forfeiture declared by the statutory provision. But apart from this, and on the more general grounds which I have stated—first, that the statutory provisions throughout draw a clear distinction between lands to be compulsorily taken and lands acquired voluntarily for extraordinary purposes; and, second, that the very object of the provision given to railway companies to purchase and hold lands and to sell and repurchase them from time to time forbids the conclusion that such lands behoved to be sold within the prescribed period. The judgment of Justice Blackburn, to which I have referred, was founded on in the course of the debate as illustrative of the true meaning of the statutory provision in the English Railway Act, which is to the same effect as the 120th section of the Scotch Act. The case before Justice Blackburn referred to land which had been taken under the compulsory powers, and the observations made in the judgment, valuable as they are, all refer to lands not sold within the prescribed period, which had been taken from proprietors by compulsion of law. The argument does not touch the applicability of the statutory provision to lands acquired by voluntary purchase under the Railway Clauses Act, as occurred in this case. A specialty was stated to exist, to which I have already generally referred, to the effect that some portion of the 12,750 yards was within the deviation line, and might have been taken compulsorily at any time before the expiration of the three years after the passing of the Act of 1846. The answer is, that even assuming the facts to be so, the land was not so taken. It was only after the expiration of the three years that it was, along with other ground beyond the deviation line, made the subject of purchase by voluntary agreement under the company's powers to acquire the whole of these lands for extraordinary purposes. On these grounds, I think the interlocutor under review should be recalled, and decree pronounced in favour of the pursuers in terms of the conclusions of the summons.

LORDS BENHOLME and NEAVES concurred.

LORD JUSTICE-CLERK declined.

Agents for the Pursuers—Hope & Mackay, W.S.

Agents for the Defenders—Murray, Beith, & Murray, W.S.

SPECIAL CASE FOR MR AND MRS CAMPBELL AND THEIR MARRIAGE TRUSTEES, AND OTHERS.

Husband and Wife—Marriage-Contract—Annuity—Condition—Second Marriage. A husband by his marriage-contract provided an annuity of £400 to his wife, restrictable to the sum of £100 in the event of her second marriage. By a subsequent trust-disposition and settlement he provided to his wife an annuity of £1500 a-year, without attaching to it any condition. The wife married a second time, and on her marriage claimed the larger provision. *Held* she was entitled to it.

The parties to this special case agreed to the following statement and question:—"1. By antenuptial contract, dated 14th and 17th January 1859, entered into between the said Charles Stewart Parker Tennent, on the one part, and Miss Arabella Jane Hay, daughter of the deceased Archibald Hay, Esq., of Her Majesty's 86th Regiment of Infantry, on the other part, the said Charles Stewart Parker Tennent bound himself, *inter alia*, in the following terms:—'In contemplation of which marriage the said Charles Stewart Parker Tennent hereby binds and obliges himself and his heirs, executors, and successors whomsoever, renouncing the benefit of discussing them in their order, to make payment to the said Arabella Jane Hay, his promised spouse, if she shall survive him, during all the days of her life after his death, of a free yearly annuity of £400 sterling, restrictable as after mentioned, free from all burdens and deductions whatever, payable said annuity in advance at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms which shall happen after the death of the said Charles Stewart Parker Tennent, for the half-year succeeding, the next term's payment at the first term of Whitsunday or Martinmas thereafter, and so forth half-yearly, termly, and continually during all the days of the life of the said Arabella Jane Hay, with interest of each term's payment of the said annuity at the rate of 5 per centum per annum during the not payment, and a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof: But providing always, that in the