

Thursday, July 5.

FIRST DIVISION.

[Lord Adam, Ordinary.]

LITTLE v. NORTH BRITISH RAILWAY CO.

*Process—Reclaiming Note—Competency—31 and 32
Vict. c. 100, sec. 28.*

In an action brought against a railway company for damages for personal injury, the railway company pleaded that they were not liable, in respect that there was no contract of carriage between them and the pursuer at the time the accident occurred. The Lord Ordinary repelled this plea "in so far as directed to the relevancy of the action, and appoints the pursuer to lodge such issue or issues as he proposes within six days." The defender reclaimed without obtaining leave. The pursuer objected to the competency of presenting a reclaiming note without leave at this stage. The Court held that this was an interlocutor "importing an appointment of proof" in the sense of the Act of Sederunt of 10th March 1870, sec 2.

Counsel for Pursuer—J. C. Smith, Agent—Thomas Lawson, S.S.C.

Counsel for Defender—Darling, Agent—Adam Johnstone, L.A.

Thursday, July 5.

FIRST DIVISION.

[Lord Rutherford Clark,
Ordinary.]

STEWART v. STEUART.

Entail—Servitude—Feu-contract—Implied Grant.

A proprietor granted various feus on one portion of his entailed estates, under authority of the Court, with a supply of water from another portion of the entailed estate, supplied at a certain rate per pound of rental. Thereafter he, by a contract of excambion, acquired in fee-simple that portion of the entailed estate whereon the feus were. Thereafter he granted more feus, with right to the same water supply from the entailed estate. In a question between the succeeding heir of entail and a disponee succeeding to the superiority of the feus,—held that the heir of entail had right to the water-rate payable both by those feuars who had feued before and by those who feued after the excambion.

This was an action against Franc Nichols Stuart, proprietor of the estate of Inchewan, at the instance of Sir Archibald Douglas Stewart, heir of entail in possession of the Grandtully and Murthly estates, for declarator that, as heir of entail foresaid, he had sole and exclusive right to the water assessment paid by the owners of feus in the lands of Inchewan, and that the defender had no right thereto.

The circumstances of the case were narrated by the Lord Ordinary in his note, as follows:—
"The late Sir William Stewart was heir of entail

in possession of the estate of Grandtully, and in that capacity he obtained power to feu the lands of Inchewan. In the exercise of that power he granted several feus, according to the form prescribed by the Court. In the earliest charters it was contemplated that a supply of water might be introduced by Sir William or the heir in possession, and the vassal was taken bound 'to take his supply of water for the use of his dwelling-house on the same terms and conditions as the other feuars.' Thereafter Sir William brought in a supply of water for the general use of the feuars, and in the subsequent charters the vassals were taken bound 'to take and pay for the same at the same rate as the other feuars, any assessment for said water not to exceed the rate of one shilling per pound on the yearly rental.' But it was declared that 'the vassals should have no claim against me or the heirs of entail for any deficiency in the supply of water.'

"The water was brought from the lands of Grandtully other than those of Inchewan. It was collected in a reservoir on the entailed estate, and carried by pipes to the feus. It is certain that a part of the cost of introducing the water was charged on the entailed estate. But it does not appear whether the whole cost was so charged or not.

"In 1864 the lands of Inchewan were excambioned for the lands of Stenton. After the date of the excambion several feus were given off. The form of the charter was considerably changed. Before the excambion the granter was described as heir of entail in possession of the entailed estate of Grandtully and others. After it he is described 'as heritable proprietor of the piece of ground hereinafter disposed,' but the charters contain an obligation on the vassals to take and pay for the water.

"By a general disposition *mortis causa* Sir William Stewart conveyed his whole estates to the defender, including the lands of Inchewan. The pursuer succeeded Sir William as heir of entail in the entailed lands.

"The vassals on the lands of Inchewan are willing to pay their water-rate either to the pursuer or defender. But a question has arisen to which of them it is payable. Hence this action."

The defender pleaded—" (2) The defender being superior of the several subjects contained in the feu-charters founded on by the pursuer, and as the whole obligations contained in these charters must run between the superior and the vassals or proprietors of the *dominium utile* of the subjects, and as the water-rates in question are payable under obligations in these charters, it follows that the defender, as the superior, is entitled to payment of those water-rates. (6) The defender is entitled to the water-rates in question, either as superior foresaid or as general disponee and sole executor of the deceased Sir W. D. Stewart."

The Lord Ordinary gave decree against the defender in terms of the conclusions of the summons.

"Note.—[After the narrative given above]—The question presents itself in a different form as regards the feus granted after the excambion and those granted before it. For, while the pursuer contends that it was beyond the power of Sir William Stewart to communicate to the former class