1893, 30 S.L.R. 343, was also referred to. The words in the first part of the discharge —"the society past and present represented by them"—must be held to include Miss Stirling, who was a mere hand of the directors. The second part of the discharge was extremely wide, and expressly discharged the father's whole claims.

Argued for the pursuer—There was no express discharge of the defender, neither was there an implied discharge, for there was nothing in the record to identify Miss Stirling with the "society." The document could not fairly be read as a discharge, *i.e.*, a satisfaction, of the father's whole claims, but only of his claims against the directors. There was no evidence that the damage he sustained was repaired, there had been no assessment of it by a jury. In form the discharge was a receipt for money with a general clause added, and it was a rule of construction that the latter was not to be extended beyond the specific discharge.

At advising—

LORD PRESIDENT—I think that this action is excluded by the discharge upon which the defender founds. In the first place, it is necessary to consider the terms, scope, and occasion of this discharge. Now, it was certainly granted in order to put an end to an action against James Colston and certain other persons, not including Miss Stirling. But the terms of the discharge go far beyond this, its immediate object. It begins by acknowledging receipt of the sum of £100 from James Colston and others, directors of this society, "in full of all claims of damage competent to me under the summons signeted 24th February last." Now, I do not attach much importance to it so far, but it goes on "or otherwise against them," that is, Colston or others, "or the society, past or present, represented by them for or in connection with the loss of my three children." Now, it is very material to observe that if the pursuer's object in granting the discharge was to discharge Colston and others as defenders in the former action, he has already done so in the clause I first noticed; but he is not content even with what I have last read, for he goes on to add this general clause, "and my whole claims of every kind for damage in respect of the loss of the said children are hereby discharged, as is also the said summons and all that has followed thereon." It appears to me, accordingly, that in this discharge a very clear distinction is drawn between claims against the persons who were convened as defenders in the former action, and claims on account of the loss of the pursuer's children against persons who were not called in the former action, and I think that the only construction of which the discharge is susceptible is that it discharged both sets of claims.

That being the nature of the discharge, let us turn to the claim which the pursuer here makes, in order to see whether it is a claim falling within the discharge. The claim is a claim in so many words for the loss of the pursuer's children, and the defender is charged with being responsible for that loss, because she was "honorary superintendent of the Edinburgh and Leith Childrens' Aid and Refuge, and as such was responsible for the proper conduct and management of the said institution during the period from 1884 to 1887, when the incidents founding the present action occurred." The pursuer thus in plain terms now brings Miss Stirling into Court because she was responsible for the conduct of the society in relation to his children, when in April last he had renounced his whole claims of damages of every kind for the loss of his children. It appears to me, therefore, that this discharge is a complete answer to the pursuer. And accordingly I think that the Lord Ordinary's interlocutor should be recalled.

LORDS ADAM, M'LAREN, and KINNEAR concurred.

The Court recalled the interlocutor of the Lord Ordinary, and assoilzied the defender.

Counsel for Pursuer and Respondent—Cullen. Agents — Young & Roxburgh, W.S.

Counsel for Defender and Reclaimer—Clyde. Agents—Stuart & Stuart, W.S.

Saturday, March 11.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.

MAGISTRATES OF INVERNESS *v.* HIGHLAND RAILWAY COMPANY.

Title to Lands Taken Compulsorily, whether Statutory or Feudal—Superior and Vassal — Casualties — Lands Clauses (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 80, 107, *&c.*, 117 *and* 126.

A railway company acquired compulsorily under the powers in their Act (1) certain lands belonging to A, which formed only part of the lands held by him under the same titles, and (2) certain lands belonging to B, which were the whole lands held by him under one title. The conveyances were made out in the statutory form prescribed by sec. 80 of the Lands Clauses Act, and were recorded in the appropriate register of sasines within the statutory period in order to complete the company's title.

In 1860 the company obtained from the Magistrates of Inverness, as superiors of the lands acquired from A, a charter of confirmation, purporting to confirm the said lands and the conveyance thereof, and stipulating that the company should be bound to take an entry from them as superiors and to have their writs confirmed every 25th year. In 1863 the company took a similar charter of confirmation of the lands acquired from B.

In 1892 the Magistrates of Inverness

sued the railway company, under the 4th section of the Conveyancing Act 1874, in an action of declarator and for payment of casualties alleged to be due in respect that the lands had fallen into non-entry on the expiry of 25 years from the previous entry constituted by the charters of confirmation.

Held (Lord M'Laren *diss.*) that the action was incompetent, there being no proper feudal relation between the parties, and the charters of confirmation being inept as titles to the lands and not being pleadable as contracts fixing the compensation payable to the superiors—*Magistrates of Elgin* v. *Highland Railway Company*, June 20, 1884, 11 R. 950, *considered.*

The Inverness and Nairn Railway Company, under the powers of an Act of Parliament obtained in 1854 which incorporated the Lands Clauses Consolidation (Scotland) Act 1845, acquired compulsorily for the purposes of their undertaking (1) certain portions of lands adjoining the town of Inverness belonging to John Rose, farmer, Kirkton, by conveyance dated 13th and recorded 27th July 1855, and (2) certain lands belonging to Robert Smith, solicitor, Inverness, by conveyance dated 21st October and recorded 20th November 1858.

In the case of both purchases the titles taken by the railway company were made out in accordance with the statutory form prescribed by the 80th section of the Lands Clauses Consolidation Act and the Schedule A annexed to the Act. The title was completed in the statutory manner by registration of the conveyance in the appropriate register of sasines within sixty days, the conveyance by Mr Smith bearing a warrant of registration signed by the agent of the company.

It appeared from an examination of the titles that the subject acquired from Mr Rose was only part and portion of other lands held by him under the same titles, and that the subject conveyed by Mr Smith was the whole of the lands held by him under one title.

In 1861 the Inverness and Nairn Railway Company was amalgamated with the Inverness and Aberdeen Junction Railway Company, which was united with the Inverness and Perth Junction Railway Company in 1865.

On 2nd April 1860 the railway company obtained from the Provost, Magistrates, and Council of the royal burgh of Inverness, as superiors of the lands above mentioned, a charter of confirmation which purported to confirm the lands disponed to the company by Mr Rose, together with the conveyance thereof—"To be holden, the said lands and others hereby confirmed, of and under us and our successors in office, representing the community of the said burgh as immediate superiors of the same, in feu farm, fee, and heritage for ever, paying therefor yearly to us or our foresaids, or our chamberlain for the time in our behalf, the sum of 2s. 5½d; declaring that while the said lands are owned or held by the said railway company, or by any corporation or public company, they shall always be bound, as by acceptance hereof they are hereby bound, to take an entry from us or our successors, the superiors of the said lands for the time, and procure their writs confirmed every twenty-fifth year, and shall also be bound, as they by acceptance as aforesaid hereby became bound, to pay to us and our aforesaids, or our chamberlain as aforesaid, every twenty-fifth year, the usual untaxed casualties and dues payable by singular successors to their superiors in non-entry, with one-fifth part more thereof of penalty in case of failure, and interest at five per cent. per annum thereon while unpaid, reckoning always the said period from the term of Whitsunday last 1859."

There was appended a receipt in these terms—"*Inverness, 28th July* 1860.—Received from the Inverness and Nairn Railway Company the sum of £10 sterling, being composition payable to the town of Inverness for entry by the foregoing charter of confirmation.—(*Signed*) ROBERT SMITH, *Town Chamberlain.*"

On 3rd August 1863 the railway company obtained from the Magistrates and Council a second charter of confirmation in similar terms, confirming the lands disponed by Mr Smith, together with the various writs constituting his title, and the disposition by him in favour of the company, and containing the following condition—"Declaring that while the said lands hereby confirmed, or any part thereof, are held by the said Inverness and Aberdeen Junction Railway Company, they shall be bound, as by acceptance hereof they bind and oblige themselves, in respect of such whole or part, on the expiry of every twenty-fifth year from the date hereof, to take from us or our successors, superiors thereof, a new entry and confirmation thereof, and pay the casualties exigible in respect thereof, all in the same way and to the same extent as if the lands, while in the hands of a singular successor fell into non-entry by death of the vassal: And specially declaring that while so held by the said railway company, our vassal under these presents, this confirmation shall not extend beyond, nor have any force or effect for the period after the expiry of twenty-five years from the date hereof; and in the event of alienation of the whole or any part of the premises by the company, our present vassal, then these presents, *quoad* the whole or the part so alienated, shall be limited to and not extend beyond the date of such alienation, and the said company's disponee shall be bound to take an entry from us or our foresaids, and pay to us or our foresaids a casualty as in the case of non-entry by a singular successor."

In 1892 the Provost, Magistrates, and Council of Inverness raised an action against the Highland Railway Company, under the 4th section of the Conveyancing Act 1874, to have it declared (first) that in consequence of the lapse of twenty-five years from the term of Whitsunday 1859, a casualty, being one year's rent of the

lands acquired from Mr Rose, became due and payable at Whitsunday 1884; (second) that in consequence of the lapse of twenty-five years from 3rd August 1863 a similar casualty was due on the lands acquired from Mr Smith; or alternatively (third) that the said lands became in non-entry on 1st August 1865 in consequence of their alienation to the Highland Railway Company. The action concluded for payment of £3000, being the amount of one year's rent or value of the said whole subjects, together with penalty and interest.

The pursuers pleaded—"As the superiors of the said lands and others, the pursuers are entitled to decree in terms of the conclusions of the summons, in respect of the above-recited conditions, provisions, and declarations, of the said two charters of confirmation, and the defenders being the proprietors in possession thereof."

The defenders stated that the said charters were inept and incapable of constituting the relationship of superior and vassal. They pleaded, *inter alia*, that the action was incompetent.

On 18th November 1892 the Lord Ordinary (KYLLACHY) assoilzied the defenders from the first and third conclusions of the summons, and with respect to the second conclusion found "that the pursuers are entitled, in terms of the charter of confirmation therein mentioned, as at 4th August 1888, to a year's rent or value of the subjects therein described, with interest as concluded for, and that the defenders are bound to pay such year's rent or value, with interest as aforesaid; and with these findings appoints the cause to be enrolled for further procedure, &c.

"*Opinion.*—This is a statutory action for payment of casualties brought by the town of Inverness, as alleged superiors of certain lands now belonging to the defenders, the Highland Railway Company. There are two parcels of land, which are held under different titles, and there are separate conclusions applicable to each, but in both cases the action proceeds on the assumption that the relation of superior and vassal exists as between the parties; and in both cases the casualty is claimed as on the expiry of twenty-five years from a previous entry, in terms of a provision to that effect contained in the charter of confirmation by which the previous entry was constituted.

"The first parcel of lands was acquired by the railway company, or rather by their predecessors, the Inverness and Nairn Railway Company, so far back as the year 1855. It consists of about two acres of ground, forming part of a larger area held under the same title by a former proprietor Mr John Rose; and the conveyance by Mr Rose to the company was in the form prescribed by the Lands Clauses Act, sec. 80, the title to the railway company being completed in the statutory manner, viz., by the registration of the conveyance in the register of sasines. There was no infeftment. At that time infeftment required sasine. But by force of the conveyance and registration the company obtained a title which, as expressed in the statute, was 'a good and undoubted right, and complete and valid feudal title in all time coming.' There was consequently no necessity for confirmation, nor was there then or afterwards any room for it. There was no base infeftment to confirm. The company did not become the vassal of the superior, nor did the statutory title contemplate or admit of that relation being constituted between them. The right of the superior was to claim compensation for the loss of his superiority, and he had right to have that compensation assessed before the company obtained possession. Beyond that he had no claim against the company. All this must be held as settled by the decision of the Court in the case of the *Magistrates of Elgin* v. *The Highland Railway Company*, 11 R. 950.

"It appears, however, that in 1860 the town's agent required, or the company's agent proposed (it does not appear which way it happened) that the company should take out an entry, paying a year's rent of the subjects, and obtaining a charter of confirmation confirming the title obtained from Mr Ross. No question seems to have been raised or to have suggested itself to either party as to the necessity or competency of this procedure; but in point of fact a year's rent was paid, and a charter of confirmation was granted and accepted, bearing *inter alia* 'that while the lands are owned or held by the said railway company, or any corporation or public company, they shall always be bound, as by acceptance hereof they are hereby bound, to take an entry from us or our successors as superiors of the said lands for the time, and procure their writs confirmed every twenty-fifth year.'

"The present action is brought to enforce this obligation and to compel the railway company to pay a year's rent as the proper casualty now due.

"I am of opinion that, so far as applied to this parcel of ground, the present action, as a statutory action coming in place of the old declarator of non-entry, is incompetent. Such an action is only competent where the relation of superior and vassal exists, and here, as I have said, it does not exist. But further, even taking the action as a petitory action, founded simply, as the pursuers argued, on the contract contained in the charter of confirmation, I am still of opinion that the demand cannot be enforced. It is not of much consequence to what legal category the objection is to be referred. But a contract which assumes as its basis that a relation exists between the parties while it does not exist, which stipulates for entry which cannot and never could be granted, and for a composition as the price of that entry, cannot, I apprehend, be enforced by a court of law. The parties, as appears on the face of the contract, have contracted under mutual belief that a right exists which in fact is non-existent, and have come under obligations which cannot be performed in terms of the contract. In such circumstances the contract, I think, is bad on the ground

of mutual error, or of failure of implied condition, or of impossibility of performance, or perhaps on each and all of these grounds, according as it may be viewed.

"With respect to the second parcel of land, it appears to me that the case is different. The conveyance there was obtained in November 1858 from Mr Robert Smith, who appears to have held a personal title to the lands, which title was made real by certain base infeftments taken at the time of the railway company's purchase. Beyond that, however, Mr Smith's title was not made up; and it is possible that in these circumstances it was considered doubtful how far the railway company were safe with a mere statutory title flowing from a person who was not publicly infeft. At all events, the railway company's title was in this instance in fact made up, so as to be a good title at common law. The statutory form was so far followed, but by that time the statutory form had become, under the Titles Act of 1858, undistinguishable practically from the new common law disposition, and all that was required to make a good common law title was, that a warrant to register should be added signed by the disponee or his agent, which warrant being recorded with the disposition, infeftment was duly constituted. Accordingly, all this was duly done, as appears from the print of documents, and it was in these circumstances that in 1863 the railway company took out the charter of confirmation second mentioned in the summons, whereby, on the conditions therein specified, they obtained from the superior confirmation of the various writs constituting their authors' title, and also confirmation of their own registered conveyance.

"Now, I am not prepared to hold that in these circumstances the charter of confirmation was inept, nor do I see any reason why it should not receive effect according to its terms. There was and is no incompetency, so far as I know, in a railway company, if it pleases, taking a title at common law, and such a title is, I apprehend, none the worse that it may also be good under the statute. The main thing is, that under such a title the relation of superior and vassal subsists, or may be made to subsist, if the parties desire it. And if in such a case, for reasons good or bad, the railway company desires the intervention of the superior, and applies for or accepts a charter of confirmation, I am, I confess, not able to see any good reason why the conditions in that charter should not be enforced. I suppose the question would have been just the same if, instead of a warrant for registration the conveyance by Mr Smith had included, as it might have done, a clause of resignation for new infeftment. The statutory title, I suppose, would have been none the worse for insertion of that clause, although the statute does not require it. But if it had been inserted and the title had been made public by a charter of resignation, I should think it very difficult to contend that the railway company could at a subsequent period fall back on their statutory title and refuse to pay the superior the composition stipulated in the charter.

"I therefore consider that on this part of the case the pursuers are entitled to decree. There may have been error on one side, or on both, as to the company's rights, or as to the alternatives open to them, but no such error appears on the face of the transaction, nor would it, I think, be easy now to establish it. I should, perhaps, add that I have, on this part of the case, assumed in favour of the railway company the truth of their averment that the lands acquired from Mr Smith were like the other parcel, part and portion of other lands held by Mr Smith under the same title. If that were not so, there might possibly be alternative arguments open to the pursuers which, in face of the decision in the Elgin case, they cannot maintain as regards the lands acquired from Mr Rose."

Both parties reclaimed.

During the discussion it was maintained for the pursuers that even if the charters of confirmation were inept as titles to the lands, yet effect must be given to them as contracts under which the compensation payable to the superiors was mutually agreed on. In order to make this clear, they asked leave to amend the record by putting in a minute stating that the defenders and their predecessors had since the dates of the two charters regularly paid to the pursuers or their predecessors the feu-duties payable thereunder, and by adding the following pleas—"(2) The defenders or their predecessors having by the said charters contracted and agreed to make to the pursuers and their predecessors the payments therein stipulated, the pursuers are entitled to decree therefor. (3) *Separatim*, the defenders having settled the compensation payable to the superiors in respect of the feu-duties and casualties of the said lands, or having redeemed the same by undertaking the obligations contained in the said charters, the pursuers are entitled to decree against the defenders for implement thereof."

The defenders stated in answer that they admitted having paid to the pursuers or their predecessors the sums specified in the notes of feu-duties in process, being the old feu-duties, but not under the charters of confirmation.

The amendment and answers were allowed.

The arguments sufficiently appear from the opinions of the Judges,

At advising—

LORD ADAM—This is a statutory action by the Magistrates of Inverness against the Highland Railway Company for declarator and payment of certain casualties, brought under the provisions of the fourth section of the Conveyancing Act of 1874.

The action relates to two separate portions of land which were taken by the railway company for the purposes of their undertaking, under the powers conferred upon them by their private Act, which

incorporated the Lands Clauses Consolidation (Scotland) Act 1845.

One of the portions of land was acquired from a Mr Rose, and the other from a Mr Smith.

With reference to the land acquired from Mr Rose, it formed a part only of the lands held by him under the same titles at the time it was so acquired by the railway company. It is not disputed that the railway company have a statutory title to this land. The conveyance in their favour, which is dated in July 1855, is in the terms prescribed by the 80th section of the Lands Clauses Act, and was duly recorded in the register of sasines in terms of that section of the Act.

Having regard to the case of the Magistrates of Elgin, referred to by the Lord Ordinary, I think that the effect of that statutory title was to give to the company, in the words of the 80th section, "a good and undoubted right and complete and valid feudal title in all time coming to the premises" described in the conveyance. If that be so, the lands could never thereafter be in non-entry, or the superior be in a position to demand or give an entry. In short, the taking and recording of the conveyance established no feudal relation between the superior of the lands taken and the company. The parties do not stand in the relation of superior and vassal.

So far, the case is on all fours with the case of the *Magistrates of Elgin*.

But on 2nd April 1860 the railway company obtained from the pursuers a charter of confirmation. By this charter the pursuers professed, as superiors of the lands, to confirm them to the railway company, and also to confirm the conveyance thereof in their favour. It was also thereby declared that the lands were to be holden under them as immediate superiors thereof, and that the company should be bound to take an entry from them, and to have their writs confirmed every twenty-fifth year, and to pay to them the usual untaxed casualties and sums payable by singular successors to their superiors in non-entry.

But if I am right in what I have said as to the effect of the statutory title taken by the railway company, it is clear that the pursuers were not at the date of the charter of confirmation superiors of the lands in question, and could not confirm them to the company, and that they had no power to give them the entry in respect of which the casualties were to be paid. In fact it appears to me that this deed as a charter of confirmation is a nullity.

But I am further of opinion that the deed cannot be treated as a contract by which the railway company agreed to pay a year's rent of the land every twenty-five years. That is not at all the nature of the deed. But even so treating it, I am clear that it could not be enforced in this action, which is a purely statutory action, and cannot, I think, be converted into a mere petitory action for payment of money.

The action is a statutory action introduced by the 4th sub-section of the 4th section of the Conveyancing Act of 1874, coming in place of the former action of declarator of non-entry, and is only applicable where a declarator of non-entry would have been applicable, which is certainly not the case here.

It is declared by that Act that "any decree for payment in such action shall have the effect and operate as a decree of declarator of non-entry according to the now existing law," so that a decree for payment of a sum of money in this action would empower the pursuers to recover payment of it, not by ordinary diligence, but by entering into possession of the land. In the case of *The Governors of Heriot's Hospital* v. *The Drumsheugh Baths Company*, 17 R. 937, the late Lord President said—"Sub-section 4 must apply to and regulate every action which is brought under its authority. Now this is an action under it. But the condition under which it can be brought, viz., that the superior would under the former law have been entitled to sue the action of declarator of non-entry does not exist." Every word of that appears to me to apply to the present case. I therefore agree with the Lord Ordinary in so far as regards the lands acquired from Mr Rose.

With reference to the land purchased by the railway company from Mr Smith, it was conveyed by him to them by conveyance dated 21st October 1858. The land, as I have said, was acquired by the railway company compulsorily, and under the powers conferred by their private Act. It was not a part or portion of other lands held by Mr Smith under the same titles, but, as appears from the titles recently produced, was the whole land held by him under these titles.

The case therefore differs from that of the lands acquired from Mr Rose and the case of the *Magistrates of Elgin*, in respect that it would appear that the 126th section of the Lands Clauses Act has no application to it.

The conveyance in favour of the company appears to me to be in entire conformity with the terms authorised and provided by the 80th section of the Lands Clauses Act. The conveyance sets forth that the price was paid pursuant to the company's private Act, and that the lands are disponed and conveyed to the company according to the true intent and meaning of the said Act. The lands are, *inter alia*, described as distinguished on the Parliamentary plans and book of reference of the railway company by certain numbers, and they are conveyed with all such "right, title, and interest in and to the same as I and my foresaids are or shall become possessed of, or are by the said Act empowered to convey"—that is, by the private Act incorporating the Lands Clauses Act. There is nothing, it appears to me, to suggest that this was anything but a statutory conveyance. The conveyance was duly registered in the register of sasines on 20th November 1858—that is, within sixty days of its date, as required by the 80th section of the Act. This was all that was required to give the company a statutory title, and consequently a com-

plete and valid feudal title to the lands. At the time when this statutory sale and purchase was carried out, I see nothing to suggest that it was not intended to be completed by the railway company taking the appropriate statutory title, and none other.

If this be so, then the charter of confirmation of date 3rd August 1863, which the company obtained from the pursuers, is, for the reasons I have stated in the case of the lands acquired from Mr Rose, a nullity.

But there is this further difference between the two cases. The conveyance by Mr Smith is dated on 21st October 1858. The Titles to Land Act 1858, which had by this time been passed, had rendered it unnecessary after the 1st October in that year to insert in any conveyance an obligation to infeft or a precept of sasine or a warrant of infeftment, and had also dispensed with the expeding or recording of an instrument of sasine, and had authorised the recording of the conveyance itself, as being equivalent to infeftment. That being so, it was argued by the pursuers that the conveyance to the company when registered, as it was, in the register of sasines, while it no doubt constituted a statutory title to the lands, constituted also a good common law title.

I agree that if we were dealing, for example, with a non-statutory purchase, the registered conveyance would have been a good title to the lands, and when confirmed would have constituted a complete and valid feudal title. It may also be that there is no incompetency in the company taking a common law title when the lands are purchased compulsorily. But the question is, what was the legal effect of what was done when the company registered their conveyance in 1858? Now, the taking of the land was statutory, the conveyance was in statutory form, and it was registered in terms of the statute, the necessary result of which was, as it appears to me, to give the railway company a statutory title. If that be so, then the pursuers ceased thereafter to be superiors of the lands, and had no power to grant the charter of confirmation of 1863.

The argument for the pursuers proceeds on the footing that the conveyance to the railway company contains by implication a precept of sasine which was completed by infeftment. Section 80 of the Lands Clauses Act seems to have provided for the case of a conveyance taken in such terms, because it enacts that "it shall not be necessary for the promoters of the undertaking to record in any register of sasines any feus or conveyances in their favour which shall contain a procuratory of resignation or precept of sasine, or which may be completed by infeftment," and in that case it goes on to enact that "the title of the company under such last-mentioned feus or conveyances shall be regulated by the ordinary law of Scotland until the said feu or conveyances or the instrument of sasine thereon shall have been recorded in a register of sasines." That would seem to imply that in the case of compulsory purchase, the title of the company where the conveyance contained a precept of sasine, as it is said to do here by implication, was to be regulated by the ordinary law of Scotland only until it should have been recorded in a register of sasines, but no longer. If, however, it is not to be regulated by the ordinary law, by what other law? No other law occurs to me but the law of the statute. The meaning of the statute, however, is not clear, and as the matter was not argued to us, I do not rest my judgment upon it.

I have already said that this case differs from the case of the lands acquired from Mr Rose, in respect the lands taken are the whole lands, and not a part only of other lands held by the owner under the same titles. In that case it would appear that the railway company cannot found in aid of their title on the 126th section of the Lands Clauses Act, which was the subject of consideration in the case of the Magistrates of Elgin.

But I do not think that that fact is material, because I think that the nature and effect of the company's title on the 80th section, which by conferring on the company a complete and valid feudal title, puts an end to the possibility of the lands therein described being at any future time in non-entry.

The Act deals in the first place with the settlement of questions arising between the owner of lands and the company, and provides for the mode in which land is to be acquired, the title to be given, and the terms and conditions on which the company is to have right to enter on the lands.

It then proceeds to deal in the 107th and subsequent clauses with the case of the superior. These clauses are introduced by a preamble which sets forth that "with respect to any lands which shall be charged with any feu-duty, ground-annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not hereinbefore provided for, be it enacted as follows—It shall be lawful for the promoters of the undertaking to enter upon and continue in possession of such lands without redeeming the charges thereon, provided they pay the amount of such annual or recurring payments when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same."

These words appear to me to be intended to include every kind of payment for which the lands can be liable to the superior.

Then the 107th section provides that it shall be lawful for the proprietors of the undertaking to enter upon and continue in possession of such lands without redeeming the charges thereon, provided they pay the amount of such annual and recurring payments when due, and otherwise fulfil all obligations accordingly, and provided they shall not be called upon by the party entitled to the charge to redeem the same.

I suppose the railway company were not called upon to redeem the charges affecting

the lands, otherwise they would have been redeemed.

Having obtained a conveyance from the owner, the company were therefore entitled to enter upon and continue in possession of the lands, and, I suppose, paid the amount of such annual and recurring payment as became due.

A question, however, has now arisen between them and the pursuers whether they are liable for the composition now sought to be enforced against them.

The 117th section of the Act seems to me to meet the case. It provides that if at any time the promoters shall have entered upon any lands which they were authorised to purchase, and which shall be permanently required for the purposes of the special Act, any person shall appear to be entitled to any estate, right, or interest in or charge affecting said lands, which the promoters shall through mistake or inadvertency have failed or omitted duly to purchase or pay compensation for, then, whether the period allowed for the purchase of lands shall have expired or not, the promoters shall remain in the undisturbed possession of such lands, provided, within six months after notice of such estate, right, interest, or charge, in case the same shall not be disputed by the promoters, or in case the same shall be disputed, then within six months after the same shall have been finally established by law in favour of the party claiming the same, the promoters shall purchase or pay compensation for the same, and such purchase money or compensation shall be agreed on or awarded and paid in like manner as according to the Act the same would have been agreed on or awarded and paid in case the promoters had purchased such estate, right, interest, or charge before their entering on such land, or as near thereto as circumstances will admit.

The company have entered into possession of the lands in question without redeeming the charges thereon as they were entitled to do. A claim has been made against them which they dispute. They are entitled to have the question of right tried in a court of law, and if it shall be finally decided against them they are entitled to remain in undisturbed possession for six months thereafter provided they purchase the charge within that time.

It appears to me that these provisions are altogether inconsistent with the competency of a declarator of non-entry against the company, or of the statutory action which has come in its place, seeing that decree in such actions would immediately lead to the disturbance of the company's possession of the ground.

I think, therefore, that the defenders should be assoilzied.

Lord M'Laren—The points to be considered are, first, the nature of the right which the company acquired by a disposition in the form authorised by the 80th section of the Lands Clauses Consolidation (Scotland) Act; secondly, the pecuniary rights of the burgh of Inverness in the lands conveyed; and thirdly, the possibility of enforcing such rights under the present action.

On the first point I may begin by saying, that as I read the statute, the railway company is not in the position of a freeholder, but is a feudal proprietor holding of the superior under whom its authors held, viz., the burgh of Inverness. This opinion is opposed to the view expressed in the *Elgin* case by the late Lord President and the Judges who concurred in that decision. But I am not able to say that I agree in their construction of the statute, which appears to me to be illegitimate. The reasons assigned for the opinion that the relation of superior and vassal is extinguished by a conveyance under the 80th section are, as I understand, chiefly these—(1) that it is not contemplated that the company shall enter with the superior; and (2) that the superior's claims to feu-duties, casualties, and recurring payments are to be commuted for a capital sum, or at least are only to continue during the pleasure of the two parties, and until compensation shall be made. The reasons appear to me to be inconclusive. By subsequent legislation the formality of entry with the superior was abolished in all cases, but the feudal relation subsists; and it is conceivable that the intention of the Legislature in relation to lands acquired for public undertakings was the same, the object in both cases being to relieve purchasers of lands of an expensive and perfectly useless procedure, while reserving to the superior all his substantial rights. Again, the mere commutation of feu-duties and casualties does not to my mind necessarily import the destruction of the feudal relation, because we are familiar with blench holdings in which the feudal prestations are elusory.

But now if the relation of superior and vassal is destroyed by the effect of a conveyance under the 80th section, this may mean that as regards the lands conveyed, the superior's title is destroyed and his right vested in the company, who, I suppose, according to the agreement, will then hold of the Crown. This is to my mind a very alarming proposition. A great part of the mineral property of the country stands on clauses of reservation in titles of superiority, but the superior is not to be compensated for this, but only for feu-duties and recurring payments; and while no doubt there are provisions in the statute for assessing compensation in case the owner of the minerals may wish to work them, if we begin by cutting down the title of the superior it is not easy to see how these clauses are to be explicated. Further, the statute makes provision for the sale of superfluous lands which the company holds in property. What is the position of a purchaser of such lands from a railway company? Does he take an allodial title, or must he make up a title direct from the Crown? I am speaking now of the forms which existed in 1845, and in the absence of any express enactment putting an end to the estate of supe-

riority, I should have thought that the estate would remain, and that the purchaser from the company would have to make up a title in the ordinary way by entering with the superior from whom the title to the lands originally flowed. It is not to be overlooked that the 80th section, in describing the effect of the conveyance which it authorises, declares that it shall constitute a complete and valid feudal title. A feudal title, according to the known use of such words, is a title held of a subject superior, and this expression seems to me to indicate that the effect of the conveyance when recorded was to be identical with the effect attributed by subsequent legislation to the recording of any conveyance—I mean that the disponee was thereby entered with the nearest superior whose right is not defeasible at the will of the disponee.

Any doubt that might affect the construction of the 80th section appears to me to be set at rest by the 126th section, which declares explicitly that the rights and titles to be granted as mentioned in the Act, "shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same." No doubt the statute goes on to add (in terms which have been much criticised), "which shall remain entire in the person granting such rights and titles." It is impossible to suppose that this means that the superiority is to remain with the seller of the *dominium utile;* the expression certainly demands construction, and being as I think a mere *demonstratio*, it ought to be construed in a manner consistent with the main purpose of the enactment, which is to preserve rights of superiority. I imagine that the true meaning is, that the superiority is to remain with the original granter of the feu-right, or his assignees, and this appears to me to be the only admissible construction, because I cannot assent to the view of Lord President Inglis, which comes to this, that no effect is to be given to this enactment unless in cases where the superiority and the property happen to be held in the same person. That the enactment is not confined to this special, and I may say casual case, is shown by the collocation of the second part of the clause, which is quite general in its operation, and is put as a proviso or riding enactment to the general declaration that rights of superiority are to be unaffected.

2. I pass to the second point, the pecuniary interests of the pursuer, first, irrespective of contract, and secondly, as affected by the contracts, if any, which are embodied in the two charters of confirmation which they granted to the company.

In the defences to the action it is stated that these lands were severed lands, but this was not admitted by the pursuers.

After hearing the case this Division of the Court called for further evidence on the point; and on a consideration of the documentary evidence which has been produced, it is evident that the subject conveyed to the railway company by Smith was an entire subject, the subject being defined by boundaries which are identical with the boundaries which define the subject conveyed to Smith himself. As regards the subjects conveyed to the railway company by Rose, it is clear that the conveyance does not embrace the entirety of the subjects held by Rose of the superior under one title, and therefore this is a case of a conveyance of severed lands.

With respect to subjects which are conveyed entire to a company, the rights of the superior are defined by the 107th section, which follows on the introductory words — "With respect to any lands which shall be charged with any feu-duty, ground-annual, casualty of superiority, or any rent or other annual or recurring payment or incumbrance not hereinbefore provided for."

It was questioned in argument whether the superior's claim of composition is a "casualty." As matter of history "composition" was not one of the ancient feudal casualties, but was rather of the nature of a fine which the new tenant agreed to pay for having his right acknowledged. But since superiors have been put by statute under obligation to receive disponees on payment of a year's rent as "composition," I think it must be taken that the composition is a casualty of superiority—that is to say, a right of the superior recurring at uncertain intervals, —and it has been so regarded by all the text-writers and by the profession. It does not appear to be open to doubt that composition is covered by the words "casualty or recurring payment" in the preamble to the 107th and subsequent sections.

Now, by the 107th section the promoters of the undertaking are empowered to "continue in the possession of such lands without redeeming the charges thereon" on complying with certain conditions. The conditions are two—first, that the promoters shall pay the amount of such annual or recurring payment when due, and otherwise fulfil all obligations; and secondly, that they shall not be called on by the party entitled to the charge to redeem the same.

According to the opinion of Lord President Inglis in the *Elgin* case, this was a mere temporary provision until compensation should be settled; and I agree that if either party desire that the charges should be redeemed the assessment contemplated by the 107th section will be temporary. But if neither party desired that the charges should be redeemed, the provisions of the 107th section would regulate their rights in perpetuity, and it appears to me that consistently with the 107th section the company may if so minded enter into an agreement with the superior under which the option to redeem should be renounced by the two parties, and the superior's claims be irrevocably satisfied by an undertaking on the part of the company to make such annual or recurring payments in perpetuity. Under such an agreement it would be natural and proper

that the superior's chance of obtaining composition for the entry of singular successors should be treated in the way which is usual on the entry of a corporation, *i.e.*, that the company should agree to pay the amount of a casualty every 25th year. This is in substance what the parties proposed to effect when the Highland Railway Company agreed to take charters from the superiors for these two subjects, and if the terms arranged had been put into an agreement instead of a charter, I think the company would not be able successfully to disaffirm its agreement, or to revert to its original right to redeem. I say so, because I think that the statute gives an election to either party, and there is no legal principle that I can discover which should hinder the parties from making an irrevocable election to continue in possession on the terms on which the company's predecessors had held the lands.

With regard to several subjects the case may be different, especially if we are to accept on this point the decision in the *Elgin* case. Under the ordinary feudal law of the country every purchaser of a severed portion of an estate became liable to the superior for the entire and undivided feu-duty, and it was only by favour of the superior, or in virtue of an antecedent agreement on his part to allocate the charge that the purchaser could have his obligation restricted to a sum proportionate to the rent or value of the severed part.

It is evident from the terms of the 109th and 126th sections that it was not intended that public undertakings should be subjected to feudal obligations disproportionate to the actual values of the lands acquired, and possibly it was considered that it would not be consistent with the superior's rights that he should be compelled to allocate his feu-duties, because allocation has a tendency to impair the superior's security. Accordingly, in the case of severed lands, the superior is to be settled with by way of compensation, unless the parties agree to an apportionment of the charge as provided by section 109. But even in the case of severed lands I see no reason against the validity of an agreement that the company shall continue in possession on the condition of paying feu-duties and casualties proportionate to the value of the subject. The statute tolerates voluntary purchases and voluntary settlements of the prices of lands compulsorily acquired, and leaves the parties absolutely free to settle on such terms as they please. Notably by sections 10 and 11, the company, in treating with parties absolutely entitled, may purchase in consideration of a feu-duty or ground-annual. The case immediately in view was probably the purchase of a *dominium utile*, but as the series of clauses 108-111 provides for the settlement of the superior's claims by agreement or compensation in the manner prescribed with reference to their compulsory acquisitions, it seems to follow that instead of settling with the superior by payment of a capital sum, the company may, if the superior agrees, convert the compensation into a charge, which would naturally take the form of an agreement to pay a proportional part of the existing feu-rents and casualties affecting the estate.

3. I come now to what in my view is the really difficult part of this case—whether the two charters granted by the pursuers and accepted by the defenders are deeds capable of receiving effect as real or personal contracts for the payment of the duties and casualties stipulated?

If I am right in holding that infeftment under the 80th section does not dissolve the relation of superior and vassal, and that there is an estate of superiority remaining in the burgh of Inverness, it would follow that the superior would be able to grant a corroborative title. I apprehend that under the ordinary feudal law a superior might at any time grant a corroborative charter on the application of his vassal, and such a charter under the name of novodamus was not unfrequently applied for in order to cure some infirmity in the existing title of the vassal which could not be removed in other ways.

But in the cases we are considering the charters do not contain words of disposition, they only purport to confirm existing rights with the object and effect of making the company's tenure a public holding, and at the same time defining the company's obligations to the superior. Such a confirmation was unnecessary, because the company was entered with the superior by the operation of the statute. In this I agree with the Lord Ordinary, although my views may not be exactly the same on all points.

Nevertheless, as regards the subject acquired from Robert Smith (which I assume was an undivided subject) as (1) the 107th section makes the payment of annual and recurring charges a condition of the company's right to possess, until the company shall be required to redeem, (2) as the company has not been required to redeem, and (3) as the settlement of the composition on the footing of a recurring charge was a matter requiring adjustment, I think that the stipulations in the charter are binding on the company by agreement. I think that the charter may be regarded as a statement by the superiors of their claim or demand under the 107th section, and that on a proof of acceptance of the charter, and payment of the first composition and feu-duties thereafter accruing, we may infer an agreement on the part of the company to make periodical payments in terms of the charter. The 107th section does not contemplate a new agreement in writing, but only the actual payment of such feu-duties, ground rents, casualties, or recurring payments as might be due to the superior, and it is a question of fact, what are the charges for which the railway company is liable? On this question I conceive that the acceptance of a charter by the company, coupled with part performance by the payment of the composition which was then due, and the subse-

quent payments of the yearly feu-duties, is evidence against the company as to the extent of its obligations to the superior, keeping in view that it is the policy of the statute to give the utmost latitude to private agreement in regard to all matters relating to the compensation of owners whose rights are affected.

Now, it may be that the present action is not well adapted for enforcing a claim to a recurring payment such as is reserved by the 107th section. It is an action of declarator and payment in the form prescribed by a later statute as coming in place of the old action of declarator of non-entry. But there is nothing very technical or peculiar in the form of that action; it calls on the Court to declare that a casualty is due, and concludes for a decree for payment of one year's rent or value of the subjects. I think that such a summons at the instance of a superior will cover a demand for a prestation amounting to one year's rental of the estate on whatever grounds such a claim may be lawfully maintained. I do not think that the cases of *Dick Lauder* and *The Drumsheugh Company* (17 R.) are opposed to this view, because we have here a petitory conclusion for the amount of a casualty. In any view, I understand that the parties wish a judgment from us as to their rights under the two charters, and if that judgment were adverse to the defenders, they would be willing to pay the composition without putting the superiors to the trouble of bringing a new action, and therefore it is not necessary to consider this point very carefully.

I ought to add that if I were to take the view which I understand is held by the majority of the Judges of this Division—I mean that the pursuers' claim cannot be maintained on the basis of an agreement to pay in terms of the 107th section—then I should agree with the Lord Ordinary that the pursuers would be entitled to a sum equal to a year's rent of Smith's feu as a proper feudal prestation. The disposition by Smith to the railway company is ambiguous in this respect, that it is capable of being read either as a conveyance under the Lands Clauses Act of 1845 or as a conveyance in the equivalent statutory form which was made applicable by the Act of 1874 to ordinary transactions in land. The only difference between the two forms is that in the first case the conveyance is registrable without a written warrant, the statute being itself the warrant, while in the latter case the disponee has to endorse a warrant of registration (in lieu of the old precept of sasine by the seller) upon the deed. The Lord Ordinary held that as the company had elected to treat their conveyance by Smith as an ordinary disposition by sending it for registration with a warrant of registration written upon it, the title had been made up as a title under the ordinary statutory law (which is permissible under the Lands Clauses Act), and that confirmation by the superior was therefore appropriate and indeed necessary to the completion of a public holding. I agree with the Lord Ordinary that in the case of Smith's feu the title may be treated as an ordinary feudal title, and that in this view the casualties due to the superior under the charter of confirmation may be recovered by an action in this form. This leads to the conclusion that in the case of Smith's feu the company must make payment of the stipulated casualty as a proper incident of the feudal tenure. But it is right to add that this is a conclusion which I could not easily reach if I began by holding that the title of a railway company under section 80 is not a feudal title, but an estate *sui generis*. The 80th section calls it a feudal title, and I have this in view in accepting the Lord Ordinary's ground of judgment as an alternative solution of the case.

With respect to the subjects acquired from Rose, which are admitted to be severed lands, I have more difficulty. Because if I am right in holding the 126th section to be a clause applicable to the rights of superiors in general, then by the terms of that section the present claim is excluded in relation to lands which are "a part or portion of other lands held by the same owner under the same titles," and the superior's right under that section is a right to claim compensation for the loss of his casualties. Therefore it is not a case of ascertaining the extent of a liability created or continued by the statute; it is a case of proving an agreement with respect to lands which differs essentially from the agreement which would result from the statutory right of entering on the lands. Now, such an agreement must be in writing, and the writ must be the writ of the party who undertakes the obligation. I am unable to see that the acceptance of a charter, even when followed by payment of certain feudal prestations, is tantamount to an undertaking on the part of the company to innovate the contract which is made for it by the combined effect of the statute and the entry on the lands. The result of the consideration which I have given to the case is that in my opinion the Lord Ordinary's judgment ought to be affirmed.

I may add that as regards the lands acquired by the company from Rose, my view in no way touches the right of the superiors to claim compensation for the loss of their casualties, and if I am in error as to the other branch of the case, the superiors would have a claim of compensation for the loss of casualties due from Smith's estate.

LORD KINNEAR—This action is based upon an assumption that the defenders hold the lands in question in feu-right of and under the pursuers, so that the latter are entitled to resume possession of the feu in case their vassals shall fail to perform the conditions of the charter by which they hold. I am of opinion with Lord Adam that this assumption is without foundation, that there is no proper feudal relation between the parties, and that the defenders hold their lands by a statutory title which

is complete in itself and derives no additional efficacy from the pursuers' charter.

I think the purpose of the Lands Clauses Act was to give to the promoters of railway and similar undertakings a right of ownership for statutory purposes which should not be entangled with the feudal title or limited by the feudal privileges of any superior. The main difficulty in construing the statute in this sense arises from the terms of the 126th section. But the purpose of that section is to protect a right which is described in very obscure language from prejudice or diminution by the operation of the rights and titles to be granted for the purposes of the Act, and therefore we must first ascertain the meaning of the enactments by which those rights and titles are created, and it is only when that has been determined that we shall be in a position to construe the qualifying clause. These enactments are contained in the 80th section and in the fasciculus of clauses from the 107th to the 111th dealing with feu-duties and casualties of superiority.

The basis for any argument as to the operation of these clauses must be found in the true construction of the 80th clause, which introduces the statutory forms of conveyance and defines their legal effect. By an earlier clause, the 10th, it had been provided with reference to the purchase of lands by agreement, that it should be lawful for persons entitled to dispose of lands absolutely to convey such lands for a feu-duty or for a ground-annual, and the 80th section prescribes the form and defines the effect of conveyances for such feu-duties as well as of conveyances for a price. In both cases the granter is to convey to the company for ever, according to the true intent and meaning of the Act, the lands themselves and all right, title, and interest of the granter in and to the same. In neither is there any warrant for infeftment or any executory clause by which it is possible for the company to become the vassal of the granter, or to enter in his room and place with his superior. If the lands are sold for a feu-duty, it is to be charged upon the tolls and rates, and the creditor's right to recover it is altogether independent of tenure, or of any continuing right in the lands which can be supposed to remain in the granter. It is a personal right transmissible to assignees and enforceable by action or by personal poinding of the goods and effects of the company, but not by any real action by poinding of the ground or maills and duties or by irritancy *ob non solutum canonem*, and neither in this case nor in that with which we are more immediately concerned, of a sale for a price, has the conveyance any resemblance to a feudal grant or to the transmission of a feudal right already created. It is a conveyance by which the granter is divested absolutely so as to leave him neither right nor title by which he can remain vested in the land carried by his grant, and yet it contains no warrant nor procuratory upon which it would be possible for the company at common law to demand a charter from the superior. When the company has obtained a bare conveyance in this statutory form, the statute says that being registered in the register of sasines it shall give and constitute a good and undoubted right and complete and valid feudal title to the promoters of the undertaking "any law or custom to the contrary notwithstanding." It is impossible to hold in the face of these clear and explicit words that the company requires any charter by progress from their author's superior to make the right and title complete, and I think it equally out of the question to say that this enactment is a mere anticipation of the abbreviated forms introduced by more recent legislation, which, dispensing with the superior's intervention as a mere instrument of conveyancing, reserves undisturbed his supereminent right and title in the land so that nobody can hold it except directly or indirectly by virtue of his grant. A title which is not good against the superior is not a complete or valid title, and when the statute says that the registration of a conveyance to which the superior is no party shall constitute an undoubted right and complete and valid feudal title, I think it means a title which shall be good against the superior and against all the world. I conceive, therefore, that the opinion of the late Lord President in the case of the *Magistrates of Elgin* is perfectly sound and unimpeachable when he says that the effect of section 80 "is to give an independent right, so to speak, to the railway company, without any relation to the superior at all—I mean as regards the matter of title. There may be a relation to the superior as regards a liability for money. That is another affair altogether, but as regards a matter of title, I conceive that the railway company have nothing to do with the superior at all."

I think this construction of the 80th section is confirmed by the series of enactments to which I have referred, regulating the money liabilities of the company to their authors' superiors. This fasciculus of clauses appears to me to be a complete code dealing exhaustively with all the superiors' claim for feu-duties and casualties, both in the case where the whole land held under one title is taken by the railway company, and in the case where a part only of the land is taken. The 109th section provides specially for the latter case. But the whole series of clauses is in my opinion overridden by the introductory words, and by the 107th clause which immediately follows them. The 107th and 108th are applicable generally to all cases in which any lands shall be charged with feu-duties or casualties, or other recurring payments not previously provided for in the Act. With respect to all such lands it is enacted by the 107th clause that the promoters may enter upon and continue in possession without redeeming the charges, provided they pay the amount when due and fulfil all obligations accordingly, and provided they shall not be called upon to redeem. The 108th regulates the settlement of compensation in any case of the kind described, where differences may arise between the

promoters and the party entitled to any such charge upon any lands; and the 109th deals with a specific case falling within the general rule, not by exempting it from the operation of the regulations already laid down, but by providing the necessary data for enabling them to be carried into effect. If the land taken by the promoters is subject along with other land to a general charge, it is necessary that the charge should be apportioned in order that the liability of the promoters may be ascertained. And the 109th clause prescribes the method by which this is to be done. But there is nothing in the terms of the clause or in the nature of the rights for which it provides to exclude the operation of the general enactment that the promoters may enter upon the lands which they have acquired without previously redeeming the charges in the same way as if the whole of the land so affected had been taken. But if it were otherwise doubtful whether the case contemplated in the 109th clause was intended to fall within the general enactments of the preceding clauses, that would, to my mind, be removed by the only two remaining clauses of the series, the 110th and the 111th. The 110th refers generally to all cases in which compensation shall be payable for the redemption of feu-duties, casualties, ground annuals, and other recurring payments, and prescribes the method by which the land of the company is to be freed from all such liabilities if the superior or other creditor declines to grant a discharge; and the 111th reverts to the particular case where lands shall "be so discharged from any such charge or incumbrance to which they were subject jointly with other lands," and saves the superiors' rights in the lands which have not been taken. It appears to me, therefore, that when a portion only of an estate subject to the charges in question is taken by a railway company, it is to be disencumbered of the charge upon exactly the same conditions as when the whole is taken, and in either case the company may enter upon the lands and pay or redeem the charges, without obtaining any charter from the superior or any other title but the conveyance prescribed by the 80th section.

If I am right in thinking that every clause in this part of the Act confirms or assumes the completeness and efficacy of the statutory title, it does not appear to me that that conclusion should be affected by the terms of the 126th clause. I cannot say that I see any satisfactory construction of that very difficult clause, and I have little confidence in the view which I am disposed to take of it, since it is not in all respects in accordance with the opinion expressed by the late Lord President in the case of *The Magistrates of Elgin*. But, with great respect, I find myself unable to accept the construction propounded in that case, that the 109th and the 126th clauses are to be read together, so that when casualties fall to be apportioned under the 109th, the superior is entitled under the 126th to interdict the railway company from entering upon the ground until his compensation has been ascertained and paid. If these two clauses had been complementary of one another, I think that, in accordance with the general plan of the statute, they would have been placed together in the same chapter or series of clauses, instead of being separated by several chapters dealing with other matters. The successive clauses of the series in which the 109th occurs are not merely in juxtaposition. They are logically connected, and when they are read together they are found to contain a perfectly clear and intelligible series of regulations dealing exhaustively with a definite class of rights. If the 126th were intended to regulate the same rights the two enactments would be contradictory. But it seems to me to refer to a different right altogether—a right which is not supposed to be vested in the landowner's superior but in the landowner himself—"The rights and titles to be granted in manner herein mentioned in and to any lands to be taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same which shall remain entire in the person granting such rights and titles." If these last words have any meaning the right which is not to be affected or diminished is a right already vested in the granter of the company's title. The Lord President points out that a man having a *dominium utile*, and selling a portion of it to the railway company, cannot possibly have his superior's rights reserved to him, the vassal. The inference would seem to be, that it cannot be his superior's right, but some right of his own, which is reserved. But then it is said that that would be either unintelligible or else contradictory of all the other enactments we have been considering, and also in certain cases of the immediately following provision. For the granter of the company's title cannot retain a superiority unless the company becomes his vassal in the lands they have acquired. It seems to me impossible to reconcile these contradictions if the word "superiority" is to receive its strict technical meaning. The only satisfactory explanation is that proposed by the late Lord President with reference to certain local and personal Acts in the case of *Macfarlane* v. *The Monkland Railway Company*, and repeated with reference to the Lands Clauses Act in the case of *The Magistrates of Elgin*. His Lordship thought that the clause in the later Act was a survival of certain provisions which had been inserted for political purposes in earlier empowering statutes at a time when the elective franchise in counties belonged exclusively to proprietors of estates of £400 of valued rent, holding directly of the Crown or Prince. But if the right to be saved was the elective franchise of the Crown vassal, it is manifest that the case contemplated could not be that of a grant of land to be held by the ordinary feudal tenure either

of the Crown vassal himself or of his sub-vassal. For the grant of a feu-right by the Crown vassal would not have affected his qualification in the slightest degree so long as the valued rental of his entire estate was undiminished. But if a part of the Crown vassal's estate were taken under conditions which divested him absolutely, the consequent interference with the estate held of the Crown, and the amount of its valued rent, might destroy the franchise. And accordingly his Lordship holds that the purpose of these enactments was by no means to compel railway companies to complete a feudal title by entry with the superior, but on the contrary to give to the company without a feudal title "the full rights and interests of proprietors in the surface of the ground and also in the underground estate so far as necessary for the undertaking," and at the same time to preserve unimpaired the feudal integrity of an estate held of the Crown. If this be so, it explains the reservation of what is called a superiority to the granter of the conveyance to the company instead of to the granter's superior. For although the granter is not to become the superior of the grantee, the feudal estate which he holds of the Crown is to remain in him undiminished. But however this may be, the material point for the present purpose is that there is nothing in the clause to require the railway company to enter with a superior in order to complete their title to land acquired for the purposes of the undertaking. This is expressly enacted with reference to the case of a part only of the lands being taken. But I think it equally applicable where the whole lands are taken, because the right of superiority which is reserved, whatever it may be, cannot be repugnant to the right already conferred on the railway company. The right which is not to be affected or diminished, therefore, cannot be the common law right of the superior to disregard any conveyance which may divest his vassal unless it is confirmed by himself. At the date of the Lands Clauses Act the superior could not be compelled to enter a disponee except upon his vassal's resignation; and he could not be compelled to enter a corporation at all. If these rights were unaffected and undiminished, the company could never obtain a valid title except with the superior's consent, and upon such terms as he might choose to impose I think it impossible, therefore, to infer from the provision of the 126th clause which exempts the company from the obligation of entering with the superior in one case, that in all other cases they are bound to enter in order to complete their title. It may be that when the entire estate is taken by the company the reservation of the superiority will be inoperative unless the company enter. But however that may be, I do not think it consistent with sound principles of construction to set up against the plain words of the earlier part of the statute so doubtful an implication as any that can be derived from the 126th clause. There may still be a feudal title in the superior under the 126th clause, but whether that may be so or not, the right and title of the railway company is independent of the superior. I do not think it necessary to consider, therefore, whether either of the parcels of land in question formed one entire estate before the company acquired it, or whether it was only a portion of an estate.

I cannot think it a serious difficulty that the right thus created should be anomalous or out of harmony with the general doctrine that land must be held of a superior. The true meaning of the doctrine is, that all land being held in law to be vested in the Crown, the actual landowner must necessarily hold by the Crown's grant or by the grant of a vassal or sub-vassal of the Crown. But a railway company taking land in the exercise of compulsory powers, does not in fact hold by the grant of the former owner or of his superior, but by virtue of an Act of Parliament. It is intelligible that Parliament should create a right of ownership for the public purposes which should involve no relation of superior and vassal; and in this respect, as the Lord President has explained, the Lands Clauses Act introduces no novelty but only follows a practice which had already prevailed in private legislation.

His Lordship, however, points out in *Macfarlane* v. *The Monkland Railway Company* that the views he has expounded do not apply to land bought by the railway company by voluntary agreement, and to which they obtain a common law conveyance, but only to the land which they take in the exercise of their powers and to which they obtain only a statutory conveyance. And the next question we have to consider is, by which of these different rights and forms of title the defenders now hold the lands in dispute. On this point I agree with the opinion expressed by Lord Adam and the Lord Ordinary as to the first parcel of land acquired by the railway company; and I agree with Lord Adam as to the second parcel. The difference is, that by the time the second parcel was acquired the Act of 1858 had enabled a disponee to complete his title without infeftment by recording his disposition in the register of sasines. The Lord Ordinary holds that by that time the statutory form had become practically indistinguishable from the common law disposition, that under such a title the relation of superior and vassal may be made to subsist if the parties desire it, and therefore if the railway company take a charter of confirmation there is no reason why its conditions should not be enforced. But I venture to think the two forms of titles are very readily distinguished, and that the distinction does not lie in the presence or absence of a rule authorising registration. The conveyance to the company bears to be granted for a payment made pursuant to certain Railway Acts which are cited, and the land is conveyed in the terms prescribed by the Lands Clauses Act to the company "according to the true intent and meaning of the recited Acts,

with all right, title, and interest in the same." The question is, whether the registration of a conveyance in these terms is or is not to have the statutory effect of constituting a good title without the confirmation of the superior; and I think that question admits of only one answer. The warrant to register was no doubt superfluous, but the superfluity cannot detract from the efficacy of a title granted pursuant to the Act, and for the purposes of the statutory undertaking.

I am, therefore, of opinion that there was no necessity and no room for an entry in either case. Entry means nothing more than the recognition or confirmation by the superior of a title which is imperfect until it is so confirmed. And I think the defenders' title by registration of the statutory conveyance was already complete. They were therefore entitled to enter upon and continue in possession of the ground as owners independently of the superior, although by doing so they became liable in certain money payments to be fixed by agreement or by arbitration under the statute. Among these payments I think the superior's claim for compensation as well as for feu-duty must be taken into account. It may be that the composition payable on the entry of a singular successor is not accurately described as a charge upon land. But the superior's right to refuse an entry on other terms gave him a claim of the same nature, and in substance as effectual as if it were a real burden. And it is not to be supposed that the Legislature intended to deprive him of a valuable money interest without compensation. It may be also that in fixing the compensation the arbiter might be asked to take into account the loss to the superior from the creation of a right which precludes future change of possession by succession or purchase, and so extinguishes the casualties of relief and composition altogether. But these are questions of compensation which are altogether independent of title. They are not new conditions to be admitted into the investiture, but money payments in respect of the company's possession on a right and title already perfect.

It follows that the charters in question are inept as titles to land, and if that be so, I do not see how they can be sustained as contracts. They are neither in form nor in substance agreements for fixing compensation. If they embody a contract, it is a contract by which the superiors agree to confirm a right already acquired from their vassals by the railway company upon certain terms and for a certain period. Now, there can be no question that by accepting a feu-charter, and being vested in the lands by virtue of the right of ownership which it confers, the grantee becomes liable *ex contractu* to perform the conditions of the grant as effectually as if they had been imposed by a bilateral contract executed by himself. But then the railway company do not hold their lands by virtue of the pursuers' charters. They had already the entire right which the charters purport to confer, and a contract which proceeds upon a false assumption as to the existence of a right which does not in fact exist cannot stand. The same rule applies where one party purchases from the other a right which is not in the seller, but is already vested in the purchaser. The case of *Cooper* v. *Phibbs*, L.R., 2 H. of L. 149, affords a good illustration of the doctrine that where parties contract under mutual mistake and misapprehension as to their relative and respective rights, the agreement is liable to be set aside as having proceeded upon a common mistake. That appears to me to have been the position of the parties to this case. They believed that the company could have no valid title unless they entered with the superior on such terms as he might impose, and on that assumption they fixed the terms of entry and granted and accepted a charter.

It is unnecessary to say that although the charters may be inept, the defenders cannot continue to hold the lands without paying or redeeming feu-duties and casualties. But the extent of their liability in this respect cannot be determined in this action.

I agree with Lord Adam that for the reason he has given the action is incompetent. It is a statutory action which is competent only to a superior who but for the Act of 1874 would have been entitled to sue a declarator of non-entry against the successor of his vassal in the lands. The effect of a decree in terms of the pursuers' conclusions is fixed by the statute. It will not warrant diligence for recovery of a sum of money, notwithstanding that it contains in form a decree for payment, because it is enacted that a decree for payment in such actions shall have the effect and operate as a decree of declarator of non-entry. It would therefore enable the pursuers to resume possession of the lands and to poind the ground. I agree with Lord Adam's opinion in the case of *The Magistrates of Elgin* and in the present case, that an action of that kind is incompetent against a railway company holding by a statutory title. Their statutory title gives them a conclusive defence against any attempt to resume possession as if the lands were in non-entry.

But even if the defenders held under the charters libelled, the action would still be incompetent, because a declarator of non-entry, or the statutory action which comes in its place, can only be brought against the heir or singular successor of a deceased vassal. It cannot be brought against the vassal actually in possession and entered with the superior. But the pursuers' allegation is that the defenders have accepted a charter, by virtue of which they have been vested and are now in possession of the lands. The stipulation that they shall apply periodically for a new entry is, in my opinion, inept. No authority has been cited to support it, and it is contrary to the feudal principle on which the pursuers rely. For a vassal infeft upon the superior's charter continues to be an entered vassal until he dies, or until the superior

has accepted a new vassal in his room. It is perfectly competent for the superior to stipulate for a payment in the nature of a casualty every twenty-five years, or at any other recurring period. But his remedy, if payment is withheld, is not by a declarator of non-entry, but by an action upon the charter or feu-contract, or by a declarator of irritancy, if the stipulation has been fenced by an irritancy, as is not uncommon in such cases. An action upon the charter assumes the existence of a feudal right, the conditions of which the superior desires to enforce. A declarator of non-entry proceeded on the superior's right to resume possession, because all rights flowing from him had determined, so that there was no existing vassal in the feu. That the statutory action cannot be used, any more than the old declarator of non-entry, as a method of enforcing obligations under a subsisting charter is decided in the cases of *Heriot's Hospital* v. *The Drumsheugh Baths Company* and *Dick Lauder* v. *Thornton*. The latter case is a clearer illustration of the distinction than is perhaps apparent from the report. For the superior had first brought an action in the statutory form, which was dismissed as incompetent, because on his own showing the fee was full. He then brought a second action containing an alternative conclusion for payment altogether independent of the statutory declarator, and based upon the conditions of the feu-contract. In this second action he obtained decree in terms of his alternative conclusion, and the distinction between the two remedies is explained by the Lord President in the later case of *Heriot's Hospital*. If the charters were effectual, therefore, the pursuers' remedy would not be the statutory action, but a common law action to enforce the conditions of the contract.

But, for the reasons already given, I think that in the present case such an action must have failed. It would still have been a superior's action against his vassal, and that is not the true relation between the parties. But at all events the action before us cannot be sustained, because it proceeds on the assumption that the defenders' title flows from the pursuers, and depends for its validity upon their grant, whereas in truth it depends on the Act of Parliament alone, and arises from the statutory power to take lands by compulsion from their grantee.

LORD PRESIDENT—I agree with Lord Adam and Lord Kinnear.

The Court assoilzied the defenders.

Counsel for the Pursuers—Sol.-Gen. Asher, Q.C.—M'Kechnie—Macleod. Agent—D. Forbes Dallas, S.S.C.

Counsel for the Defenders—H. Johnston—Macphail. Agents—J. K. & W. P. Lindsay, W.S.

Wednesday, March 15.

FIRST DIVISION.

HENDERSON *v.* HENDERSON AND ANOTHER.

Trust — Removal of Trustee — Judicial Factor.

A party conveyed certain house properties and other heritable subjects to A and three other trustees for behoof of B in liferent and A in fee, declaring it to be his wish that B should factor the properties, but with full power to the trustees to remove him. All the trustees accepted office, and B was appointed factor, but after a time he was removed, and the trustees, other than A, the fiar, subsequently resigned, with the result that the trust-estate came under the management of A as sole trustee. On the petition of B, the liferenter, who was dissatisfied with A's management, the Court, on the ground that the truster had never meant the trust-estate to be under the sole management of A, and that there was a conflict of interest between A and B, without removing A, *sequestrated* the estate and appointed a judicial factor.

By trust-disposition and conveyance, dated 15th and recorded 30th June 1877, James Holmes disponed certain house properties and other heritable subjects in Hamilton in favour of Robert Holmes Henderson and other three trustees, for behoof of James Henderson in liferent, and after his death for behoof of his wife Agnes Holmes Henderson in liferent, and for Robert Holmes Henderson in fee, but subject to the burden of an annuity of £100, and heritable bonds amounting to £2410. The truster declared it to be his wish that the trustees should appoint James Henderson, the liferenter, "to act as factor for the subjects hereby conveyed, with power to uplift the rents and feu-duties, and to execute all necessary repairs, but the appointment to continue only during the pleasure of the said trustees, with full power to them to remove him at any time from the office of factor."

All the trustees accepted office, and they appointed James Henderson as factor in terms of the truster's express desire, but at Whitsunday 1879 they removed him and appointed another factor. Down to 1889 the gross rental of the properties averaged about £367, but thereafter it considerably increased.

In December 1879 an agreement was concluded between Robert Holmes Henderson, the fiar, and James Henderson, the liferenter, which provided that Robert Holmes Henderson should be entitled to receive the free residue of the annual income of the subjects conveyed under the foresaid trust-disposition in place of James Henderson, and that in consideration thereof he should pay James Henderson an annuity of £52. It was also provided that James