

ary in his original decree declined to impose—when I say declined I am assuming of course that the words “as trustee” have the limiting and qualifying effect which the majority of the Court in the case of *Craig v. Hogg* were of opinion that they had—or we have an example of a case, which has never to my knowledge occurred before, of a cautioner being found liable for more than his principal, without any relief against his principal, and without any fault or indiscretion on his part, as in the case of the cautioner for a minor acting without his curator, or for a married woman. I cannot assent to that. I think that the cautioner is liable only in so far as his principal is liable. I think therefore that the cautioner here is bound to implement the decree only in so far as Mrs Daily is bound.

There are some exceptional words introduced into the bond with a view to protecting any preference which the respondents might have already secured. They were introduced for no other purpose. All the rest is in the ordinary words of style.

I am therefore of opinion that the opinion of the Lord Ordinary is wrong and that his interlocutor ought to be reversed. I regard this case as of importance because it arises on the case of *Craig v. Hogg*.

LORD TRAYNER—In the interlocutor under review the Lord Ordinary assumes the rule laid down by the majority of the Court in the case of *Craig v. Hogg*, but thinks it does not form a good defence to the present defender. I agree with the Lord Ordinary. I leave aside the considerations which arise from the differences between a cautioner in a suspension and an ordinary cautioner who intervenes at the request of a creditor to guarantee the debtor's debt. These considerations are by no means immaterial in themselves, but in my view do not need to be taken into account here. I think the cautioner's obligation here is to see paid whatever expenses shall be found due “in case of wrongous suspending.” The reasons of suspension were repelled, and therefore there was “wrongous suspending” in the sense of the bond of caution.

I cannot take the view that the cautioner's obligation before us is limited to the extent of the suspender's liability for expenses. His liability for the principal sum is so limited. He undertakes as cautioner that the suspender shall, “as trustee foresaid,” make a certain payment which the bond of caution defines. But the bond does not bind the cautioner merely to pay the expenses which the suspender “as trustee foresaid” shall be decreed to pay. He guarantees substantially that “payment shall be made” of the expenses found due in respect of wrongous suspending. He is not asked now to do more.

To limit the cautioner's obligation as he contends for would make the caution not a benefit but an injury to the charging creditor. For if the executrix makes payment of the expenses out of the estate under her charge (which she must do if she has estate enough to do it) she just diminishes the

fund out of which the charging creditor is to operate payment of the principal sum due to him. In a word, it would be giving the charger decree for expenses against his opponent, and allowing the opponent to pay them out of the charger's money.

LORD MONCREIFF was absent.

The Court adhered.

Counsel for the Pursuer—W. Campbell—Abel. Agents—Wallace & Pennell, W.S.
Counsel for the Defenders—F. T. Cooper—Welsh. Agents—Welsh & Forbes, S.S.C.

Friday, July 16.

FIRST DIVISION.

[Lord Low, Ordinary.]

MACFIE v. THE CALLANDER AND OBAN RAILWAY COMPANY.

Railway—Superfluous Lands—“Purposes of the Undertaking” — Bar—Effect of the Company Entertaining Proposals for Sale of Lands Claimed

An action was brought against a railway company by an adjoining proprietor under sec. 120 of the Lands Clauses Act 1845, concluding for declarator that the plots of land A and B, which had been acquired by the company from him compulsorily for the purposes of their undertaking, had become superfluous lands, and had become the property of the pursuer. The two plots together amounted to a little over half an acre. They were adjacent to the company's station in the middle of a town. The land, of which part consisted of the plots in question, when acquired by the company was rough ground partially covered by the sea at high water, and was made up by the company and used in part for their station, and in part for the approaches to it. Plot A was directly contiguous to the station buildings, and B was separated from it by the roadway forming the access to the station. Both plots were laid out in ornamental grounds, and through A access was furnished to part of the station buildings. It was proved that there was a reasonable probability of the ground being required for the extension of the station. With regard to A, the directors of the company, after the expiry of the statutory period of ten years, within which it was lawful for them to sell off superfluous lands, entered into negotiations with the Post Office with a view to selling part of it, and directed their secretary to take the necessary steps for doing so, but on their learning that the sale was illegal it was not carried out. With regard to B, during the ten years they considered various proposals for the purchase of parts of it, but declined them on the ground of the pro-

posed price being too small. After the lapse of the ten years they let portions of plot B on lease for five years.

Held (rev. judgment of Lord Low) (1) that the lands were not superfluous within the sense of the statute; (2) that the company were not barred by the actings of the directors from pleading this.

London and South-Western Railway Company v. Blackmore, 1870, L.R., 4 E. and I. App. 610, *discussed*.

The Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. c. 14) provides—"With respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:—(Sec. 120) "Within the prescribed period, or if no period be prescribed, within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall absolutely sell and dispose of all such superfluous lands in such manner as may deem most advantageous, and apply the purchase money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same."

The Callander and Oban Railway Company by their Act of 1878 (41 and 42 Vict. c. 167) obtained authority to take compulsorily for the purposes of their undertaking certain lands in the town of Oban belonging to Mr Robert Macfie, Airs House, Appin. By section 36 of the Act they were authorised to complete their works by 16th July 1882. On the ground compulsorily acquired from Mr Macfie they erected a railway station, quay, and seawall.

Mr Macfie on 11th March 1896 raised an action against the Callander and Oban Railway Company concluding for declarator that two plots of ground marked A and B on the plan produced, being part of the ground acquired from him, "not having been required or used by the defenders for the purposes of their undertaking, and not being required, have become superfluous lands within the meaning of section 120 of the Lands Clauses Consolidation Act, and vested in and became the property of the pursuer from and after 17th July 1892, or at least that they are now vested in and have become the property of the pursuer." The two plots in question amounted to little over half-an-acre. The ground acquired by the company from the pursuer consisted to a great extent of ground which had been reclaimed from the foreshore. They built a retaining wall, and filled up the whole of the ground to one level. Along the centre of the ground they made a road to the station, on each side of which there was a triangular plot of ground, being

the two plots in question. One of these, A, was directly contiguous to the station buildings, and B was separated from A by the breadth of the roadway. The plots of ground were surrounded with walls and iron railings, and laid out with shrubs and flowers as ornamental grounds. A was crossed by a road, one branch of which led to the cellar under the refreshment room, and another was used as an access to the back of the station. Plot B was separated from the Station Hotel only by the Black Lynn Burn. From the year 1886 Mrs Campbell, the proprietrix of the hotel, made repeated offers to purchase the plot B from the company, which were submitted to the directors, but were declined. Reports, however, were made by the secretary to the directors in regard to the value of the ground, and they frequently discussed the question of disposing of it. The secretary wrote in 1889 to an intending purchaser that "My directors . . . are disposed to sell if a suitable offer is made." In point of fact no sale was effected of either plot within the statutory period.

In July 1892 the Post Office authorities opened negotiations for the acquisition of plot A for a new Post Office, and on 10th August the secretary was authorised by the directors to state that "a certain portion of the ground at Argyle Square," being the land in question, "can be sold, and the directors will consider proposals for its purchase." Negotiations proceeded till in December 1894 the directors remitted "to Mr Anderson and Mr Neave" (the solicitor of the company) "to endeavour to come to an arrangement."

In March 1895 they remitted "to secretary and solicitor to take the necessary steps for sale of ground."

The sale was not carried out, Mr Neave having advised that the company could not give a good title. Thereafter the company let part of plot B to the Post Office authorities on a five years' lease, while the other part of it was leased for the same period to Mrs Campbell.

The Post Office authorities commenced to erect buildings on the ground leased by them, and the pursuer, having warned them that this was in contravention of his rights, and intimated a claim to the company that the lands had re-vested in him, raised the present action.

The Caledonian Railway Company were sisted as parties to the action in virtue of an agreement with the Callander and Oban Railway Company to work their line; and intimation was made to the Lord Advocate on behalf of the Post Office.

The pursuer pleaded—"(1) The plots of ground referred to in the summons not having been required or used by the defenders, the Callander and Oban Railway Company, for the purposes of their undertaking, and having thus become superfluous land within the meaning of the 120th section of the Lands Clauses Consolidation Act 1845, the pursuer, as proprietor of the adjoining lands, is entitled to decree in terms of the first, second, and third conclusions of the summons."

The defenders, the Callander and Oban Railway Company, pleaded—“(5) The land being required by these defenders for the purposes of their undertaking, and having on that account been retained by them, is not superfluous land within the meaning of the statute. (6) The said lands not being superfluous lands within the meaning of the statute, the defenders should be assolized with expenses.”

The Lord Ordinary (Low) allowed a proof, the import of which sufficiently appears in the opinions of his Lordship and of the Lord President, *infra*.

On 3rd March 1897 the Lord Ordinary pronounced the following interlocutor:—“Finds that the portion of the plot of ground marked A on the plan produced with the summons, which the directors of the Callander and Oban Railway Company agreed to sell to Her Majesty's Postmaster-General in the year 1895, and the plot of ground marked B on said plan, became superfluous lands within the meaning of section 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and vested in and became the property of the owner or owners of lands adjoining thereto from and after the 17th July 1892: Appoints intimation of this action and of this interlocutor to be made to the Lord Advocate (as representing Her Majesty's Woods and Forests), in order that he may sist himself as a party to the action, if so advised: Reserves meantime the question of expenses, and grants leave to reclaim.”

Note.—“If the directors of the Callander and Oban Railway Company had not tried to sell the plots of land in question, but had all along dealt with them as if they were lands which the company required and intended to hold, I should have thought, although even then the question would have been attended with difficulty, that the pursuer could not succeed.

“The two plots of ground, which have been referred to as A and B, were parts of certain lands which the company, in the exercise of their compulsory powers, acquired from the pursuer. These lands lay between Argyle Place and Aird's Place and the sea, and to a great extent, if not wholly, consisted of ground which had been roughly reclaimed from foreshore. The ground was bounded on the north by a stream called the Black Lynn. The company, at considerable expense, built a retaining wall along the stream, and filled up the whole of the ground to one level. Across the centre of the ground they made a road leading from Argyle Square to the station. On each side of the road there was a triangular plot of ground—the plots in question—which they surrounded with walls and iron railings, and laid out with flowers and shrubs as ornamental ground. The two plots of ground together amount to very little over half an acre.

“There is no doubt that by so dealing with the plots of ground the company made the approach to their station much more sightly and attractive than it would have been if the plots had been covered with buildings, or left in the rough state in

which they were when the company acquired them. It was said, however, that such a use of the ground was not one of the purposes authorised by the company's Act, and that the plots are therefore in the same position as regards the present question as if they had lain waste. Now, there are no statutory limits or requirements as to the size or style of railway stations, and if a railway company thinks it advisable to spend money upon what is merely ornamental, that is a matter between them and their shareholders. Therefore I am not prepared to assent to the view that to lay out a small piece of ground as ornamental ground in front of an important station is necessarily so beyond the powers of a railway company that they are liable to forfeit the ground so laid out at the end of ten years if they cannot show that they require it for strictly railway purposes. I think that is a question of circumstances. If a small piece of ornamental ground formed part of a scheme for making a station attractive and convenient, I think that the Court would be very slow to hold the ground to be superfluous. If, on the other hand, it appeared that the ground had been laid out merely as a temporary expedient to prevent unsightliness, until a good opportunity arose of disposing of it, or until it should be required for other purposes, I do not think that the fact that the company had expended money upon the ground would prevent it falling into the category of the superfluous.

“In the present case, however, I think that there are strong grounds for believing that the two plots were never designed to be kept permanently as ornamental ground. Although small in extent, they are very valuable, being apparently worth from four to five thousand pounds. It is most unlikely that the directors of a railway company, which never seems to have been overburdened with funds, should have dedicated such valuable ground to such a use. The presumption seems to me to be that the directors laid out the plots as they did until the ground could be otherwise used or disposed of, and that view is, as I shall show, entirely consistent with the actings of the directors.

“But (apart from the actings of the directors) there is a great deal to be said for the view that the plots are not superfluous, because there is a reasonable prospect of their being required for railway works.

“If an extension of the station is required, the company have no ground which could be made available except these two plots. It was said by several witnesses of great skill and experience that the station accommodation is ample, and that there is no prospect of any more being required. I think, however, that the balance of the evidence is, upon the whole, the other way. The traffic has largely increased, and is increasing; and the probability is, that, owing to the opening of new lines, it will continue to increase in the future.

“I think that a terminal station upon a line upon which the traffic is increasing,

and upon which there is already a large passenger traffic in summer, cannot be regarded as well equipped when it has only one refreshment room and one room for both left luggage and parcels, and no office—except a booking office—for any official. I therefore think that the necessity for increased station accommodation is likely to arise, although within what period it is impossible to foretell; and, as I have said, the plots in question are the only ground available.

“Further, the defenders founded strongly on the fact that plot A is not wholly used as pleasure ground. It is crossed by a road, one branch of which leads to the cellar under the refreshment rooms and another branch to the back of the station. These accesses are of the nature of proper railway works, and accordingly the defenders contended that the plot of ground upon which they are placed could not be regarded as superfluous. It is plain, however, that the defenders would not have acquired the whole of plot A for the purpose of making an access to the cellar and the back of the station. A road along the station wall would have been equally convenient; and I imagine that the road was placed where it is simply because the defenders had no particular use for plot A, and by taking the road round one side of it, they were able to lay out the plot more tastefully. The strong point for the defenders in regard to plot A is, that it immediately adjoins the railway station and is the ground upon which any extension of the station must be built.

“If, therefore, it had not been for the actings of the directors in regard to the ground (I refer to both plots), I should, upon the whole, have been of opinion it was not superfluous, on account of the reasonable probability which appears to me to exist of its being required for extension of the station.

“Unfortunately, however, the directors have dealt with the ground in a way which is inconsistent, in my judgment, with any other supposition than that in their opinion it was superfluous.

“The time limited by the company’s special Act for the completion of their works expired in July 1882, and they had ten years from that date within which to sell superfluous lands. The question of disposing of the ground does not appear to have been brought prominently before the directors until about 1886. From that time forward, however, it was repeatedly the subject of consideration at Board meetings.

“A great deal was said about reports which Mr Anderson, the secretary, made to the directors in regard to the value of the ground, and plans which he had prepared, showing how it could be best utilised. Now I do not think that the fact that the directors discussed the question of disposing of the ground, and made inquiries as to its value, is in itself of much importance. The question whether lands are or are not superfluous must often be a delicate one for a railway company, and I think that it is quite reasonable for the

directors in considering it to ascertain what price they could get for the lands if they came to be of opinion that they could do without them and resolved to sell them.

“But in this case the directors went far beyond getting information as to the value of the lands and the chances of the market. They dealt with actual offers. They actually concluded a contract for the sale of a large part of plot A, and they only did not do so as regarded plot B because the price offered did not satisfy them; and there is no suggestion in the minutes or correspondence that they ever had any doubt as to their power to sell the ground, or as to the advisability of doing so, provided they could get a sufficient price.

“Plot B is separated from the Station Hotel only by the Black Lynn Burn, and Mrs Campbell, the proprietrix, was anxious to acquire that plot, chiefly because she wished to cover over the burn, which she considered to be prejudicial to the hotel. She accordingly made repeated offers to purchase the ground, and it is plain that her offers were refused for no other reason than that the directors did not consider the price which she offered high enough. Mr Brown, the only member of the Callander and Oban Board who was examined, said that even if Mrs Campbell had offered a sufficient price, the directors would not have agreed to sell to her until they had consulted their engineer as to whether or not the ground was required for railway purposes. I think that Mr Brown’s recollection must be at fault upon the point. In the first place, there is no indication in the minutes or the correspondence that the directors considered it to be necessary to consult anyone as to whether or not (apart from the question of price) it was prudent to sell the ground. On the contrary, the plain inference to be drawn from the documentary evidence is that the only thing which stood in the way of a sale to Mrs Campbell was the price. In the second place, when the Post Office authorities offered for a portion of plot A what the directors considered to be a sufficient price, an agreement of sale was concluded without the engineer or anyone else being called in to advise the directors.

“The Post Office authorities first opened negotiations for the acquisition of ground for a new post office in July 1892. The matter was brought before the directors at a meeting held upon the 10th August 1892, and the minute bears that the secretary was authorised to state ‘that a certain portion of the ground at Argyle Square can be sold, and the directors will consider proposals for its purchase.’ That was a very plain indication of the directors’ opinion that a portion, at all events, of the ground in question was superfluous, because it was only upon the assumption that it was superfluous that it could be sold. The Post Office authorities subsequently proposed that, instead of their purchasing a piece of ground, the company should build a post office, which they (the Postal authorities) should take on lease. That proposal was

declined, but by letter of 7th September 1893 the secretary, Mr Anderson, intimated that the company 'are willing to sell land for this purpose.' Finally, in the end of 1894, the Post Office authorities offered a sum of £2350 for a portion of plot A. After some correspondence, that offer was in March 1895 approved of by the directors, and they remitted to the secretary and the solicitor 'to take the necessary steps for sale of ground.'

"The sale of the ground was not in fact carried out, because Mr Neave, the solicitor of the company, advised that they could not give a good title. Mr Neave was not examined as a witness, and the letters which he wrote upon the subject are very guarded, and the impression which they convey to my mind is, that they do not disclose his full reasons for advising that the company could not give a title. He simply says that the lands are not superfluous lands, and that therefore the company could not sell them. No doubt he noticed that the ten years during which it was competent for the company to sell superfluous lands had expired before the agreement with the Post Office was made.

"What, then, is the result as regards the present question of the directors having agreed to sell a portion of plot A to the Post Office and negotiated for the sale of plot B?

"The directors are the proper persons, in the first instance, to decide whether lands are or are not superfluous, and they have the best means of judging as to what is required for the purposes of a railway. And when it is proved that they have deliberately acted in a way which showed that their opinion was that the lands were not required, I think that the *onus* is shifted. It is then for the directors to show that the lands never were superfluous, and to explain their previous actings and reconcile them with the position which they now take up.

"It seems to me that in a question with the Callander and Oban Railway Company the decision of the House of Lords in the *London and South-Western Railway Company v. Blackmore*, 4 E. & I. App. p. 610, is in point. There a railway company had, during the currency of the ten years, sold certain lands. These lands not being in town, or building lands, or built upon, an adjoining proprietor had a right of pre-emption. In an action at the instance of the adjoining owner the sale was set aside, and it was held that his right of pre-emption had arisen—the contention of the company that the sale being set aside they were entitled to continue to hold the lands until the expiry of the ten years, as if the sale had never been made, being repelled.

"Lord Westbury, after saying that the sale must be set aside, put the point thus—'But then the question arose, were the directors to be remitted to their former position, and placed in a capacity to determine what to do with these lands as if they had never proceeded to deal with them as superfluous lands? That is a question which at first sight appeared to me to

deserve much consideration, but undoubtedly in the cases referred to it has been held—and I am by no means inclined to disagree with the decision—that the act of the directors in putting up the lands for sale stamps the lands absolutely with the character of superfluous lands, and that the directors are estopped from denying that they have that character under the Act of Parliament.'

"Now, if an attempted sale of lands during the currency of the ten years stamps them with the character of superfluous lands and once gives rise to the right of pre-emption, an attempt to sell at the end of ten years, after the directors have had the full period allowed by statute to consider whether the lands are or are not required for the purposes of the special Act, must also do so.

"If the directors had been able to give any explanation of their actings in regard to the ground which showed that their actings were not inconsistent with the position which they now take up, I have no doubt that they would have done so. But no satisfactory explanation has been forthcoming. Mr Anderson, the secretary, who prepared numerous reports upon the subject and conducted the correspondence, was not examined. I think, however, that it is plain from the documentary evidence that his opinion all along was that the ground was not required by the company and should be sold. Mr Bolton, the chairman of the company, was said to be too ill to attend the proof, but it was not said that he could not be examined on commission. The only individual who had anything to do with the proceedings who was examined was Mr Brown, and I do not consider that the explanations which he gives are satisfactory. He says, in the first place, that the company were willing to sell to the Post Office, although they would not have sold to a private individual. I do not think that Mr Brown has any distinct recollection of what passed at the meetings, and the documentary evidence leads me to conclude that the directors would have sold as readily to a private person as to the Post Office, if the former had offered as good a price. Further, a desire to favour the Post Office as being a branch of the public service is really beside the question, because the directors could not sell one foot of ground to the Post Office or anyone else, unless it was ground which was not required for the purposes of the special Act—that is to say, superfluous ground. Mr Brown says in the next place that the directors never applied their minds to the question whether plot B was ground which they ought to sell or not, because they never had an offer at a price which was worth considering. Now, unless the directors were prepared to sell to Mrs Campbell if she offered them a sufficient price, they treated her in a way which it is impossible to justify. In the first place, they undoubtedly gave her to understand that the only reason for declining her offer was deficiency in the price. In the second place, at their meeting of 22nd November

1889, they instructed the secretary 'to inform Mrs Campbell that inquiries are being made for the vacant ground near the station, and ascertain whether and for what quantity she desires to acquire it.' That was inviting her to offer for the ground. In the third place, they allowed Mrs Campbell's agent, by arrangement with the secretary, to travel to Glasgow on three different occasions to have a personal interview with them on the subject. It seems to me to be impossible to believe that the directors would have acted in that way unless they had been prepared to sell the ground to Mrs Campbell if she came up to their views of an adequate price.

"I have therefore come to the conclusion, although with regret, that so far as the Callander and Oban Company is concerned, the directors, by agreeing to sell part of plot A to the Post Office, stamped the portion which they so agreed to sell with the character of superfluous lands. In regard to plot B, although the actings of the directors are not perhaps so unequivocal as in regard to plot A, there are much stronger grounds (apart from the actings of the directors) for holding the former to be superfluous land than the latter. Practically the only use to which it has been suggested that plot B could be put, is that if the station was extended over plot A, it might be necessary to shift the road from Argyle Square on to plot B. If, therefore, plot A must be regarded as superfluous land, I think that it necessarily follows that plot B must also be so, and I can find no ground for distinguishing between different parts of plot B.

"In regard to the portion of plot A other than that which the directors agreed to sell to the Post Office, there is more difficulty. It is to be observed in the first place that the pursuer now recognises that he cannot claim the whole of plot A, and he has restricted his claim so as to leave a free entry from the north to the strip of ground, thirteen feet in width, running along the wall of the station to form an access to the cellar and the back of the station, in lieu of the roads which now run round plot A. Now I do not think that it is proved that the directors ever contemplated selling the whole of plot A. On the contrary, I think that there are indications that they did not do so. Thus the minute of the directors' meeting of 10th August 1892 (when the Post Office first approached them) ran thus:—"Mr Anderson authorised to state that a certain portion of the ground at Argyle Square can be sold." Further, the directors never had any offer before them for the purchase of the remainder of plot A, and they never intimated to anyone that they were willing to sell that ground, and although plans were prepared showing buildings covering the whole of plot A, these buildings included railway offices. Therefore I am of opinion that the defenders are not estopped by their actings from pleading that the portion of plot A, not included in the sale to the Post Office, was not at the end of the ten years superfluous, and as it is the only ground available

for building an office, or a second refreshment room, or a parcels office, and is quite suitable for these purposes, I think, for the reasons which I have already stated, that I am justified in holding that it was not, as matter of fact, superfluous." . . .

The defenders reclaimed, and argued—1. The fair reading of section 120 of the Lands Clauses Act was that if at the end of ten years lands did not fall within the category of "not being required," the section would not apply. Accordingly, that was the point of time to look at for the purpose of determining the question. There was no authority for the proposition that if lands were in use at that time, but there was a probability they might not be used at some future date, they were therefore to be regarded as superfluous. A fair reading of the evidence showed that the lands had been in actual use and occupation during the ten years, and that they were the only possible place which could be used for the extension of the station, and would in the ordinary development of the railway be applied for that purpose—*Hooper v. Bourne*, 1880, L.R., 5 App. Cas. 1. Yet the Lord Ordinary had awarded to the pursuer some of the land which was actually used by the defenders for access to their station. The *onus* of proving that lands were superfluous was upon the pursuer, and he had entirely failed to discharge it—*North British Railway Company v. Moon's Trustees*, February 8, 1879, 6 R. 640, at 651. This case was in sharp contrast with any in which lands had been held to be superfluous. The land did not fall within any of the four categories of "superfluous" lands described by Lord Cairns in *Great Western Railway Company v. May*, 1874, L.R., 7 H. of L., 283, at p. 292; *Norton v. London and North-Western Railway Company*, 1879, L.R., 13 Chan. Div. 268; *Stewart v. Highland Railway Company*, March 8, 1880, 16 R. 580. Moreover, it was the case that the Court would take a more liberal view of small pieces of land such as these in close proximity to the station. The dealings of the directors, if looked at as part of the evidence, did not turn the scale to the effect of making the lands superfluous if it had been sufficiently proved from their use, actual and potential, that they were necessary to the company. It was evident that the directors had never considered the point as to whether the land was "necessary" in the sense of the statute. This was shown by the fact that they had entered into negotiations to sell after the ten years, when it was out of their power to do so. (2) Nor did the fact that they had entertained offers bar them from maintaining that the lands were not superfluous. There was no case where directors had been held thus barred by entertaining offers for small parts, subject to their getting a high enough price. Nor had the sale or proposed sale ever been held to be relevant except where the lands were put up to auction as superfluous—*Carington v. Wycombe Railway Company*, 1868, L.R., 3 Ch. App. 377. The authorities were against the view that there could be any detailed criticism of the

directors' dealings with small portions of the land if it were clear that the main part was wanted—*Moody v. Corbett*, 1866, L.R., 1 Q.B. 510, 34 L.J., Q.B. 166. The mere fact that the company purported to convey lands away was held not to be conclusive as showing they were superfluous, in *Hobbs v. Midland Railway Company*, 1882, L.R., 20 Ch. Div. 418; *Dunhill v. North-Eastern Railway Company*, L.R. [1896], 1 Ch. 121. As regards the case of *London and South-Western Railway Company v. Blackmore*, founded on by the Lord Ordinary, the lands had as a matter of fact been sold by the company, and there was no evidence to the effect that they were not superfluous and that the company did not intend to dispose of them as such. The case, moreover, turned on the pre-emption clause of the English Act. Lord Westbury's opinion was founded upon "the cases referred to," viz. — *Carington v. Wycombe Railway Company*, 1868, L.R., 3 Ch. App. 377; and *Beauchamp v. Great Western Railway Company*, 1868, L.R., 3 Ch. App. 745, which in no way justified it; and his remarks were *obiter*. As regards the attempted sale to the Post Office, even if it could be held that that could effect the position of the ground in 1892, they were authorised, for their own convenience, in treating them in an exceptional manner — *Betts v. Great Eastern Railway Company*, 1878, L.R., 3 Ex. Div. 182.

Argued for respondent — (1) It was common ground that since 1880 this land had been used only as ornamental ground with passages for purposes of access. That was not a purpose of the defenders' understanding—*Betts v. Great Eastern Railway Company*, *supra*. The negotiations for disposing of the land entered into by the directors were clear evidence that they did not consider it necessary. In short, there had been a prolonged course of treatment of it as superfluous, and they could not now come forward and suggest possible uses. The case of *Stewart v. Highland Railway Company*, *supra*, showed that it was the defenders' original bill which must be looked at for their "undertaking," not a new bill for the purposes of extending their station. The fact that they had leased out part of the land to the Post Office after the ten years had elapsed showed that they could never have considered it necessary. (2) But assuming that the land was required and used till 1892, yet the directors, having unequivocally shown that they did not want the land and meant to sell it, had stamped it as superfluous, and were barred from maintaining that it was not. This was decided in *London and South-Western Railway Company v. Blackmore*, *supra*, a case exactly analogous to this. In accordance with that decision an attempt to sell the lands even at the end of ten years entitled the pursuer to found upon sec. 120. It was true that that was a case of application of the clause of pre-emption, but there was no distinction between the two clauses in principle. Nor did the fact that there was an out-and-out sale differentiate the cases, the point being

that the directors' views on the matter were quite clear.

At advising—

LORD PRESIDENT—The pursuer's claim, as stated in the summons, is that from 17th July 1892 the two pieces of ground in dispute vested in him; and the question at issue is whether at that date they were superfluous lands in the sense of the statutes. The summons purports to claim a declarator that, even if the lands did not become the property of the pursuer at 17th July 1892, at least they are now vested in him and have become his property. No plea is stated on record, or has been stated in argument, in support of any theory according to which the lands, if they were not vested in the pursuer at 17th July 1892, became vested in him at some later day. The sequel will show that this observation is not unimportant. If the lands were superfluous at 17th July 1892, they vested in the pursuer; if at that date they were not superfluous, then the pursuer has no right to them.

It may be convenient to consider, first, the condition and actual uses of the ground in July 1892, apart from their potential uses, and the uses which have been projected for them. But the history of the ground bears upon both subjects.

The terminus of the Callander and Oban line at Oban is situated close to the sea, and the land taken from the pursuer is the northmost or terminal part of the lands taken under their compulsory powers. The lands taken were not, however, ready to hand for the uses to which they have been applied. They consisted of rough ground, with the tide—at least in the part now in question—coming through the stones. The company made up the ground, and used it, when so transformed, for their station. The land taken from the pursuer was accordingly used in part for the station buildings, and in part for the approaches to the station. In front of the station there was formed an open place. Instead of making the eastern approach to the station as wide as this place, the company made it a good deal narrower, leaving on either side the pieces of ground now in dispute. Of these, the one A is less than, and the other B is over, a quarter of an acre. A is directly contiguous to the station building; and B is separated from A by the breadth of the roadway. Both A and B were laid out as ornamental grounds with accesses and broad footpaths. In the case of A, two of those footroads, forming what the pursuer's leading witness calls a very considerable part of the area, furnish access to the south-east portion of the station and the wine or beer cellar of the refreshment room. Those roads have been in use by the company for the purposes of the station since the grounds were laid out. Accordingly at 17th July 1892 the condition of matters was this—both areas formed ornamental grounds, and A was further used, to the extent of its roadways, for access to the station. Those were not, of

course, principal accesses, or used for other than subordinate purposes, but they were, in fact, accesses.

I now inquire what were the potential uses of those lands to the Railway Company, and of course I disregard what is imaginary, or conjectural, or remote. We are to put ourselves in the position of business men looking around them in July 1892, with a view not too sanguine and not too *borné*. Can we say that, if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he would have said at that time that the lands in question would, by the ordinary development of the railway or neighbourhood, be required to be actually applied to the purpose of the railway within a reasonable time? (*See Hooper*, 5 Ap. Ca. at p. 18).

I do not think it necessary to elaborate this point, because the Lord Ordinary has indicated that, apart from the actings of the company themselves, he would hold that there was a reasonable probability of the ground being required for the extension of the station. In this opinion I concur. But as the effect to be given to the actings of the company may depend on the degree of strength of the evidence that the lands would, in reasonable probability, be needed for the active purposes of the company, I shall dwell on it for a moment.

It is obvious to remark, and has frequently been remarked, that where pieces of land are small and close to a station, and in a town, it is the more easily to be believed that they are "required." The patent facts about Oban and about this railway render these general considerations applicable with more, rather than less, than the average force. Further, it is proved that if the station or its accesses were ever to be enlarged by a foot, this ground is the only resource which the company has to draw on; and it is directly available for those purposes. Should such needs arise, then, on the assumption of the pursuer's success, this land would have to be bought back again. That such needs are likely to arise requires but little enforcement. The existing establishment was originally planned in accordance with the limited financial ability of the company at the time, and is in several respects contracted; there is adequate evidence that, for goods and parcel traffic, for refreshment rooms, and for offices, the present arrangements are already insufficient, if regard be had to present comfort, and the expansion of traffic.

Up to this point what I have said is entirely in accordance with the opinion of the Lord Ordinary; and the next question is, why has the Lord Ordinary come to the conclusion that the greater part of these lands was superfluous at 17th July 1892? The answer to this question of fact must be—because, and only because, of the actings of the directors.

I shall state briefly—and the matter admits of brevity—what I hold to be the facts as to the company's actings. Some of the propositions are negative, but these are

not the least important.

1. The directors never considered before, at, or after July 1892 of what use the lands in question were, or were likely to become to the company.

2. The directors never came to any general resolution to sell "A" or "B," or either of them. They only considered certain proposals for the sale of certain parts of them.

3. In regard to "A," the directors did not within the ten years either resolve to sell or consider any proposal for the sale of any part of "A."

The only step taken in the direction of selling any part of "A" was after the expiry of the ten years, to wit, in August 1892, when the secretary was authorised to state to the Post Office that a certain portion of "A" would be sold, the negotiations being continued till 1895, when the directors remitted to the secretary and solicitor to take the necessary steps for selling to the Post Office the ground specified in the Lord Ordinary's interlocutor. There was no concluded contract of sale, and the proposal was abandoned.

4. In regard to "B," the directors did within the ten years consider various proposals by Mrs Campbell for the sale to her of parts of "B." Those proposals, were in each instance, declined on the ground of the proposed price being too small.

5. No part of "B" was in fact ever sold, and none was let until 1895, when, after the falling through of the proposal for a sale of part of "A," a certain portion of "B" was let to the Post Office for five years, and another portion of "B" was let to Mrs Campbell for the same period.

6. The pursuer has proved, as part of his case, that in 1892 a plan was prepared at the instance of the company's officers for utilising a part of "A" for offices for the company, provision being made in part of the building for shops, which might apparently be let.

It is manifest from what has now been stated that the conduct of the executive of the defenders, to a certain extent, supports the contention of the pursuer. The actings of the directors, and the absence from the witness-box of several of the officers of the company, who took part in those proceedings, have furnished the pursuer's counsel with material for legitimate comment. But it is necessary to see precisely what is the legal result of this conduct. Do the actings of the directors constitute a bar against the company now asserting the lands not to have been superfluous at 17th July 1892? or do they merely constitute evidence, more or less cogent, that the lands were in fact superfluous? Those two things are essentially different; but they meet, and I think are in danger of being confused, in a metaphor much used in the discussion—it is said that the company have stamped the lands as superfluous. (This phrase has come from an opinion of Lord Westbury's, in which it is used, with precision, as relative to estoppel.)

Now, it cannot be disputed that the fact, e.g., that directors within the ten years

resolved to sell, and only did not sell because the price was too small, is, *prima facie*, cogent evidence that the land so dealt with was not required for the company's purposes. The reason for the inference is that the duty of directors being only to sell what is not required, it is to be presumed, that before resolving to sell, they had considered whether or not the land was required for the company's purposes, and had concluded that it was not. I say such a fact is cogent evidence, but it is not conclusive, and cannot possibly be so. Suppose that directors, tempted by a large price, resolved to sell the platform of a station, or a siding in daily use, the proper inference from the resolution would be, not that the lands were superfluous, but that the directors had not known or had not attended to the legal limitations on their power to dispose of the company's property. Again, suppose the case to be less gross than that of a platform or a siding—the case of land about which opinion might be divided as to whether it was or was not required—that the directors had resolved to sell, but that it appeared that they had so resolved in ignorance of the law, which enables them to sell what is superfluous, but forbids them to sell what is required. In that case the cogency of the resolution to sell as evidence of superfluity is largely abated. It would merely come to this, that the directors thought that the money was more required by the company than the land. It would not prove that they thought the company did not require the land. It is necessary here and throughout the discussion to beware of misusing the word "required." The question is not whether it would not be possible to get on without the lands, or whether, by reconstructing your station, you might not so economise your ground as to leave this bit over.

Now, as I have pointed out in my summary of the evidence, the directors of the defenders' company did not consider the questions properly arising when a sale of company's lands is proposed. Their proceedings show clearly that they did not consider whether the land was or was not required, and show also that they acted exactly in the same way after, as during, the ten years, although, after the ten years, they had no power to sell, the theory of the statutes being that after the ten years all that remains in the company is "required." In short, I think it is abundantly plain that they did not advert to the facts (and were never reminded or told) that directors can only sell land not required for the company's purposes, and that they cannot sell at all after the ten years. There is a very significant letter, dated 31st August 1893, from the secretary to the chairman, from which it appears that the law about superfluous lands was only unearthed after the ten years were out, and that on this occasion the wrong section was supposed to apply. All the testimony harmonises with this view, although, for reasons easily conjectured, it does not directly affirm it.

If, then, the actings of the directors be

merely evidence on the question of fact, whether the lands were required or not, I hold that no legitimate inference can be drawn that the opinion of those persons was that the lands in question, if retained by the company, would not be required to be actually applied to the purpose of the railway within a reasonable time. If no such inference arises, then the conduct under consideration does not, as evidence, affect the question at issue. Even if, contrary to my opinion, an inference of opinion on the part of those persons that the lands were not required did arise, then I prefer the testimony of the very capable men who have given in the witness-box their opinions (and the reasons of those opinions) that the lands were required. And in regard to those parts of "A" which were and are actually used as accesses to the station, I prefer the facts to any opinions, proved or inferred.

There remains the question whether the actings of the directors bar the company from maintaining that the lands are not superfluous. The way in which the question arises can best be seen by taking "A" and "B," one by one, for the facts are different.

As regards "A," the Lord Ordinary proceeds solely on the abortive resolution to sell part of "A" to the Post Office in 1895. I think it quite clear, from several passages in his Lordship's opinion, that he treats that transaction as a bar, and not merely as evidence of superfluity. His theory leads to a very singular result, for he holds to be superfluous that part of "A" which was and is in actual use as an access to the station, while he allows the company to retain a large part of what was only used as ornamental ground; and his grounds for so distinguishing are that, as regards the latter, the company "are not estopped by their actings from pleading that the portion of 'A' not included in the sale to the Post Office was not at the end of the ten years superfluous," and that that ground is available for an office or a second refreshment room. It is most remarkable that the pursuer has acquiesced in the Lord Ordinary's interlocutor. He is therefore acquiescent in the view that about one-half of "A" is not superfluous. Now, when an area of less than a quarter of an acre is reduced by one-half, and it appears that of the remaining fraction a large part is admittedly in use for access, the argument becomes pretty thin.

There seem to me to be at least two fatal objections to the theory of bar as regards "A." The one is that the resolution to sell was come to after the expiry of the ten years, and the other is that no sale was made.

1. The law, as I understand it, is that at the end of the ten years, *i.e.*, on 17th July 1892, the lands either vested or did not vest in the adjoining proprietor. If at that date the lands were not required by the company, they vested in the pursuer; if they were required, then they did not vest in him, and his interest in them for ever came to an end. Of course, on the question of fact, light may be got from the sequel of

events, and therefore what was done in 1895 may throw light on the state of things in 1892. But the hypothesis of the present question is that, taking all evidence into account, the lands were "required" in 1892, and the argument is that the company are barred, in a question with the pursuer, from pleading the fact. To my thinking, that hypothesis involves that in 1895 the pursuer had no right which could be affected by anything which the company could do, and that the actings of the company could not revive a right which, from 17th July 1892, was dead and done with. The argument would be exactly the same if the abortive resolution to sell had been in 1895 instead of 1892, only that in that case the unsoundness of the pursuer's plea would be more open and palpable.

2. The second point to which I call attention is that the resolution to sell was departed from, and no sale took place. In his interlocutor, the Lord Ordinary uses the words, "which the directors agreed to sell" to the Postmaster-General; but it must be observed that no contract of sale was concluded with the Postmaster-General—no acceptance of his offer having been sent. The fact was that the directors, having instructed their officers to carry out the sale, were told by these officers that the sale could not go on; and it was no further proceeded with.

Now, I cannot hold the mere private fact that the directors resolve to sell, although they immediately after abandon or rescind their resolution, can bar them from saying and proving that the lands were required. Suppose the directors were told by one of their local officials that they ought to sell the lands, and, too readily accepting his advice, remitted to their officers to carry out the sale, and then were told, by return of post, by the head engineer, that this would never do, that they would require the lands next year, and the idea of sale is abandoned. The pursuer's contention involves that the ill-advised resolution is final in a question with the adjoining proprietor, although he never heard of it till after he claimed the lands. Such a theory seems to me entirely unsupported by principle.

The Lord Ordinary seems to have been much influenced by the case of the *London & South-Western Railway Company v. Blackmore*, and indeed he has really decided the case in consequence of certain remarks of Lord Westbury in that case. Now, it has to be observed (1) that on the facts *Blackmore's* case was the case of a sale and not of a projected or contemplated sale; (2) that the claim was by a person having a right of pre-emption under what in the English Act is sec. 127, and in the Scottish Act sec. 121; (3) that it was the case of a sale within and not after the ten years; (4) while Lord Westbury speaks of the act of the directors in putting up the lands for sale as stamping the lands with the character of superfluous lands, and estopping the directors, he says that this had been decided, and expresses his own personal opinion merely by saying that he is by no means inclined to disagree with

the decision. We were told, and I suppose accurately, that the decisions referred to were *Lord Carington's* case and *Lord Beauchamp's* case. If Lord Cairns' judgment in *Carington's* case be referred to, it will be found that he rests his conclusion on the fact that the company had not still retained possession of the land, but had sold it to another. In *Lord Beauchamp's* case the judgment on this point is rested on the authority of *Rangeley v. The Midland Railway Company*, L.R., 3 Chan. App. 306; and I am unable to find in the report of that decision anything which bears upon the present question. I am not prepared, therefore, upon the somewhat indirect and inconclusive authority which I have stated, to give effect to a plea which seems to me unsupported by the principles of our law of bar.

The case relating to "B" may be more briefly discussed. As already stated, what occurred within the ten years was merely the consideration and ultimate rejection of offers to purchase. As regards these, in my view they enter the question only as items of evidence, and the observations apply which have already been made in relation to "A." The leases given in 1895 to the Post Office and Mrs Campbell can hardly be regarded as inconsistent, by reason of their duration, with the view that ultimately, and at no distant time, the lands will be required for railway buildings. The temporary use in each case is appropriate to the general idea of railway interests being continuously furthered, for it cannot be doubted that the convenience of the Post Office is to a certain extent the convenience of the railway; while Mrs Campbell's possession of the rest of the area as garden ground ensures the continuance of the embellishment of the station.

My opinion upon the whole matter is that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied from the conclusions of the summons. In this view I have had no occasion to consider the separate plea of the Caledonian Railway Company.

LORD ADAM and LORD KINNEAR concurred.

LORD M'LAREN was absent.

The Court recalled the interlocutor of the Lord Ordinary and assoilzied the defenders.

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