Friday, March 27.

FIRST DIVISION.

[Lord Cullen, Ordinary.

HERIOT'S TRUST *v.* CALEDONIAN RAILWAY COMPANY.

Superior and Vassal—Railway—Casualty—Statutory Title—Lands Clauses Consolidation (Scotland) Act 1845 (8 *Vict. cap.* 19), *sec.* 80.

The Lands Clauses Consolidation (Scotland) Act 1845, sec. 80, enacts—"*Form of Conveyances.*—Feus and conveyances of land so to be purchased as aforesaid may be according to the form in the Schedules (A) and (B) respectively to this Act annexed, or as near thereto as the circumstances of the case will admit; which feus and conveyances, being duly executed, and being registered . . . within sixty days from the last date thereof . . . shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking . . . any law or custom to the contrary notwithstanding: Provided always 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 the title of the company under such last-mentioned feus or conveyances shall be regulated by the ordinary law of Scotland until the said feus or conveyances or the instruments of sasine thereon shall have been recorded in a register of sasines."

A railway company acquired compulsorily certain lands pursuant to a private Act which incorporated the Lands Clauses Consolidation (Scotland) Act 1845, the lands so taken being the whole lands held by the disponer under the same title. The disposition in the company's favour was not, however, registered within sixty days of its date. In an action at the instance of the superiors against the company for payment of a casualty of composition the defenders maintained that they had a valid statutory title to the lands which, in virtue of the Lands Clauses Act 1845, had destroyed the pursuers' rights of superiority therein.

Held that the pursuers were entitled to payment of the casualty sued for.

Per the Lord President and Lord Skerrington, on the ground that the lands were held on a title none the less feudal because it was statutory, and that though the feudal remedies by way of forfeiture were gone, the feudal prestations remained; and

Per Lord Johnston, on the ground that though the feudal relation no longer subsisted, the pursuers were entitled to the feudal payments so long as these remained unredeemed.

Observed that when a railway company takes land which it is authorised by statute to take, it can only make up a statutory title, even though the conveyance does not strictly comply with the terms of Schedule A annexed to the Lands Clauses Consolidation (Scotland) Act 1845.

Authorities commented on.

On 14th March 1912 the Governors of George Heriot's Trust, incorporated under the Educational Endowments (Scotland) Act 1882 (45 and 46 Vict. cap. 59), *pursuers*, brought an action against the Caledonian Railway Company, *defenders*, for payment of £1576, being a year's rent of the subjects after mentioned, which they alleged became due to them as a composition on 26th October 1910, on the expiry of a period of twenty-five years from the date of the previous payment, in terms of section 5 of the Conveyancing (Scotland) Act 1874 (37 and 38 Vict. cap. 94).

The pursuers pleaded, *inter alia*—"(2) The pursuers being the immediate lawful superiors of the defenders in the subjects described in the summons, and a composition being now due, are entitled to decree as concluded for. (4) A composition of a year's rent, the sum sued for, having become due by the defenders to the pursuers on 26th October 1910 in consequence of the lapse of twenty-five years from the last payment of a casualty, and being still unpaid, decree should be pronounced in terms of the conclusions of the summons. (6) The defenders having failed to record the conveyance in their favour within sixty days of its date, as provided by the Lands Clauses Consolidation (Scotland) Act 1845, have not acquired a statutory title to the subjects thereby conveyed."

The defenders, *inter alia*, pleaded—"(2A) The conveyance to the defenders having been duly recorded by them in terms of section 80 of the Lands Clauses Consolidation (Scotland) Act 1845, the defenders have a valid statutory title thereto, and are entitled to decree of absolvitor. (3) The pursuers not being the superiors of the defenders in the subjects in question, which are vested in the defenders under a duly completed statutory title, have no right to demand the casualty sued for, and the defenders should therefore be assoilzied. (4) Alternatively, if the pursuers are the superiors of the defenders in the subjects in question, the action is incompetent as laid."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (CULLEN), who on 14th December 1912 repelled the 1st, 2nd, 3rd, and 4th pleas-in-law for the defenders, sustained the 6th plea-in-law for the pursuers, and allowed a proof.

Opinion—"In this action the pursuers, the Governors of George Heriot's Trust, seek to recover from the defenders, the Caledonian Railway Company, a casualty of composition in respect of a piece of ground belonging to the defenders and situated at their Princes Street Station in Edinburgh.

"The ground in question was acquired by the defenders in 1867 pursuant to an Act

29 and 30 Vict. cap. cccxxv, whereby they obtained powers enabling them to alter and enlarge their terminal station, &c. Prior thereto it was held in feu of the pursuers' predecessors. It was conveyed to the defenders in 1867 by Isaac Scott, the then entered vassal, conform to conveyance dated 12th August 1867, and registered in the Particular Register of Sasines for the Sheriffdom of Edinburgh, &c., on 15th May 1868.

"The main question raised in the action is whether the defenders, by virtue of this registered conveyance, obtained a statutory title to the ground of the species created by section 80 of the Lands Clauses Act 1845, and now hold it free from the burdens and incidents of the former feu, or whether, on the other hand, the defenders hold the ground in feu of the pursuers as the successors of Isaac Scott, the last-entered vassal.

"The first branch of the argument which I heard was directed to the form of the conveyance of 1867. The pursuers, under this head, contend that the deed does not conform to the statutory style of conveyance provided in section 80 and Schedule A of the Lands Clauses Act. The second branch of the argument was directed to the non-registration of the conveyance within sixty days from its date. The pursuers, under this head, contend that *esto* the conveyance was habile in form to found a statutory title under section 80, registration within sixty days is under that section an essential condition of the constitution of such a title.

"When the Lands Clauses Act of 1845 was passed the form of conveyance contained in Schedule A of the Act was broadly distinguished from the common law form of feudal conveyance by the absence from it of the usual executory clauses necessary towards infeftment. The changes in conveyancing forms, however, introduced by subsequent statutes have practically obliterated this broad distinction. In 1867 these executory clauses had ceased to be essential to a common law feudal conveyance, and infeftment was obtained then as now by registering the conveyance itself, with a warrant for registration on it, in the appropriate register of sasines. Any distinctive features of the statutory form of conveyance must accordingly be looked for elsewhere.

"The form of Schedule A of the 1845 Act bears that the consideration paid for the conveyance is paid 'pursuant to an Act passed, &c., intituled, &c., by the (company) incorporated by the said Act.' And the seller thereby conveys to the company 'for ever, according to the true intent and meaning of the said Act,' the land in question.

"The two sets of words above quoted are pointed to by the pursuers as being the distinctive marks of the statutory form of title under section 80 of the Lands Clauses Act in contrast to the common law feudal conveyance according to the form of such conveyance obtaining in 1867.

"Turning to the conveyance by Isaac Scott of 1867 one finds that the price bears to be paid 'pursuant to the provisions of the company's Act of Incorporation, and of the special Act 29 and 30 Vict. cap. 325, before mentioned.' So far the deed conforms to the style of Schedule A. Passing on to the clause of conveyance one finds that the words in that style 'for ever according to the true intent and meaning of the said Act' are not inserted. But following on the description of the subjects conveyed there is this clause—'To be holden by the said company and their successors for ever in terms of the foresaid Acts.'

"A literal adhesion to the words of the Schedule A style in every case is not required by section 80 of the Lands Clauses Act. The two sets of words which I have quoted from the conveyance of 1867 appear to me, taken together, to serve in substance the same purpose as those which the pursuers contend fall now to be regarded as the distinctive parts of the schedule style, that is to say, of marking the conveyance as one granted pursuant to the Acts recited and for the purposes thereof.

"The pursuers, however, further point to certain other features of the conveyance of 1867 which they say stamp it as a common law conveyance of the *dominium utile* in the feu. The first is the presence of the words 'heritably and irredeemably,' which follow or include the words of conveyance and precede the description of the lands at the place where the words 'according to the true intent and meaning of the said Act' occur in the Schedule A style. They are the words usually employed in a common law conveyance. They are not, however, *inter essentialia* of it.

"The pursuers next point to the clause whereby the conveyance is made 'with and under the burdens, conditions, and servitudes' specified in an instrument of sasine in favour of Isaac Scott, 'in so far as the same are not inconsistent with the Railway Statutes.' As to what these burdens, conditions, and servitudes were I have no information. But this qualifying clause was proper and necessary to an accurate definition of what Isaac Scott had to convey, and intended to convey, to the company.

"The pursuers next point to the clauses assigning the rents and the writs, and binding the granter to free and relieve the company of incumbrances, feu-duties, casualties, and public burdens. It does not seem to me that these are incongruous with the acquisition by the company of the special statutory species of right and title in the lands created by section 80 of the Lands Clauses Act.

"As against these features of the conveyance founded on by the pursuers, the defenders lay stress on the fact that the conveyance contains no procuratory of resignation, and no clause as to the manner of holding. Both clauses were usual in common law conveyances in 1867. But neither was essential.

"So far, therefore, as the form of conveyance is concerned, the matter stands thus, if I am right in the views which I have expressed. The conveyance contains what is said by the pursuers to be distinctive of the Schedule A style. On the other

hand, it contains some clauses and it omits others which were usual in a common law feudal conveyance, although none of these was essential to the efficacy of such a conveyance. The result, in my opinion, is that the conveyance was habile in point of form to found the special statutory right and title to the land introduced by the Lands Clauses Act, although it was equally habile as a common law transmission of the feu.

"Passing from the form of the conveyance, the pursuers, under the second branch of the argument, raise the question whether the conveyance was duly registered in terms of section 80 of the Lands Clauses Act. It was executed on 12th August 1867, and was registered on 15th May 1868, after an interval of over nine months. The pursuers' case here is that under section 80 registration of a conveyance within sixty days is an essential condition of the constitution of the special statutory right and title which the defenders plead they possess.

"Section 80 begins by authorising feus and conveyances to be taken according to the styles given in Schedules A and B, and then proceeds as follows:—'which feus and conveyances, being duly executed, and being registered in the Particular Register of Sasines kept for the county, burgh, or district in which the lands are locally situated, or in the General Register of Sasines for Scotland kept at Edinburgh, within sixty days from the last date thereof, which the respective keepers of the said registers are hereby authorised and required to do, shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking, and their successors and assigns, to the premises therein described, any law or custom to the contrary notwithstanding.'

"Now this provision does not seem to me to be ambiguous, but to plainly require that a statutory conveyance must be registered within sixty days of its date as a condition of its efficacy to give the said good and undoubted right and title to the promoters of the undertaking. The answer which the defenders make is that the statute does not contain a sanction—that is to say, does not provide that a conveyance which is not registered within the sixty days shall not be valid and effectual to constitute the special statutory right and title. I am unable to see the force of this contention. The defenders say that the requirement of registration within sixty days presumably reflected the statutory requirement of the registration of instruments of sasine within a like period, and they point to the sanction contained in the Act of 1617, which (as interpreted by decisions) makes a sasine not registered within sixty days of its date null and void. But instruments of sasine were, prior to the Registration Statutes, valid and effectual to make an infeftment without any registration. It was therefore proper and necessary that the Legislature should not only direct them to be registered but also nullify them if not duly registered. The case is quite different as regards the special statutory title created by the Lands Clauses Act. This was a species of title unknown to the common law. All that was required was that the statute in introducing it should prescribe the conditions necessary to its constitution. And, *inter alia*, the statute does so by conditioning the constitution of the statutory title upon registration of a conveyance within sixty days of its date. Having done so, it would have been superfluous to say that a failure in the observance of this prescribed condition should invalidate the statutory title.

"The obscure provision occurring at the end of section 80 was referred to in the argument, but neither of the parties professed to be able to derive any assistance from it in the present question.

"I am accordingly of opinion that in respect the conveyance by Isaac Scott to the defenders was not registered within sixty days of its date in the register of sasines, it is not habile to constitute the special statutory right and title to the lands, annihilating the previous tenure, which the defenders plead they possess. And if this be so, there seems to be no doubt that the defenders, in respect of their registered title, are infeft in the ground as the vassals of the pursuers.

"The fourth plea-in-law for the defenders was not insisted in. Following the views which I have expressed I shall repel the first four pleas-in-law for the defenders. There remains a question of fact as to the amount of the composition which the pursuers demand, and as to this I shall allow a proof."

The defenders reclaimed, and argued—(1) The defenders' title was a statutory one, and (2) being a statutory title, the only claim open to the pursuers was for compensation, and against that compensation must be set any payment already made. (1) The Lord Ordinary though right as regards the conveyance being in statutory form, was in error in holding that the failure to record it within sixty days of its date deprived it of statutory effect. It was not essential that it should be so recorded, for the provisions of section 80 of the Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19) were directory merely and not imperative. That being so, the failure to record the conveyance within the prescribed period did not render it null — *Munro* v. *Fraser's Trustee*, June 21, 1851, 13 D. 1209; *Duchess of Sutherland* v. *Reid's Trustees*, February 25, 1881, 8 R. 514, 18 S.L.R. 329. (2) The policy of the Lands Clauses Act 1845 was to put an end to the relation of superior and vassal with its recurrent payments, and to give to the superior in lieu thereof compensation for his loss. *Esto* that where, as here, the lands acquired were all comprised under the same title, the company could, if they chose, remain in possession without redeeming the charges, provided they paid them when they fell due—section 107—that was merely a temporary arrangement pending their redemption, and one which was not intended to interfere with the policy of the Act—*Magis-*

trates of Elgin v. *Highland Railway Co.*, June 20, 1884, 11 R. 950, *per* the Lord President at p. 959, 21 S.L.R. 640. The provisions of section 126 that rights of superiority were not to be affected was inapplicable, for that provision was inserted for political purposes and applied only to the case of Crown vassals—*Magistrates of Elgin* (*cit.*), *per* the Lord President at p. 958. Where, as here, the company's title was completed under section 80, the company got a "valid feudal title in all time coming" to the lands described in the conveyance, and it followed that the lands could never thereafter be in non-entry, or the superior be in a position to demand a casualty—*Magistrates of Inverness* v. *Highland Railway Co.*, March 16, 1893, 20 R. 551, 30 S.L.R. 502—though, no doubt, he was entitled to claim compensation for his loss—*Magistrates of Inverness* v. *Highland Railway Co.*, 1909 S.C. 943, 46 S.L.R. 676. The moment the statutory conveyance was completed the company had a title independent of the superior—*Fraser* v. *Caledonian Railway Company*, 1911 S.C. 145, *per* the Lord President at p. 162, 48 S.L.R. 76. The defenders therefore were in this action entitled to absolvitor.

Argued for respondents—(1) The pursuers' title was not a statutory one, for (*a*) it was not in accordance with the form contained in Schedule A of the Act—[The pursuers' argument on this point sufficiently appears from the opinion *supra* of the Lord Ordinary]—and (*b*) it was not recorded within sixty days of its date. Section 80 relieved a disponee of the necessity for infeftment, provided he recorded the conveyance within the prescribed period, and if he wished to avail himself of the statute he must comply strictly with its provisions—*Johnston* v. *Pettigrew*, June 16, 1865, 3 Macph. 954. Here the statutory provisions had not been complied with, and the conveyance therefore was a common law conveyance. That being so, the superior's rights remained unaffected—*cf. Town Council of Oban* v. *Callander and Oban Railway Company*, June 21, 1892, 19 R. 912, 29 S.L.R. 818. A railway company could competently take a common law title even where, as here, the lands had been compulsorily acquired—*Hill* v. *Caledonian Railway Company*, December 21, 1877, 5 R. 386; *North British Railway Co.* v. *Magistrates of Edinburgh*, May 23, 1893, 20 R. 725, 30 S.L.R. 649. (2) *Esto*, however, that the pursuers' title was a statutory one, they were none the less entitled to the casualty sued for—Lands Clauses Act 1845, sec. 107. The provisions of section 126 that a company acquiring lands should not be liable for any feu-duties or casualties was inapplicable, for it applied only to the case where the lands were part of other lands held by the same owner under the same title. Where, as here, the lands taken were the whole lands of the disponer, then so long as the company remained in possession without redeeming the feudal charges they were bound to pay them—*Magistrates of Elgin* (*cit.*), *per* the Lord President at p. 959; *First Inverness Case* (*cit.*), *per* Lord Kinnear at 20 R. p. 571; *Fraser* (*cit.*), *per* Lord Johnston at p. 153,

At advising—

LORD SKERRINGTON—This is an ordinary petitory action brought for the purpose of recovering a casualty of composition from the defenders, who are a railway company and a corporation. The defenders purchased the subjects in 1867 from a Mr Scott. He died in 1885, whereupon the pursuers demanded payment of composition. On 26th October 1885 the defenders, as appears from the receipt produced, paid £479 to the pursuers as superiors of the subjects, being "the casualty of superiority consisting of one year's rent, as adjusted under deduction of the feu-duty for the year and an allowance for taxes and repairs due on the entry of the said company to said subjects: Declaring that the next casualty shall be payable and exigible on the 26th day of October 1910." The action is founded upon section 5 of the Act of 1874, which enacts that corporations shall pay a first composition at the date at which it would have been payable if the Act had not been passed and every twenty-fifth year thereafter. The defence is that the payment made in 1885 was made in error, in respect that the defenders had obtained a statutory title in the year 1868, which "destroyed" the pursuers' superiority in virtue of the Lands Clauses Consolidation (Scotland) Act 1845 (8 Vict. cap. 19), and which left the pursuers with nothing more than a claim for compensation. The pursuers met this defence with the reply that the defenders had failed to acquire a valid statutory title because the disposition in their favour, which was dated 12th August 1867, was not registered in the appropriate register of sasines within sixty days of its date, as required by section 80 of the Act. The disposition, along with a warrant of registration in favour of the defenders, was recorded in the Register of Sasines on 15th May 1868. By the Titles to Land (Scotland) Act 1858, section 1 (21 and 22 Vict. cap. 76), a conveyance being so recorded along with such a warrant has "the same legal force and effect in all respects as if the conveyance so recorded had been followed by an instrument of sasine duly expede and recorded at the date of recording the said conveyance, according to the present law and practice, in favour of the person or persons on whose behalf the conveyance is presented for registration." The Lord Ordinary has held that the disposition was in such a form as sufficiently complied with the requirements of the first part of section 80 of the Lands Clauses Act (which gives a complete title without infeftment) and also in such a form as could have been followed either by infeftment or by its equivalent under the Act of 1858, but that the disposition not having been registered within sixty days of its date did not give the defenders a title without infeftment. He held that they had obtained a valid title under the Act of 1858 by infeftment or its equivalent. The question argued before him was whether the defenders' title was what the counsel on both sides described as a "statutory title," in which case it was assumed that there could be no liability for a casualty, or

whether it was what they described as a "common law title," in which case it was assumed that the casualty claimed would be due. The Lord Ordinary decided this question in favour of the pursuers, and allowed a proof as to the amount of the casualty. In the Inner House the defenders were allowed to amend their record in order to make what seems to me to be the hopeless contention that the disposition was registered within sixty days of its date in respect that it was registered on the day on which it was delivered. The pursuers met this plea by averments of personal bar. I shall not again refer to these two points. I have come to the conclusion that the Lord Ordinary's interlocutor ought to be affirmed, but on entirely different grounds. The assumption upon which his interlocutor proceeded is one for which neither the Lord Ordinary nor the able counsel who pleaded the case are responsible, because there exists a large body of judicial opinion in its favour. But these are mere opinions, which were not necessary for the decision of the cases in which they were uttered. They are explained, in my humble judgment, by a failure to advert to the nature of a railway company's title to its lands and a consequent false and exaggerated conception of the meaning and effect of section 80 of the Lands Clauses Act.

A railway company being a statutory corporation, has no power either to acquire or to hold land except what is given to it by its statutes, and every acre which it possesses must be held and disposed of "according to the true intent and meaning" of the statutory provisions applicable to that particular acre. This result follows from the nature of the title, and it is not affected either by the form in which the title may have been completed or by the language in which it may have been expressed. The only exception is that referred to in section 80 of the Lands Clauses Act, viz., where the company's title remains personal and unfeudalised.

The lands held by a railway company may, generally speaking, be divided into three classes, viz.—(1) Lands which it received compulsory power to acquire and which are still required for the use of the railway. Such lands cannot be voluntarily alienated by the company. This proposition seems self-evident, but if authority is thought necessary, the case of *Mulliner* v. *Midland Railway Company*, 1879, 11 Ch.D. 611, may be cited. If a company has been armed with compulsory powers it does not seem material whether it purchased by agreement under section 6 or by notice under section 17 of the Lands Clauses Act. Though it was not necessary to decide this question in *Glover's Trustees* v. *City of Glasgow Union Railway*, (1869) 7 Macph. 338, *per* Lord President Inglis at p. 340, it is, I think, self-evident that lands which are held under an essentially limited title cannot be adjudged by an ordinary creditor or forfeited by a feudal superior either permanently for non-payment of feu-duties or temporarily on account of non-entry. (2) Lands which a railway company had compulsory power to acquire may become superfluous if they are not needed for the primary purpose of the statute. In that case they must be disposed of according to the true intent and meaning of sections 120-124 of the Lands Clauses Act. Once such lands have been validly acquired by a private person he holds them upon a title which is no longer limited by any statutory provision. Accordingly they may be sold or adjudged or forfeited at the instance of the feudal superior, though of course the latter cannot exact feu-duties or casualties the right to which was during the ownership of the railway company either extinguished by section 126 or redeemed in terms of section 107 of the Lands Clauses Act. (3) Lastly, a railway company may be authorised by Parliament to contract with any person willing to sell the same for the purchase of land for extraordinary purposes—Railways Clauses Act, sec. 38; Lands Clauses Act, secs. 12-14. Such land is, of course, held by the railway company for a statutory purpose, but the company is left free to sell and dispose of it in such manner and for such considerations as it thinks fit. On principle it must be held that land which is held on an unlimited title may be adjudged or forfeited.

It was expressly admitted at the Bar by the defenders' counsel that the subjects in question formed the whole of the property held by Mr Isaac Scott under the same title. The defenders wanted this property in order to enlarge their station in Edinburgh and as part of the site for an hotel. They accordingly obtained compulsory powers to acquire, *inter alia*, these subjects by the Act 29 and 30 Vict. cap. cccxxv. The preamble bore that it "would be attended with advantage and convenience to the public and to the company if the company were authorised to alter the terminus of their main line at Edinburgh, to enlarge and improve their station at the Lothian Road in that city, and erect a hotel in connection therewith, and to acquire additional lands for those purposes." Section 2 incorporated the Lands Clauses Consolidation (Scotland) Act 1845, and the Railways Clauses Consolidation (Scotland) Act 1845, Part I (relating to construction of a railway). Section 4 gave compulsory power to acquire certain scheduled lands which admittedly included those then belonging to Mr Scott. Section 5 authorised the company to enlarge its station and to erect and maintain an hotel on the lands which they might acquire for that purpose under the powers of the Act. The Act did not empower the defenders to purchase land for extraordinary purposes, and it did not incorporate section 38 of the Railways Clauses Act. It does not appear, and it is not material, whether the defenders acquired Mr Scott's property by agreement under section 6 of the Lands Clauses Act or by notice to treat under section 17. The special Act conferred no power upon the defenders to sell the subjects other than what was conferred by section 120 of the Lands Clauses Act relating to superfluous land.

I shall now consider whether the de-

fenders' special Act with its incorporated clauses interfered, and if so, to what extent, with the rights of the superiors of the lands authorised to be compulsorily acquired. By the ordinary feudal law of Scotland the estate not merely of a vassal but also of a subvassal may be permanently forfeited for the vassal's failure to pay feu-duties. A similar forfeiture of a temporary character was enforceable in the case of non-entry, and still is enforceable against both a vassal and a subvassal if the lands would have been in non-entry but for the passing of the Conveyancing (Scotland) Act 1874. In the case of public undertakings such as canals and railways, the enforcement of such feudal remedies would prevent the due execution of the parliamentary purpose. Nevertheless, in the case of *Todd* v. *Clyde Trustees*, (1843) 6 D. 108, the Court held, on a construction of a private Act of the year 1840, that the Clyde Trustees had no power to purchase compulsorily the feu-duties of a property which they were authorised to acquire compulsorily for the purpose of improving the navigation. I doubt this decision, but it is interesting because it proceeded on a clause reserving the superior's rights in language of which section 126 of the Lands Clauses Act is a bungled version. It is printed in full in the report of the case at an earlier stage in 1 Bell's App., p. 462. In *Hill* v. *Caledonian Railway Company*, (1877) 5 R. 386, both parties assumed that the superior's rights continued, and they asked the Court to fix the composition due in respect of a piece of ground compulsorily acquired by a railway company and occupied as part of their line. In the case of *Macfarlane* v. *Monklands Railway Company*, (1864) 2 Macph. 519 (a case of assessment for a manse), both parties assumed in their argument that the railway's company's title was non-feudal apparently because the statutory form of conveyance did not use the word "dispone," and because the company was declared by the private Act not to be liable for feu-duties and casualties. This view received the sanction of Lord President Inglis, though his opinion on this point was not necessary for the judgment. There is, however, no good reason why Parliament should not confer upon promoters a feudal title which shall be reasonably safe from forfeiture or which shall even be indefeasible at the instance of any superior except the Crown. An example of what, on the lowest view, was a reasonably safe feudal title is to be found in the report of the case of *Marquis of Linlithgow* v. *North British Railway*, 1912 S.C. 1330, which shows that the Union Canal Company held its property blench for payment of a penny Scots if asked only under registered conveyances in statutory form which were declared equivalent to charter and seisin. Under such titles the Canal Company could never itself commit a feudal delinquency involving forfeiture either permanent or temporary, and the risk of a forfeiture through the fault of a superior may have been considered negligible. I venture to doubt whether any superior except the Crown could prevail against the parliamentary title. In spite of weighty authority to the contrary, I remain of opinion that a railway company whose special Act incorporates the Lands Clauses Act holds the property which it had power to acquire compulsorily by a tenure which is feudal but which forbids feudal forfeiture just as it forbids voluntary alienation so long as the property is required for a statutory purpose. This construction of the Act of 1845 gives effect to the express language of section 80, and to the clear implication to be derived from sections 107 and 120 and from the special Act. There is no inconsistency in holding that the feudal relations and the feudal rights continue although the lands cannot be voluntarily alienated and although the feudal remedies by way of forfeiture are temporarily suspended. The opposite view is that in such cases the relation between superior and vassal ceases to exist as soon as a railway company has completed a title in the statutory form. If this opinion is sound a railway company's title may with accuracy be described as allodial—Ersk. ii, 3, 8. At first sight it may seem to be a mere matter of words whether the property right of a railway company is described as allodial or as a special and limited form of feudal ownership, but the difference is one of considerable practical importance. In the first place, it is difficult to see how an allodial right can be acquired by infeftment on a precept of sasine. Hence the opinion (fallacious and mischievous in my view) that section 80 of the Lands Clauses Act authorises a railway company to elect between an allodial or "statutory" tenure on the one hand and a feudal or "common law" tenure on the other hand. The theory in question is also responsible for the difficulty which has been felt in construing what otherwise would be a perfectly intelligible and workable statute. With each successive decision the conflict of judicial opinion becomes more marked and embarrassing. The theory of a non-feudal title has also a direct bearing upon the substantive rights of the superior, and if applied in the present case would, in my judgment, operate injustice to the pursuers. I shall begin by stating the rights of the parties as I conceive them to have been established by the special Act and its incorporated clauses.

The first part of section 126 of the Lands Clauses Act contains an obvious blunder which any reader may correct for himself, but the general intention is clear, viz., that rights of superiority are not to be affected. But the clause cannot be so construed, because it goes on in perfectly unambiguous language to interfere very seriously with the rights of superiors in cases where the lands taken by the promotors are "a part or portion of other lands held by the same owner under the same titles," in which case "the said company shall not be liable for any feu-duties or casualties to the superiors thereof, nor shall the said company be bound to enter with the said superiors; provided always that before entering into possession of any lands full compensation shall be made to the said superiors for all loss which

they may sustain by being deprived of any casualties or otherwise by reason of any procedure under this Act." This inconsistency might create a difficulty if we did not know on the high authority of Lord President Inglis in the *Monklands* case and of Lord Chancellor Hatherley in *Inspector of St Vigeans* v. *Scottish North-Eastern Railway Company*, (1870) 8 Macph. (H.L.) 55, that the purpose of the legislation embodied in the first part of section 126 was political and that its object was to preserve superiority franchises. An example of its working in the Registration Court will be found in *Raeburn* v. *Geddes*, (1870) 9 Macph. 20. We may therefore lay aside the first part of the clause and confine our attention to the latter portion. In the cases to which it applies section 126 extinguishes once and for ever the right of a superior to his feu-duties and casualties. It does not, however, extinguish the feudal relation, otherwise it would have been idle to absolve the company from its obligation to enter with the superiors. If we read only section 126, the superior's right to feu-duties and casualties would cease as at the date of the compulsory taking, but section 80 says that the company's title is to be "regulated by the ordinary law of Scotland" so long as it remains personal. The compensation must therefore be assessed according to the rental of the subjects at the time when the company completes its title to them. The proviso at the end of the clause does not make the extinction of the superior's right to feu-duties and casualties or his substituted right to compensation conditional on the company not having entered into possession. Obviously neither feu-duties nor casualties can be claimed by the superior in respect of the period after these rights have been extinguished. Sections 108 to 111 are ministerial clauses applicable both to cases falling under section 126 and to cases falling under section 107. This latter section regulates cases like the present one where the whole lands held under one title have been taken. The group of sections 107 to 111 is headed "And 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." Section 107 enacts—"It shall be lawful for the promotors 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 payment 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." The redemption here spoken of is one form of compensation, and it is so described in sections 108 and 110. I do not need to consider whether in a fitting case a superior may not be entitled to claim compensation under section 117 of the Lands Clauses Act or section 6 of the Railways Clauses Act. The salient difference between section 126 and section 107 is that in the latter section the superior's right to his feu-duties and casualties is regarded as subsisting until these rights have been severally redeemed by the company. If I am right in thinking that section 107, like section 126, applies to casualties in general, including untaxed composition, the value of such a casualty must be fixed according to the rental of the subjects at the date when redemption is demanded and not as at the date when the company completed its title. No demand for redemption either of the feu-duty or of the casualty has yet been made by either party in the present case. The section further assumes that until these charges have been severally redeemed the company, in common with other owners of feudal property, must pay or perform as they fall due or prestable the feudal obligations arising out of the titles of the subjects which it acquires. It is easy to apply this enactment to feu-duties, taxed casualties, and (possibly) obligations as to the maintenance of buildings. The superior can compel payment or performance of each obligation as it becomes exigible by means of any competent remedy which does not involve a forfeiture or the attachment of the company's rolling stock, &c. The position, however, was different as regards untaxed casualties when prior to 1874 heritable subjects fell into non-entry. Upon the death of the last-entered vassal no pecuniary claim of any kind accrued to the superior, and I cannot construe section 107 as creating a statutory right of a pecuniary character in lieu of a feudal right which did not exist in the year 1866, when the special Act was passed. Though the company's obligation to find a vassal was, on my reading of section 107, reserved, the section provided no remedy in lieu of a declarator of non-entry except that the superior could insist upon immediate redemption of the casualty. In such a case the arbiter in assessing the compensation would no doubt keep in view that the subjects were actually in non-entry. On the other hand, there was nothing to prevent the Railway Company from asking that the heir of the last-entered vassal should be received by the superior on payment of relief, or from bargaining for its own entry on such terms as the parties could agree on. The natural and proper solution was that which the Court held to be incompetent in the first *Inverness* case, 1893, 20 R. 551, viz., for the Railway Company to purchase a charter of confirmation which bound it to pay a casualty every twenty-five years. Assuming for the moment that the defenders' title was in order, the Conveyancing Act of 1874 automatically entered them as the pursuers' vassals and also made them liable for a casualty on the death of Mr Scott in 1885, and for a further casualty every twenty-five years thereafter, exactly as if a charter of confirmation containing such a clause had been granted under the law as it stood prior to 1874. The parties settled accounts on this footing, as appears from the receipt already quoted. The only difficulty in the way of the pursuers' success is created by the theory that all feudal connection between them and the defenders was severed in the year 1868.

The opinion that the title of a railway company is non-feudal is based upon section 80 of the Lands Clauses Act—a clause which properly understood has no bearing or effect upon the right of superiors. It enacts that . . . [*quotes, v. sup. in rubric*] . . . I am quite unable to understand how eminent Judges have been able to construe this clause as creating a novel tenure which is "non-feudal" and "unassailable." They must, I think, have overlooked the fact that it proceeds on the assumption that the granter of the disposition possesses, not only an undoubted right to the subjects, but also a valid progress of titles showing, *inter alia*, that the lands are not in non-entry. There has been litigation as to the effect of section 81, and as to who must bear the expense of completing the title of a compulsory vendor —*Graham* v. *Caledonian Railway Company*, (1848) 10 D. 495; *Methven's Executors* v. *Edinburgh, Perth, and Dundee Railway Company*, (1851) 13 D. 1267, *per* Lord Ivory; *Miles* v. *North British Railway Company*, (1867) 5 Macph. 402; *Thomson* v. *North British Railway Company*, (1867) 5 Macph. 410. But no one has ever doubted that the compulsory purchaser is entitled (on paying the expense) to have a complete and valid feudal title made up in the person of the vendor. Section 80 does not purport to empower a person who has an incomplete title or a doubtful title or no title to confer an undoubted right and a complete and valid feudal title upon the promoters by the simple method of executing a disposition in their favour which they may register within sixty days. In all such cases the promoters must either insist on a proper title being completed by the vendor, or they may proceed (if they competently can) under one or other of sections 74 and 76. On depositing the price they may be able, by recording a notarial instrument, to put themselves in the same position as if they had received a registered conveyance, presumably from a person possessing an undoubted right and a complete title. Section 80 assumes that the vendor can deliver what every purchaser of land was in 1845, and still is, in substance entitled to demand, viz., what Mr Duff — Feudal Rights, secs. 101 and 102—describes as (1) an "undoubted right" to the subjects, (2) a progress of titles showing, *inter alia*, that the title is "complete" in respect that the lands are not in non-entry, and (3) a "valid disposition" which, if in the ordinary form, must contain or assign warrants whereby the purchaser may obtain a valid feudal title. Section 80 contemplates that a compulsory purchaser may prefer to make up his title by infeftment in common form, but it abstains from enacting what is obvious, viz., that if the seller's right to the lands is undoubted, his progress of titles valid, the fee full, and the purchaser's infeftment regular, the latter will obtain "a good and undoubted right and complete and valid feudal title in all time coming" for himself, his successors, and assigns. But it was necessary to enact all this *per expressum* in regard to the new form of title without infeftment which the section permitted the purchaser to adopt if he chose. So far as I am aware, no special significance has ever been attributed to the words "in all time coming," which mean much the same as "heritably and irredeemably" in an ordinary conveyance. The true meaning and effect of section 80 is illustrated by the fact that it applies with equal legal accuracy to lands of every description which a railway company may happen to acquire and hold under its statutory powers. The section is absolutely silent on the all-important question whether the title of a statutory company as regards any particular land is subject to any, and if so, what limitations. This question, as I have already indicated, can be answered only by reading the special Act and the whole incorporated clauses. The new statutory form of title permitted by section 80 is admirably and exactly adapted to the case of lands purchased for extraordinary purposes; and yet Parliament cannot have intended to affect in the slightest degree, much less to destroy, the feudal rights of superiors in regard to lands the compulsory acquisition of which it was not asked to and did not sanction. In the case of *M'Corkindale* v. *Caledonian Railway Company*, (1893) 31 S.L.R. 561, Lord Low, in the Outer House, decided that section 126 of the Lands Clauses Act did not apply to such lands, but he based his judgment upon the form of the title, which seems to me to be immaterial, rather than upon considerations of a more substantial character. Sections 107 to 111 and 126 are quite general in their language, but their subject-matter shows that they apply only to cases where Parliament has conferred compulsory powers. On similar grounds section 120 has been held not to apply to lands bought for extraordinary purposes—*Caledonian Railway Company* v. *City of Glasgow Union Railway Company*, (1869) 7 Macph. 1072, *aff.* 9 Macph. (H.L.) 115.

If one disabuses one's mind of the assumption that the first part of section 80 of the Lands Clauses Act has in view a non-feudal title, it becomes apparent that the section gives no countenance to the idea that a railway company has an option to hold upon one or other of two distinct tenures the land which it has compulsory power to acquire. Whatever the form and language of the title, such land must and can be held only according to the true intent and meaning of the special Act, save in the one case where the title remains personal. Parliament, acting in the public interest, prohibits railway companies from selling lands acquired under compulsory powers so long as these lands are required for a statutory purpose, and at the same time it protects such lands from forfeiture. It would be extraordinary if directors or their solicitors had an option to expose to feudal forfeiture subjects which the railway company was prohibited from alienating voluntarily. Three forms are pointed out in section 80 by which a heritable title may be completed. The first two are statutory, but the effect of all three is the same. (1) A disposition may be taken in the statutory form, and may be registered within sixty days of its date in the

appropriate register of sasines, or (2) a disposition may be taken in ordinary form, but instead of taking infeftment on the procuratory of resignation or precept of sasine therein contained, or on an open procuratory or precept carried by the assignation of writs, the promoters may obtain a real right by registering the disposition in the register of sasines. In both these cases a title would be completed *vi statuti* and without infeftment. In the second case it was not said, though I think it was implied, that the disposition must be registered within sixty days of its date. Lastly, (3) the promoters might take infeftment and register the instrument of sasine. When the Lands Clauses Act became law on 8th May 1845 such registration, by the Act 1617, cap. 17, had to be made within sixty days of the date of the instrument, but by the Act 8 and 9 Vict. cap. 35, section 3, which came into force on 1st October 1845, an instrument of sasine could be recorded at any time during the life of the grantee.

Before leaving the Lands Clauses Act I may for the sake of clearness point out that in one case, viz., that of feus, it introduces what in substance and not merely in form may be regarded as a new variety of feudal tenure—sections 10, 11, 80, and Schedule B. In this case the subjects are disponed in return for what sections 10 and 11 describe as "a feu-duty or ground-annual," and Schedule B describes as "a feu-duty or rent charge" or "rent." Section 11 enacts that such feu-duties or ground-annuals "shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties," and may be recovered by poinding and sale of the goods and effects of the promoters. Further legislation bearing on this subject will be found in the Entail Act 1853 (16 and 17 Vict. cap. 94), sections 14-16, the Lands Clauses Consolidation Amendment Act 1860 (23 and 24 Vict. cap. 106), and the Railway Companies Act 1867 (30 and 31 Vict. cap. 126), section 4 (Protection of Rolling Stock and Plant). In a statutory feu there is nothing to prevent the feu-duty from being secured upon the ground in the ordinary way, although, for reasons already explained, the feudal remedies of the superior by way of forfeiture and poinding of the ground may be suspended during the ownership of the statutory company.

When we now examine the title of the defenders it will be found that they did not literally comply with any one of the three alternative methods pointed out by section 80. Their disposition was not registered within sixty days of its date; it did not contain a procuratory of resignation or precept of sasine, nor, as the law stood in 1845, could it have been followed by infeftment. No instrument of sasine was expede and recorded. The special Act which was passed in 1866 did not refer as it should have done to the conveyancing changes operated by the Act of 1858, and did not expressly authorise the defenders to make up a title in the form thereby sanctioned. Can it be successfully maintained that the defenders' title still falls to be regulated not by the statutes but "by the ordinary law of Scotland," as would have been the case if the Act of 1858 had not been passed and the title had remained a personal one? Such an argument seems to me to be far too technical. I agree with the Lord Ordinary that the defenders' disposition, when duly registered along with the warrant of registration in their favour, gave them a valid title equivalent to infeftment, but I also think that the title so completed was attended with the same statutory consequences as if the forms mentioned in section 80 had been literally observed.

Four cases have been decided in this Division of the Court as to the effect of the compulsory acquisition of land by a railway company upon the rights of the superior, viz.—*Magistrates of Elgin* v. *Highland Railway Company*, (1884) 11 R. 950; *Magistrates of Inverness* v. *Highland Railway Company*, (1893) 20 R. 551; *Magistrates of Inverness* v. *Highland Railway Company*, 1909 S.C. 943; and *Fraser* v. *Caledonian Railway Company*, 1911 S.C. 145. In the *Elgin* case a railway company had taken part of the lands held by an owner under the same title, and had completed its title in the statutory form. An action for declarator and payment of a casualty in the form introduced by the Conveyancing Act of 1874 as in place of an action of declarator of non-entry was held to be excluded by section 126. Opinions were expressed to the effect that such an action was incompetent against a defender who had by statute a complete and valid title to the subjects, and by Lord President Inglis to the effect that "the relation of superior and vassal does not subsist between the pursuers and defenders." He further said that in his opinion the 107th section applied where the whole lands held under the same title had been taken. He added, however that in this case it was not "contemplated that the relation of superior and vassal shall be created," but that the railway company must pay the superior everything due to him until redemption. In the first *Inverness* case the action again took the incompetent form of a statutory action in lieu of a declarator of non-entry. It ought to have been dismissed on this ground, instead of which decree of absolvitor was pronounced. It related to two parcels of ground, one of which comprised the whole of the ground formerly held by a Mr Smith under the same title, and the other a part only of the land formerly held by a Mr Rose. In each case a title had been duly completed by registered disposition in the statutory form. Lord Kinnear reaffirmed the theory that the defenders' title was non-feudal. Lord M'Laren dissented. The Court disregarded as nullities charters of confirmation obtained by the railway company, though the Lord Ordinary (Kyllachy) and Lord M'Laren were in favour of sustaining the validity of such a charter in the case of Smith's lands. The second *Inverness* case was an action concluding for declarator that the defenders were bound to pay compensation to the pursuers in respect of their having acquired a superiority with the feu-

duties and casualties pertaining thereto, or alternatively were bound to redeem the said feu-duties and casualties. The defenders had acquired part only of the lands held under the same title, and had registered a conveyance in statutory form. The Court allowed a proof, as the pursuers' title was disputed and as there was a plea of *mora*. Lord Kinnear again expressed the opinion that the railway company held by statute and not by tenure under a superior. The latest case is that of *Fraser*, which was an action laid upon an alternative award by an arbiter on a claim for compensation made by a superior against a railway company. The subjects formed part of an estate held under the same title. They were compulsorily acquired in 1846, but the railway company did not obtain a title until 1875. It was in statutory form. In 1903 the superior for the first time called upon the company to pay compensation for the loss of his rights as superior. He was held entitled to £885, being the compensation assessed upon the rental of the year 1875, under deduction of £500 paid by the defenders in 1877 in settlement of a casualty claimed by the superior on the death of the former vassal, with interest on the balance from the date of demand in 1903. The interpretations of the Lands Clauses Act presented by the Lord President and by Lord Johnston in this case were widely different from each other, and were also inconsistent with the opinions expressed in the earlier cases. The only occasion on which the Court has had to consider the position where the whole of the lands included in one title had been taken was in regard to Smith's lands in the first *Inverness* case. Although the Court held (erroneously as I think) that the charters of confirmation in favour of the railway company were nullities, that is in no way binding upon us, because it was pronounced in an action which was in itself incompetent. Lord Adam said (20 R. p. 560) that the provisions of the Lands Clauses Act "were 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." Lord Kinnear (20 R. p. 572) agreed with Lord Adam that the action was incompetent. The Lord President (Inglis) concurred with Lord Adam and Lord Kinnear. Further, I do not feel myself bound by judicial opinions, however weighty and numerous, as to the non-feudal character of a railway company's title, seeing that these opinions were in no single case necessary for the decision, and further, were in plain and direct conflict with the language of the Act of Parliament.

I am accordingly of opinion that the pursuers, as the defenders' feudal superiors, are entitled to recover the casualty sued for. The action is properly laid on debt and does not claim a feudal forfeiture. The Lord Ordinary's interlocutor should therefore be affirmed.

LORD JOHNSTON—[*Read by Lord Ormidale*]—The material facts are that Isaac Scott by a conveyance dated 12th August 1867 conveyed to the Caledonian Railway Company the site of part of the company's present Princes Street Station in Edinburgh, being the whole subjects held by him off Heriot's Hospital, as superior, under a writ of confirmation dated in 1861. While entry to possession was given at Whitsunday 1867, and the conveyance itself was dated 12th August 1867, payment of the price was postponed at interest till 15th May 1868, and the conveyance was not delivered till the price was paid on the said last-mentioned date. The conveyance was registered in the Register of Sasines on the same day.

The deed of conveyance itself was in such terms that though not strictly complying, and though there was no special reason for its not complying, with those of Schedule A to the Lands Clauses Act of 1845, it may and I think must be held nevertheless to be a statutory conveyance under the 80th section of that Act.

Isaac Scott, the entered vassal, having died, George Heriot's Trust, in whom was vested the superiority of the lands, in 1885 claimed and received a composition, on the footing that the company were a corporation, the receipt, which was given and accepted, declaring that the next casualty should be payable and exigible twenty-five years thereafter, or on the 26th day of October 1910. I doubt whether it can now be said with confidence on what footing the parties transacted, but I think that it may be inferred that they misunderstood the statutory position in which they stood to one another. It looks extremely likely that they assumed that the registration of the conveyance of 1867-68 had the same effect as the registration of a conveyance under the Titles Act 1858, and that by virtue of the Conveyancing Act 1874 the company were impliedly entered with Heriot's Hospital, and were due a casualty in respect of the death of Isaac Scott, the last-entered vassal, and that that casualty was the casualty payable by a corporation under the Act of 1874, section 5. One of the questions in the case is whether this mistake, if it was a mistake and was made, affects the pursuers' present claim. George Heriot's Trust, the twenty-five years having expired, now sue for a further payment as at 26th October 1910.

Before considering the general provisions of the Lands Clauses Act I think it is desirable to examine the conveyance in question with reference to the conveyancing system as at its date. In 1867 the older form of conveyancing had been modified by the Infeftment Act of 1845, the Transference of Lands Act of 1847, and the Titles Act of 1858, and in the light of these Acts the conveyance must be read.

Section 80 of the Lands Clauses Act 1845 allows, but does not require, lands compulsorily acquired to be conveyed in the form of Schedule A to the Act, and provides that such conveyance, if duly registered in the register of sasines, should give a good statutory title. The scheduled form has nothing in the way of a tenendas, even in the short

abbreviated form. The idea of making title by registering a conveyance was in advance of ordinary conveyancing. A few months after the passing of the Lands Clauses Act 1845 the Infeftments Act was passed. But this only provided for the taking of infeftment notarially instead of on the ground, and registering the notarial instrument. In 1847 the Transference of Lands Act was passed, but this only permitted the substitution of abbreviated forms for the ordinary clauses, then essential and in use, such as the obligation to infeft, precept of sasine, &c. In 1858, however, the Titles Act of that year introduced the reform which practically abolished the instrument of sasine and allowed a title to be completed by the mere recording of the conveyance. This Act provided by section 5 for dispensing altogether with various clauses formerly essential to completing a title by sasine, and for which short statutory forms had been provided in 1847. In particular, it was enacted that "if the lands shall be disponed to be holden *a me* only, or *a me vel de me*, the clause so expressing the manner of holding shall imply that the lands are to be holden in the manner expressed" in the Transference of Lands Act 1847, sec. 2, "with reference to obligations to infeft *a me*, or *a me vel de me*, respectively; *and where no holding is expressed* the conveyance shall be held to imply that the lands are to be holden in the same manner in which the granter of the conveyance held or might have held the same." Turning to the conveyance in question, it is found that it does contain a tenendas, but in this form —"to be holden by the said company and their successors forever in terms of the foresaid Acts," these being the company's original Act of 1845 and its empowering Act of 1866 incorporating the Lands Clauses Act of 1845. Had the conveyance been silent as regards the tenendas a holding in the same manner as that in which Isaac Scott held might, so far as the face of the conveyance was concerned, have been implied, and an ordinary title might have been made up. But "to be holden . . . in terms of the foresaid Acts" makes it impossible to regard this conveyance as anything but a statutory conveyance, or as being capable of being used to make up by registration anything but a statutory title. The tenendas expressed is surplusage but innocuous.

I am thus obliged to disagree with the latter portion of the Lord Ordinary's opinion.

Further, in my opinion anything but a statutory title was impossible under the Acts. But meantime the above considerations dispose of the contention that the title taken might be treated alternatively as an ordinary title, having on registration the ordinary feudal effect. I have no hesitation in concluding that the company never were, by their recorded conveyance and the effect of the Conveyancing Act 1874, impliedly entered with the Heriot Trust as their superior.

This does not, however, necessarily negative the superiors' claim, for they have prudently discarded the form of action which now comes in lieu of the declarator of nonentry, and state their demand in the form of a purely petitory conclusion for a sum of money, though some of their pleas indicate that they are still under the erroneous impression that they have an entered vassal.

Before proceeding to consider the effect of a statutory title under the Lands Clauses Act 1845 in a question with the superiors, I shall deal with the pursuers' sixth plea, which is that the defenders having failed to record their conveyance within sixty days of its date, as provided by the said Act, section 80, they have not acquired a statutory title to the subjects conveyed.

The Lord Ordinary has found that the conveyance in question was one which might be read as a conveyance in statutory form under the 80th section of the Lands Clauses Act 1845 and the relative Schedule A, but then he has also held that, as it was not registered in the register of sasines within sixty days from its date, it did not give the company the benefit of a statutory title under that section. This requires a consideration of the 80th section. It provides that conveyances of lands purchased by companies proceeding under the Act may be in or as near as may be in the form of Schedule A to the Act, which conveyances being duly executed and registered in the register of sasines within sixty days from the last date thereof, "shall give and constitute a good and undoubted right and complete and valid feudal title in all time coming to the promoters of the undertaking and their successors and assigns to the premises therein described, any law or custom to the contrary notwithstanding." What, then, is the occasion and meaning of the sixty days, and what is to be the effect of failure to register within sixty days? The former I think is easily explained. The Scots Statute 1617, cap. 16, which established the register of sasines as a check on the frauds which were apparently rife, by which owners after having sold or bonded their properties fraudulently executed further deeds to the prejudice of those who had already transacted with them, required that sasines should be registered within sixty days, and that if they were not so registered they should "make no faith in prejudice of a third party, who hath acquired a perfect and lawful right to" the subjects, "but prejudice always to them to use the said writs against the party maker thereof." That this was not a perfect safeguard is evident, but at least it prevented the holder of the first writ keeping his sasine latent for more than sixty days, unless he was to run the risk of being ousted by the holder of a subsequent competing writ. Yet it left his sasine perfectly good against his author. Reverting to the 80th section, it is evident that if a statutory title was to be given to a company by registration of a conveyance without sasine, something must be done to place the company acquiring such conveyance in the same position as the private purchaser or borrower under the old law. Hence I think there can be no doubt that the sixty days' limitation by that section was imposed for the purpose of placing the company *in pari casu* with the private individual. But

there was no declaration of absolute nullity on failure to register within the sixty days any more than under the Act 1617, cap. 16.

Now it is somewhat inexplicable that the Lands Clauses Act having been passed on 8th May 1845, another Act was passed on 21st July of the same year, which practically repealed the above provision of the Act of 1617, and provided that from 1st October 1845 any instrument of sasine may be competently registered at any time of the lifetime of the party taking it. And it is difficult to see why the limitation in question should have been introduced in the Lands Clauses Act when the two statutes must in all probability have been in preparation at the same time. The only explanation I can hazard is, that this portion of section 80 was a stock clause in use to be inserted in private bills, and found its way into the Lands Clauses Act through inadvertence.

The Infeftments Act of 1845, to which I have referred, was followed by the Titles to Land Act 1858, which made sasine no longer necessary, and gave to the registered conveyance the same effect as a charter or disposition and sasine. Section 19 of this Act authorised the recording of the conveyance at any time in the life of the party on whose behalf it was presented for registration, and therefore carried on the relaxation of the Act of 1847 into the new system of completing title. Accordingly I think that the limitation on registration of the Lands Clauses Act, section 80, became on the passing of the Infeftments Act of that year, and still more on the passing of the Titles Act of 1858, an obsolete provision, having no longer any meaning. It was no longer required to place the company *in pari casu* with the private individual. I am therefore unable to agree with the Lord Ordinary that the statutory title was ineffectual because not timeously registered.

But further, in my opinion the Lord Ordinary, even assuming that he is right in holding that the company's registered conveyance may be regarded as effectual to confer an ordinary feudal title, has misconstrued the latter part of section 80 of the Lands Clauses Act. It will be found that section 80 of the Lands Clauses Act, after providing for a statutory title by registering a statutory conveyance, proceeds to say that it shall not be necessary for a company to record in the register of sasines any conveyance in their favour which should contain a precept of sasine, or which might be completed by infeftment; and that the title of the company under such last-mentioned conveyance should be regulated by the ordinary law of Scotland until the conveyance and the sasine thereon should have been recorded in the register of sasines—that is, should be regulated by the ordinary law of Scotland so long, but so long only, as it remained, so to speak, personal. Hence in the present case, *as* the conveyance in question, assuming it capable of founding an ordinary title, was one on which *ex hypothesi* infeftment might be taken by recording it according to the law current when it was granted, the title of the company under it would have been regulated by the ordinary law of Scotland from the date of its execution in 1867, but only till it was registered on 15th May 1868. But thereafter it would have become a statutory title, just as much as if it had been registered within sixty days of its date. On a fair reading of the 80th section it appears to me that a company to which the Lands Clauses Act applies cannot, at least if it acquires under that Act, obtain either immediately or ultimately anything but a statutory title. I do not think that the full import of this last clause of section 80 has been realised in some of the cases which have already occurred for decision.

I now proceed to consider what is meant by "a good and undoubted right and complete and valid feudal title." As has been said in previous cases, this is an inaccurate use of language. Your Lordships and I approach its explanation from a somewhat different point of view. But though we follow accordingly a different course, I think that we are entirely at one in the result we reach. What the company obtains is, according to my view, not a feudal title in the ordinary sense of that term but a statutory title, fee-simple in its nature, the feudal tenure being abolished, while the feudal prestations are preserved and protected.

I am aware that the use of the word "feudal" *prima facie* leads to a contrary view, and that some countenance may be found from other passages in the statute for the idea that it still accurately describes the relation created by the statute. But what has most completely satisfied me that the word is misused is that in 1845 the recording of a conveyance could not have conferred anything which could have been described as a feudal title, and I do not think that it can receive a different effect after 1858 from that which it must have been intended to receive from 1845 to 1858. The superior's right, then, to the feudal prestations or dues of superiority, though without the superior's remedies, are, as it will be seen, temporarily reserved, but only until they are redeemed or compensated. If we turn to sections 107 to 111, there will, I think, be found a perfectly complete code having this effect. I may avoid explaining at length my view regarding them if I may be permitted to refer to my opinion in the recent case of *Fraser* v. *Caledonian Railway Company*, 1911 S.C. 145, to which, on full reconsideration, I adhere, though there may be one or two passages which I should desire to correct. These sections are prefaced by a preamble perfectly general in its terms, viz., "and with respect to any lands" (that is, any lands taken by the company under its special Act and the Lands Clauses Act) "which shall be charged with, *inter alia*, any feu-duty, casualty of superiority, or other annual or recurring payment not hereinbefore provided for" (and I think that it is generally admitted that the prior provisions of the statute for taking lands and interests in lands do not apply to rights of superiority) "be it

enacted as follows":—And what is then enacted, stated shortly, is this—Section 107. The company may enter on possession of subjects taken without redeeming the charges thereon, provided they pay the amount of such annual or recurring payment when due, and provided they are not called upon by the party entitled to the charge to redeem it. Section 109. Where part only of the lands charged with any feu-duty, casualty, &c., is taken, the apportionment of the charge, if not agreed upon, is to be settled by the Sheriff, but by agreement of all concerned the whole charge may be left as a burden upon the remaining part of the lands. Section 108. If any difference respecting the consideration to be paid for the discharge of such lands therefrom or from the portion affecting the lands taken occurs, the same is to be determined as in other cases of disputed compensation. Section 110. Upon payment of the compensation to the party entitled to the charge, he shall execute to the company a discharge thereof, and if he fails the company may proceed "in the manner hereinbefore provided" in the case or the purchase of lands. And Section 111. The remaining lands are declared to remain charged with the whole or the remainder of such charge, as the case may be.

When this fasciculus of clauses or code is considered, it fully, I think, explains what is meant by the inaccurate expression of the 80th section, "a good and undoubted right and complete and valid feudal title." The company obtains in perpetuity a statutory title, independent of the superior, very much, I imagine, like the fee-simple title in England, after the passing of the Act abolishing feudal tenure there. But the superior is not to be deprived of his beneficial interest in the superiority—he is to recover the dues as and when they fall due or recur so long as they are not redeemed. But he may at any time require them to be redeemed, and by implication the company may insist upon redemption. Parties may by mutual consent allow them to be continued indefinitely, or either may at any time require that compensation be paid or accepted, and then they are to be discharged. In the present case neither party has called for redemption.

There remains to consider section 126, which has caused the Court so much trouble in some previous cases. The first clause of this section has been adequately explained by the late Lord President (Inglis) in the *Elgin* case, 11 R. 950. The second clause, whatever its meaning and effect, has reference to the case where a portion only of the lands held by the same owner under the same titles has been taken. We are not dealing with such a case, and are therefore not called upon to consider it, or the proviso which follows it. I think, indeed, that it will be unquestionably necessary some day to reconsider the series of prior cases in which its construction was involved, if only to arrive at some consistent interpretation which will harmonise the whole provisions of this part of the Act. But it is enough for the present case that the rights and liabilities of the parties here are not complicated by its embarrassing provisions.

In the present case the company have not redeemed the feu-duties and casualties of superiority. They have continued paying the trifling feu-duty of 1s. 3d. per annum. On the death of Isaac Scott a so-called casualty of composition or recurring payment (and the term "recurring payment" (section 107) does not involve the condition that it recurs at stated periods) then became due. The feudal relation as matter of tenure had, I think, been broken, but the superior's beneficial rights remained *pro tempore* as if it continued to subsist. They were acknowledged and satisfied as I think the statute intended. For I do not find, as I think some have, any hostility to the superior in the statutory provisions, but merely a studious desire to deal justly, and neither more or less than justly, with all established rights and interests in lands while at the same time providing for simplification of title. It is true that the parties may have been under erroneous impressions as to the effect of the statute and their rights thereunder, and they may have used terms in incidental documents which were not strictly accurate. Their expressions and even their mistakes do not alter the reality of what was done. There was no enforcing or taking of an entry. There was no granting of confirmation. There was nothing done out of the statutory order which required to be set aside or undone. When it became due a composition was paid. At an earlier date it would have been a matter of bargain what the company should pay because they were a corporation with perpetual succession. In 1874 this had been fixed at a year's rent or value of the lands with obligation to repeat every twenty-fifth year. But in the case of a company holding a statutory title with dues of superiority unredeemed, this was to be paid not for an entry but *as if on* an entry merely. The first payment was made in 1885. The recurring payment is now due, and the former superiors as in right of it demand payment. They carefully abstain from any reference to non-entry or any use of the statutory procedure which comes in lieu of the old declarator of non-entry. They confine themselves to the statutory demand to which section 107 of the Lands Clauses Act entitles them, and they are, I think, entitled to succeed. The only suggestion that there is anything wrong with their prior procedure rests on the fact that in the receipt which they gave in 1885 on the voluntary payment by the company of an adjusted sum on the occurrence of the casualty they use the term "due on the entry of the said company to the said subjects." This was an error in law no doubt, for the casualty of superiority was not due *on* the entry, because there was and could be no entry, but *as on* the entry of the company. Both parties evidently thought that there had been an implied entry under the 1874 Act. But their mistake in this respect did not affect the title and—this is the main point—did not affect the fact that the sum paid and receipt of which was acknowleged, was due,

and does not, I think, affect the fact that another sum is due now. The company had it in their power to redeem the feudal prestations of feu-duty and casualty at any time from and after 1868, and if they have not done so that is their affair, not that of the quondam superior.

Accordingly, while I cannot affirm the Lord Ordinary's interlocutor, I have come to a conclusion which will, I think, have the same practical result.

LORD PRESIDENT—I agree in the result at which Lord Johnston and Lord Skerrington have arrived, but I prefer the route which has been followed by Lord Skerrington, in whose reasoning I entirely concur. Its adoption may, no doubt, involve a modification of the dicta of certain Judges whose opinions in this department of our law are entitled to the highest respect. But I do not think that our judgment to-day involves the overruling of any prior decision; otherwise, of course, this case would have gone to a larger tribunal.

Four cases, it appears to me, require careful consideration. (First) The *Magistrates of Elgin* v. *Highland Railway Company*, 11 R. 950. It related to a strip of land which formed part of an estate. The company had completed their title under section 80 of the Lands Clauses Act. The superior raised the statutory action under section 4 (4) of the Conveyancing Act 1874. That action was thrown out, for, as Lord Adam observed, "I never could understand how this action could be maintained unless it could have been predicated of the lands that they were in non-entry, and I could not well understand how that could be when the statute provides that the titles which have been made up here by the railway company constitute a complete and valid feudal title in the persons of the railway company." In short, it was an action that could only be raised at the instance of one who was entitled to sue a declarator of non-entry against an unentered vassal, and was obviously incompetent. But both Lord Adam and the Lord President expressed the opinion that in a case such as we have before us clause 107 and following clauses of the Lands Clauses Act would have been applicable. No doubt in that case the Lord President (Inglis) said "the relation of superior and vassal does not subsist between the pursuer and the defender"; but in an earlier part of his judgment his Lordship said that the relationship did not subsist "in the ordinary sense of the constitution of a feu under a superior." So interpreted I agree.

The second case has come to be known as the first *Inverness* case, 20 R. 551. It related to two parcels of ground—the first embraced under one title, and the second forming part only of the lands embraced under one title. In both cases the company had completed its title to the land under section 80. The superior again raised the statutory action under section 4 (4) of the Conveyancing Act 1874, and once more it was held incompetent, for, to use the words of Lord President Inglis in the case of the *Governors of Heriot's Hospital* v. *Drumsheugh Baths Company*, 17 R. 937, the condition under which the action "can be brought, namely, that the superior would under the former law have been entitled to sue the action of declarator of non-entry, does not exist." But with the opinions of the majority of the Court in the first *Inverness* case regarding the pecuniary liabilities of the railway company I entirely agree, for, as Lord Kinnear observed, "the defenders cannot continue to hold the lands without paying or redeeming feu-duties and casualties."

(Third) What has come to be known as the second *Inverness* case, 1909 S.C. 943, where the company had acquired part of the lands held under one title by the vendor. Once more they completed their title under section 80, and the superior then raised an action to recover compensation for the loss of his feu-duties and casualties. It was held to be a well-founded claim. I cannot very well see how it could have been otherwise, because undoubtedly the railway company had entered upon the lands and possessed them like any ordinary vassal, and were therefore bound by the ordinary obligations of the vassal. And the Court held that the superior's right was not waived by his permission to the railway company to enter into possession of the lands.

(Fourth) The case of *Fraser* v. *Caledonian Railway Company*, 1911 S.C 145, where the company entered on the possession of the lands in the year 1846, but completed their title under section 80 in 1875, and after a lapse of many years in 1903 the superior made his claim for compensation for the loss of feu-duties and casualties. The only question raised was whether compensation should be estimated as at the date when the title was completed or as at the date when the claim was made. It was immaterial which, for the amount was the same. But holding the opinion I do in this case, I think the compensation ought to have been estimated as at the time when the claim was made.

If I have accurately interpreted the meaning and effect of those four cases, I think it will be plain that they remain untouched by the decision which we pronounce to-day. But I desire, for my part, to make it perfectly clear (first) that when a railway company takes lands which it is authorised by statute to take, it can only make up a statutory title and none other. To me the phrase used in the Lord Ordinary's note that "the conveyance is habile in point of form to found the special statutory right and title to the land although it is equally habile as a common law transmission of the feu," is quite meaningless. (Second) That the feudal relation between superior and vassal remains untouched after the railway company's title is complete. But the feudal remedies are gone. (Third) That when the railway company enters into possession of lands which it is authorised by statute to take, it becomes liable for the feu-duties and the casualties unless and until, at the

instance either of the railway company or of the superior, the dues of superiority are redeemed.

We shall therefore affirm the interlocutor of the Lord Ordinary.

LORD MACKENZIE was absent.

The Court adhered.

Counsel for Pursuers — Murray, K.C. — Chree, K.C. — Thornton. Agent — Peter Macnaughton, S.S.C.

Counsel for Defenders—Blackburn, K.C. — Wark. Agents — Hope, Todd, & Kirk, W.S.

HOUSE OF LORDS.

Tuesday, April 28.

(Before Lord Dunedin, Lord Kinnear, Lord Atkinson, Lord Shaw, and Lord Parmoor.)

JOHN WATSON, LIMITED *v.* BROWN.

(In the Court of Session, January 30, 1913, 50 S.L.R. 415, and 1913 S.C. 593.)

Master and Servant—Workmen's Compensation Act 1906 (6 *Edw. VII, cap.* 58)—*Accident—Pneumonia Following on Chill Caught through Prolonged Exposure to Draught Due to Wreck in a Shaft of a Mine.*

In consequence of a wreck in one of the shafts of a mine the miners were ordered to the surface. Those accustomed to ascend by the damaged shaft were directed to ascend by another shaft. They were detained an hour and a-half waiting until this shaft was free, the miners accustomed to use it being taken up first. While waiting they in their heated state were exposed to a down-draught of cold air. One of them caught a chill, upon which pneumonia supervened and he died. The arbiter in a claim for compensation found that his death was due to accident arising out of the employment.

Held (*rev.* judgment of the Second Division) that the arbiter's finding was right.

Alloa Coal Company v. *Drylie*, 50 S.L.R. 350, 1913 S.C. 593, *approved and applied.*

This case is reported *ante ut supra.*

Brown, the claimant, appealed to the House of Lords.

At delivering judgment—

LORD DUNEDIN—On the assumption that the case of *Drylie* was well decided I am of opinion that this case is ruled by that. I cannot help thinking on perusing the opinion of Lord Salvesen that that learned Judge really took the same view, although he did not wish to express a formal dissent from the views of the other members of the Second Division. It seems to me that here, as there, you have an accident interfering with the normal working of the mine, a consequential exposure of the workman to rigorous climatic conditions for a prolonged period, which exposure would not have been his fate but for the accident, and a finding in fact that the supervening illness was due to this prolonged exposure. There is no intervening circumstance depending on some cause other than the accident which occurs to break that chain of causation. I would illustrate what I mean by this by referring to the case of *M'Luckie* v. *Watson* (1913 S.C. 975, 50 S.L.R. 770), where the wetting which brought on the chill was not a necessary cause of the accident, but was due to the workmen's determination not to wait his turn for the cage but to stand in water in order to get in front of his fellows.

As regards the case of *Drylie*, I was a party to that judgment, and I have seen no reason to alter the opinion I then formed. I have the satisfaction of knowing that those of your Lordships who have considered that case for the first time on this occasion, have seen no reason to doubt that it was rightly decided.

I accordingly think that the present appeal should be allowed and the award of the arbitrator restored, and I move accordingly.

LORD KINNEAR — (LORD DUNEDIN intimated that his Lordship concurred).

LORD ATKINSON—This case has been very ably argued. The difficulties raised by the contention put forward by the learned Lord Advocate on behalf of the respondents arise, I think, from his effort upon one point at all events to disintegrate as it were the compound but injurious effect upon a workman of the forces or agents into contact with which he may by an accident be brought, separating the immediate and primary effect from the ultimate effect and endeavouring to establish a sequence of causation between them. He contended that the accident, under the Workmen's Compensation Act of 1906, must, to entitle the injured workman or his dependants to compensation, be the proximate cause of the personal injury, and insisted that in the present case the chill sustained by John Brown, the deceased workman, was the proximate cause of his death by pneumonia, and that the accidental breakdown or wreckage of the machinery of the mine in No. 2 shaft, so far from being the proximate cause of this chill, was either a mere historical event unconnected with it, or at least if a cause of it at all, a very remote cause.

By way of illustration I put to him during the progress of his argument the following question—Suppose an employer is during very cold weather in mid-winter driving in his motor car with two servants in front—his chauffeur and another—and suppose that when crossing a bridge over a river a tyre bursts, his car skids, and comes into collision with one of the battlements of the bridge with such force and violence that both servants are precipitated into the river below, the one being drowned and the other rescued, but rescued so tardily as to be thoroughly chilled, and that an attack of pneumonia is thereby induced, of which disease he dies—Would the dependants of