thing else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Schedule D and those assessed under Schedule A" (for which for the purposes of this case I may substitute Schedule B) "or any of the other schedules of charge. . . . The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. . . . In every case the tax is a charge on income, whatever may be the standard by which the income is measured." I may also quote Buckley, L.J., in the *Carlisle and Silloth Golf Club* case, [1913] 3 K.B. 75—"To determine this question it is not the character of the person who carries on, but the character of the concern which is carried on, that has to be regarded."

These two considerations appear to me exactly to meet the present case, and to lead to the conclusion at which the Commissioners have arrived. I do not advert to *Lord Derby's* case, [1915] 3 K.B. 374, except to say that while it is not a decision on the present question the parties seem to have accepted that the contention of the appellant here was untenable.

LORD MACKENZIE — I agree with your Lordship. The conclusion to which the Commissioners have come is, in my opinion, correct, although I am not prepared to agree with the observations which were made by them in the statement of the case. The problem appears to me to be a simple one. The appellant here maintains that he cannot be assessed under Schedule D because he is already assessed under Schedule B. Schedule B provides for income arising in respect of the occupation of land. The question is—whether a man who keeps stallions for service purposes derives therefrom an income in respect of the occupation of land? In my opinion he does not, and that irrespective of whether the stallion travels the country or whether the mares are sent in to the farm where the stallion is standing.

No doubt to a certain degree the owner of the stallion reaps a benefit from being himself the farmer who grows forage, and, of course, when it comes to the stage of striking the true income—which was never reached in this case—then he will charge as against the fees earned by the stallion the cost of feeding and so forth; he will treat it just as he would treat any other separate business. But it is a separate business inasmuch as it cannot be brought under the language of the clause dealing with land. It appears to me it directly falls under the first case of Schedule D, Case 1, and that these profits are liable to duty, to be charged "in respect of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of this Act." Therefore I am of opinion that the conclusion arrived at by the Commissioners is correct.

LORD SKERRINGTON — Looking to the manner in which this case has been stated, I am not surprised that the appellant insisted upon his appeal. As soon, however, as one understands what is the real question intended to be raised the answer is seen to be a very simple one. I agree with what has been said by your Lordships and have nothing to add.

The Court affirmed the judgment of the Commissioners.

Counsel for the Appellant — Blackburn, K.C. — W. T. Watson. Agents — Guild & Guild, W.S.

Counsel for the Respondent—Lord Advocate (Clyde, K.C.)—R. C. Henderson. Agent —Sir Philip J. Hamilton-Grierson, Solicitor of Inland Revenue.

HOUSE OF LORDS.

Monday, December 17.

(Before the Lord Chancellor (Finlay), Viscount Haldane, Lord Dunedin, Lord Atkinson, and Lord Parmoor.)

NORTH BRITISH RAILWAY COMPANY *v.* BIRRELL.

(In the Court of Session, March 16, 1917, 54 S.L.R. 339.)

Railway — Statute — Construction — Superfluous Lands—North British Railway Act 1913 (3 *and* 4 *Geo. V, cap. lxxxix*), *sec.* 41 *—Lands Clauses Consolidation (Scotland) Act* 1845 (8 *and* 9 *Vict. cap.* 19), *secs.* 120 *and* 121.

The North British Railway Act 1913, sec. 41, enacts—"And whereas lands have from time to time been purchased or acquired by the company, the Forth Bridge Railway Company, and by joint committees incorporated by Act of Parliament or Order on which the company may be represented, adjoining to or near to railways or stations belonging to the company or the Forth Bridge Railway Company, or belonging to or worked or managed by such joint committees, but such lands are not immediately required for the purposes of the undertaking of the company or of the Forth Bridge Railway Company or of such joint committees, as the case may be, and it is expedient that further powers should be conferred upon the company and the Forth Bridge Railway Company, and such joint committees respectively, with respect to such lands: Therefore, notwithstanding anything contained in the Lands Clauses Consolidation (Scotland) Act 1845, or in any Act or Order relating to the company or the Forth Bridge Railway Company, or any such joint committees with which that Act is incorporated, the company or the Forth Bridge Railway Company or any such joint committees shall not be required to sell or dispose of any such lands or any lands acquired under the powers of this Act which may not be immediately required for such purposes

but may retain, hold or use, or may lease or otherwise dispose of the same in consideration of such rent or on such other terms as the company or committee exercising the said powers may think fit."

The North British Railway Company brought an action against the defender for a declarator that he had no right or title to object to their letting certain lands to a certain coal company for the purpose of sinking and working a new coal pit. *Held* (*rev.* judgment of the First Division) that inasmuch as the above-quoted section applied to the lands, if superfluous, the company was entitled to the declarator asked.

Opinions that the company might not only let but sell the lands to which the section applied.

This case is reported *ante ut supra.*

The pursuers, the North British Railway Company and the Fife Coal Company, Limited, appealed to the House of Lords.

At delivering judgment—

LORD CHANCELLOR—The question in this case turns upon the effect to be given to one section in a Private Act of the North British Railway Company. The action was begun by the appellants against the late Alexander Birrell, and has been continued against his representatives, the respondents. The claim made by the summons was that it should be declared that the defender had no right to prevent the pursuers, the North British Railway Company, from letting to the appellants, the Fife Coal Company, certain land at Seafield, Kirkcaldy, for the purpose of the Fife Coal Company sinking and working a coal pit theron and laying down lines, sidings, and other works in relation to the pit.

The lands in question were formerly vested in the Seafield Dock and Railway Company, which was formed in 1883 for the purpose of building a dock which was to be connected by a railway with the Auchtertool Coal Pits, so that the coal might be dispatched by sea from the dock. The name of the company was in 1888 changed to that of the Kirkcaldy and District Railway Company. The time for the construction of both dock and railway was by various Acts extended, and in 1895 the undertaking was amalgamated with the undertaking of the North British Railway Company by section 38 of the North British Railway Act of that year (58 and 59 Vict. cap. cli), which incorporated the provisions as to amalgamation of the Railway Clauses Act 1863. By this amalgamation the powers of the old company vested in the North British Railway Company.

The dock has never been made, but the North British Railway Company has constructed a railway from Auchtertool Pits on part of the line proposed for the railway of the Seafield Dock and Railway Company, but ending in a junction with the North British Railway Company at the point shown on the plan, instead of being carried down to the site of the proposed docks.

The appellants, the Fife Coal Company, were desirous of getting the coal from the seams of coal under the bed of the Firth of Forth which they were to take by permission of the Crown, and for the purpose of getting access to them they wanted to sink a pit on the land coloured pink on the plan and referred to in the summons. It was proposed that the North British Railway Company should make a lease to the Fife Coal Company for this purpose. Mr Birrell was an adjoining proprietor, and he claimed that he was entitled to prevent the North British Railway Company from leasing to the Fife Coal Company any part of this land for the purpose of sinking the proposed pit. The ground of his objection was that he might have a right of pre-emption under the provisions of the Lands Clauses Act 1845 (8 Vict. cap. 19), secs. 120 and 121.

By Acts obtained by the North British Railway Company in 1897, 1902, 1904, and 1916, they were enabled to retain and hold the lands which they had acquired for periods of time extended ultimately till 1919. In the meantime there had been passed the North British Railway Act 1913 (3 and 4 Geo. V, cap. lxxxix), and it is upon the 41st section of that Act that this case turns. It runs as follows:—". . . [*quotes, v. supra in rubric*] . . ."

It is admitted that the lands in question are situate near to or adjoining the railway within the meaning of this section, and they are not immediately required for the purposes of the undertaking. The North British Railway Company assert that they are entitled under this section 41 to make a lease of the lands in question to the Fife Coal Company for the purpose of sinking a pit as proposed.

The respondents contend that the section on its true construction does not apply to the case of superfluous lands. For the purposes of the present proceeding it must be assumed that the lands are superfluous, but this is not admitted by the appellants to be true in point of fact, and in certain events the question might have to be determined on proof hereafter.

In order to determine whether superfluous lands are within the operation of section 41, it must be read by the light of the general law on the subject of superfluous land. The effect of sections 120 and 121 of the Lands Clauses (Scotland) Act 1845 is, that if the company do not sell superfluous lands within the period prescribed, they vest at the end of it in the adjoining owners, and that before selling superfluous lands the Company must, unless the lands are in a town or built upon or used for building purposes, offer to sell them to the owner of the lands from which such lands were severed, or, failing him, to the adjoining owner. It appears to me that one object of section 41 of the Act of 1913 was to exempt lands adjoining or near the railway or stations from the obligations which the general Act of 1845 imposes in respect of superfluous lands. If the lands are not immediately required for the purposes of the railway, it may be a question of some difficulty to ascertain whether they may be ultimately required, in which case they would not be superfluous. Section 41 dispenses with any

such inquiry by relieving the railway company from the obligation to sell any such lands even if they are superfluous. They could be required to sell such lands only if superfluous, and to say that section 41 does not apply to such lands is to ignore a material part of the section. The section goes on to confer upon the railway company in terms the right to retain, hold, or use such lands or to lease or otherwise dispose of the same at such rent and on such terms as the company think fit.

For this reason, in my opinion, the interlocutor of the Lord Ordinary should be restored, granting relief in terms of the summons.

I find myself in entire agreement with the judgment delivered by the Lord President, which dissented from the decision of his colleagues to reverse the judgment of the Lord Ordinary.

The defence to the action appears to me to fail upon another ground also. The interest in respect of which the defenders claim a right to object to the lease is that they would have a right of pre-emption in the event of the Railway Company proceeding to sell the land. The defenders can have no such right of pre-emption. Section 41 relieves the Railway Company from all obligation to sell, and it is only in respect of sales under the compulsion of forfeiture imposed by section 120 at the end of the time prescribed that the right of pre-emption given by section 121 applies. There is not and cannot be here any right of pre-emption, and on this ground also the defence appears to me to fail.

I am therefore of opinion that the judgment of the Inner House should be reversed and the interlocutor of the Lord Ordinary restored. The appellants should have their costs here and below.

VISCOUNT HALDANE—After consideration I have come to the conclusion that the decision of the First Division ought to be reversed and that the interlocutor of the Lord Ordinary should be restored.

Section 41 of the North British Railway Act 1913 does not apply to all the lands acquired by the companies and committees to which the section refers, but only to those adjoining or near to their railway or stations. Its operation is further confined to land not immediately required for the purposes of their undertakings. The section appears to me to include all land falling within the class ascertained by the first limitation, which is land other than that immediately required. It therefore includes land which is superfluous within the meaning of the Lands Clauses Consolidation (Scotland) Act 1845, sections 120 and 121—that is to say, it extends to land not required for the purposes of the undertaking which has not already vested in the adjoining owners by lapse of time under the statute. Section 41 provides that notwithstanding anything in the Act of 1845, or in any Act or Order relating to the companies or their undertakings, the companies or committees are not to be required to sell or dispose of any of this land, but may "retain, hold, or use, or may lease or otherwise dispose of the same, in consideration of such rent or on such other terms" as the company or committee, exercising the power conferred on it, may think fit.

The main point made for the respondents is that they have, under section 121 of the Act of 1845, a right of pre-emption which is or may be prejudiced by the proposed lease. There may well be such prejudice if the section applies, but I agree with the view of the Lord Ordinary and of the Lord President in the Inner House that this section is excluded by the operation of section 41 of the Act of 1913. I am unable to read the words "or otherwise dispose of" which occur there as limited to disposition *ejusdem generis* with retaining, holding, using, or leasing, for the simple reason that I cannot define any genus of which those powers are species narrower than disposition interpreted in the wide meaning contended against.

The words "dispose of" therefore include sale, and the main objection to the appellants' pleadings based on want of specification in that view disappears. I have read attentively the reasons for a narrower construction put forward in the judgments in the Inner House of both Lord Skerrington and Lord Johnston. It appears to me that these reasons attribute an unduly narrow and artificial meaning to the expressions used by Parliament. We cannot, sitting in a court of justice, speculate on what may or may not have been present in the minds of those who passed the Act under interpretation. Our duty is simply to give to its words the interpretation which would be regarded as the natural one unless that would lead to something not short of absurdity.

It is sufficient for the purposes of this appeal to point out that the lands to which section 41 applies are not the whole of the lands belonging to a railway company, as made the subject of sections 120 and 121 of the General Act of 1845, but particular lands which are dealt with in section 41 of the Special Act. The latter section contains an unrestricted power of leasing, and although I have already intimated that I should hold that the general words "otherwise dispose of" which follow are sufficient to confer a power of sale, I do not think that this point really arises in this appeal. For it is sufficient for the purposes of this case to come to the conclusion that the right of pre-emption conferred by section 121 of the general Act on an adjoining owner is abrogated by the explicit terms of section 41, at the least sufficiently to preclude him from objecting to any lease which can fairly be regarded as such.

This disposes also of the point relied on by Lord Johnston as to relevancy.

LORD DUNEDIN—I think the comparatively simple view taken by the Lord Ordinary and the Lord President is the right one, and that the judgment of the Lord Ordinary ought to be restored.

One of the learned Judges of the First Division would have dismissed the action as incompetent on account of its form—a

declarator asserting a negative. I see no incompetency in such a form. One great merit of the Scottish action of declarator is its elasticity. No doubt its use must be guarded. It cannot be used for the mere purpose of declaring legal propositions where no practical question or dispute lies beneath. But here there was a practical question, and the defender has himself to thank for the action taking this form. Not that by saying so I in any way blame the defender. He was quite entitled to assert what he conceived to be his rights, and if his views were sound he had a right to object to what the Railway Company proposed to do. But having said so, and said so through a law agent, he cannot object to an action being raised against him to try whether his objections were well founded or not. Nor, to do him justice, did he do so, for there is no plea to incompetency in the defences. It was quite within the right of the learned Judge to take the plea from the Bench. But if it was not good if pled by the defender, no more is it good if taken from the Bench.

It is next said that the pursuers do not disclose precisely what sort of lease they are going to grant, and that the action is therefore irrelevant. I do not think so. It is, indeed, only an advantage to the defender that no such disclosure is made, for he will prevail if he can show that he can object to any form of lease.

I pass to the merits. Now the defender is not a shareholder, and he has no title to plead *ultra vires* as to what the Railway Company propose to do with their own property. His only title is his prospective right of either (1) pre-emption or (2) ownership through forfeiture of the land in question.

Lands, whether superfluous or not, which have been purchased by the Railway Company are their property. But section 120 of the Lands Clauses Act imposes a duty on the company to sell such lands as are superfluous within a certain period with the sanction of forfeiture if they do not do so. Section 121 then says that if there be a sale there shall be a right of pre-emption in the person from whose property the lands were taken, or failing him in the contiguous owner. But then, after a set of statutes which prolonged the period fixed by section 120, and which had the effect of keeping that period still unexpired, there was passed section 41 of the North British Railway Act of 1913. That provided that notwithstanding any previous Acts certain lands, viz., lands belonging to the company and adjoining railways or stations belonging to the company, and not immediately required for the undertaking of the company, should not be required to be sold, but that the company might retain, hold, and use or lease, or otherwise dispose of the same on such terms as they thought fit. That seems to me in plain words to stop all effect of sections 120 and 121 of the Lands Clauses Act. It only remains to see whether the lands in question (1) belong to the company, (2) are adjoining the company's railway or stations, (3) are not immediately required for the company's undertaking. All these three questions of pure fact are admitted, and that to my mind ends the question.

LORD ATKINSON—I concur.

But for the marked division of opinion in the Courts below I should have considered this a reasonably plain case. It turns, in my view, on the construction of the 41st section of the North British Railway Act 1913 (3 and 4 Geo. V, cap. lxxxix). The facts having been fully stated already I therefore abstain from re-stating them save so far as is necessary to make my judgment intelligible. The lands in reference to which the controversy arises are 17 acres in extent. Of those 15 acres were in the year 1897 acquired by the Kirkcaldy and District Railway Company from Earl Rosslyn and his trustees, and in the same year the remaining 2 acres were acquired by the company from Mr Munro Ferguson of Raith and Novar. Mr Birrell, the respondents' predecessor, was the owner of lands adjoining these 17 acres. He acquired them from Earl Rosslyn and his trustees in the year 1893, and was therefore the singular successor of Earl Rosslyn in those lands from that date. By the North British Railway Company's Act 1895 (58 and 59 Vict. cap. cli) the undertaking of the Kirkcaldy and District Railway Company was amalgamated with the North British Railway Company and the former company was dissolved. In the judgment of Lord Skerrington I find two very important statements made—first, that the respondents' senior counsel in his argument before the Inner House, founding on the 121st section of the Lands Clauses Consolidation (Scotland) Act of 1845, rested his defence exclusively upon his clients' possession of a right of pre-emption of 15 of the 17 acres of land vested in the Railway Company which his own lands adjoined, and second, that the case was argued by both sides on the footing that the only "undertaking" to be considered in reference to the determination of the question whether these 17 acres were "superfluous" land or not was that of the North British Railway Company. Lord Johnston said that counsel for the respondents assumed that the only "undertaking" which need be considered was that of the North British Railway Company as it stood at the time or might thereafter be extended. And the Lord President said that the ground of the respondents' defence was that these 17 acres of land were superfluous lands within the meaning of the 120th and 121st sections of the Lands Clauses Consolidation (Scotland) Act 1845 (8 and 9 Vict. cap. 19). These two sections are identical in terms with the 127th and 128th sections of the Lands Clauses (England and Ireland) Act 1845 (8 and 9 Vict. cap. 18). Therefore the English authorities apply. In both statutes superfluous lands are defined to be lands acquired by the promoters of the undertaking under the provision of the Lands Clauses Act of 1845 or the Special Act, or any Act incorporated therewith, which shall not be required for the purposes thereof, or, as it has been put by Lord Cairns in *Directors of Great Western Railway Company* v. *May*, L.R., 7 E. and I.

App. 283, at page 292, lands which were originally acquired for the purposes of the undertaking, but which are not required for the purposes of the undertaking. Lord Cairns there proceeds to describe four different ways in which land so acquired may become superfluous land. At page 295 he states the respective times at which it is necessary that it should be determined whether or not the lands have become superfluous lands within the meaning of the statutory definition. Now the 120th section of the Lands Clauses Act of 1845 imposes upon the promoters of the undertaking a statutory obligation to sell and dispose of all their superfluous lands as defined, in such manner as they may deem most advantageous, 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. It is in reference to superfluous lands, and to superfluous lands alone, that any obligation is imposed upon the promoters to sell or dispose of any of the lands they have acquired for the purpose of their undertaking. And therefore wherever you find a statute enacting, as the Act of 1913 in its 41st section enacts, that a railway company shall not be required to sell or dispose of the lands which they have theretofore acquired, it certainly would appear to me that this provision necessarily applies, and was intended to apply, to superfluous lands alone, since the obligation from which it relieves the company applies to such lands alone.

The statutory obligation imposed upon the promoters by the 120th section has a sanction attached to it. If the company fail to discharge their obligation within the period named, the superfluous lands remaining unsold will at the expiration of that period revert to the owners of the adjoining lands. That forfeiture clause embodies the principle referred to by Lord Cairns in the above-mentioned case at the bottom of page 293 of the report, namely, the principle of securing "to the landlords from whom land was taken by compulsion the reverting, as nearly as the Legislature can accomplish it, of all land which becomes useless or is not wanted for the national enterprise which had been sanctioned." The statute does not specifically provide for the case where, as in the present, the landlord from whom the lands were compulsorily taken has alienated all his interest in those portions of his lands which adjoined the lands so taken. It is well established that the point of time at which the lands so to be forfeited are decided to be superfluous lands is the precise time at which the forfeiture operates, namely, the expiration of the time within which the promoters are bound to sell or dispose of them. If the promoters are relieved from this statutory obligation they are in no default—the forfeiture never takes place. In further pursuance of the same policy in favour of landlords a condition is by the terms of the 121st section of the Act of 1845 added as to the mode and manner in which the obligation imposed by the preceding section is to be discharged. The latter is merely ancillary to the former section. It prescribes that before the promoters of the undertaking dispose of any such superfluous lands (that is clearly those particular superfluous lands which the preceding section required them to dispose of) unless the lands be situate in a town, or be built upon, or used for building purposes, they shall offer to sell the same to the person then entitled to the lands (if any) from which the same were originally severed. It then makes further provisions in case this person should refuse to purchase. If the promoters, or, which is the same thing in this case, the appellant company, within the period fixed proceed to sell or otherwise dispose of the original lands acquired for the purposes of their undertaking, they must be in a position to establish that these lands are then superfluous lands. That has been decided to be a mixed question of law and fact not very easy to answer. The action of the promoters in offering the lands for sale as superfluous lands would be strong but not conclusive evidence on this point, and the lands cannot be held to be superfluous lands so long as there is a reasonable probability that they will be required at some future time for the purposes of the undertaking. —*Macfie* v. *Callander and Oban Railway*, [1898] A.C. 270, 25 R. (H.L.) 19, 35 S.L.R. 415.

Between the date of the amalgamation of the two companies and the passing of the Act of 1913 three statutes were passed, extending the time for the sale by the appellant company of its superfluous lands or some of them.

By the first the North British Railway (General Powers) Act 1897 it is provided that, notwithstanding anything contained in several Acts named, the company may retain and hold any lands belonging to them in the parishes mentioned in the schedule to the Act which have not been theretofore applied to or were not required for the purposes of the company, but which were situate near or adjoining any railway or station of the company, or in the opinion of the company may be required by them for the purposes of stations, sidings, or other conveniences, for the period of five years from the passing of the Act. But at any time during this period the company might, and at the expiration of the period should, sell and dispose of, as superfluous land, all such parts of those lands as should not then have been applied to, or were not then required for the purposes of, their undertaking. The extension of the time is confined to the particular class of land thus mentioned. The next of these Acts, passed in 1902, deals with such lands of this class as are situated near or adjoining any railway or station of the company, and extends the period as to these for five years, and as to the rest of the lands mentioned for two years.

The third Act, that of 1904, enabled the company to retain and hold for ten years from the commencement of the Act any lands acquired by them upon which the adjoining owner had not entered, and which have not yet been applied for the purposes of the

undertakings, or sold and disposed of, but further provided that within that period of ten years the company might, and within the succeeding period of two years should, sell, feu, or otherwise dispose of all such parts of the lands as should not then have been applied to or were not then required for purposes of their respective undertakings. This Act in its general scope applies to all lands acquired by the company upon which the adjoining owner has not entered or which have not been sold or disposed of, or applied for the purposes of the undertakings of the company. The twelve years mentioned would extend to the year 1916.

Section 41 of the Act of 1913 is not general in its scope. It recites that lands have theretofore from time to time been acquired by the company adjoining or near to railway stations belonging to the company, but which are not *immediately required* for the purposes of the undertaking of the company. These constitute the first class of lands with which the section deals. It recites that it is expedient that further powers should be conferred upon the company in respect of them, and proceeds to enact that notwithstanding anything contained in the Lands Clauses Consolidation (Scotland) Act 1845, or any Act or Order relating to the company with which that Act is incorporated, the company shall not be required to sell or dispose of any such lands, but may retain, hold, or use, or lease or otherwise dispose of the same in consideration of such rent or on such other terms as the company exercising such powers may think fit. In the second place, it deals with lands subsequently acquired under the Act of 1913, with which the appeal is obviously not concerned.

Now in the first case the compulsory sale or disposal of land belonging to the company only applies to superfluous land. They are not required to sell or dispose of any other kind of land, and I have only to repeat that it appears to me to be plain that when the statute provides that the company shall not be required to sell or dispose of any particular land the natural meaning of the provision is that the lands are of the kind which the company was theretofore bound to sell or dispose of, namely, superfluous land and none other.

Much importance was attached to the words *immediately required*. They are introduced for the first time into those Acts, and it is said that the words should have been "it is not reasonably probable will be required," or such like words, these being properly descriptive of superfluous lands. The words are not happily chosen, but land which it is reasonably probable will never be required for a particular purpose is certainly not "immediately required" for that purpose. Moreover, the additional powers given to the company are not such as would reasonably be given if they were merely to be exercised during a very short period of time.

They may hold and use these lands, lease, or dispose of them on any terms they think fit. These are the additional powers which could only be exercised if the original restraints were not removed. The word "sell" is not used, but would, I think, be included in the words "disposed of." For the purpose of this case it is not necessary to determine whether the company could sell or not, as the company only propose to lease these 17 acres to the Fife Coal Company to enable them to sink a shaft to reach the coal measures lying underneath the sea, and to place rails upon the surface upon which the trucks of the latter company may run and carry away their coals. It was suggested that the leasing of this 17 acres of land was devoting it to the purposes of the undertaking, as the Railway Company would get the haulage of the coal won and the shaft would be, as it were, a kind of underground station. I do not say there may not be much in this, even though the Fife Coal Company might not be bound to bring their coal over that company's lines, if the company had a fair chance of getting that traffic. I prefer, however, to rest my judgment on this, that when the whole of section 41 is taken together its meaning is reasonably clear, and that if these 17 acres of land "adjoin or lie near the railway" as I understand is not now disputed, the appellants are empowered to do that which they have proposed to do, and that the respondents' alleged rights of pre-emption are only interfered with if at all to the extent authorised by this Statute of 1913. That statute is a private Act, no doubt, but so in truth is the statutory enactment which confers the right of pre-emption.

The Lands Clauses Consolidation Acts of 1845 merely contain the clauses usually theretofore embodied in private Acts of Parliament. They are to be incorporated with and form parts of private Acts subsequently passed authorising the taking of lands for undertakings of a public nature.

These provisions may be modified by the Special Act which incorporates them. The only respect in which the construction of a private Act differs from that of a public Act is as to the strictness of the construction to be given to the private Act when there is any doubt as to its meaning. In the *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee*, 15 Q.B.D. 597, Lord Esher at page 603 said—"In the case of a public Act you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construction. In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who procure a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it. But when the construction is perfectly clear there is no difference between the modes of construing a private and a public Act." In my view it is clear that the appellants have the right they claim to exercise and which the respondents challenge, namely, the right to lease these 17 acres of lands to

the Fife Coal Company for the purposes mentioned upon such terms as they shall in their discretion deem fit. That being the extreme nature of their claim I cannot see how the respondents are in any way prejudiced by not having the terms of the proposed lease disclosed. And certainly nothing which has been urged in argument convinces me that the mode which has been adopted by the appellants to test the right of the respondents' predecessor to dispute the existence of the powers and privileges which the appellants claim to exercise is not legitimate. On the whole I am of opinion that the judgment appealed from was wrong and should be reversed and the judgment of the Lord Ordinary restored, and that this appeal should be allowed with costs here and below.

LORD PARMOOR—[*Read by Lord Dunedin*] —It is not necessary to repeat the facts. The summons asks that it ought and should be found and declared that the defender (respondents) has no right or title to object or to prevent the pursuers (appellants), the North British Railway Company, letting to the pursuers, the Fife Coal Company, Limited, the lands at Seafield, Kirkcaldy, belonging to the pursuers and coloured red on the plan therewith produced. The appellants cannot succeed if at any time or under any conditions a right of pre-emption can arise in favour of the respondents under the sections of the Lands Clauses Consolidation (Scotland) Act 1845 relating to the sale of superfluous lands.

The decision in the appeal depends upon the construction of section 41 in the North British Railway Act 1913, but it is necessary to refer shortly to the relevant sections of the Lands Clauses Consolidation (Scotland) Act 1845. These sections refer to lands acquired under statutory powers but not required for the purposes thereof. The meaning of these words has been exhaustively considered in the corresponding sections of the English Act in the case of the *Great Western Railway Company* v. *May* [Law Reports, 7 English and Irish Appeals, 283]. Section 120 provides for forfeiture if superfluous lands are not sold and disposed of within ten years after the expiration of the time limited in the Special Act for the completion of the works. There was no forfeiture in the present case at the passing of the North British Railway Act 1913. Section 121 gives a pre-emption right to the person then entitled to the lands (if any) from which the superfluous lands were originally severed or to several persons whose lands immediately adjoin such lands, unless the lands are situate within a town or are lands built upon or to be used for building purposes. If this section applies to the lands in question the appellants could not succeed, but in my opinion its application has been expressly abrogated by section 41 of the North British Railway Act 1913.

I confess that I am unable to see any difficulty in the construction of this section, and it appears to me to have been carefully drawn to prevent the risk of misunderstanding. The first question which arises is whether the lands in question come within the provisions of the section. The first condition is that the lands should have been purchased or acquired by the appellants. This condition has been fulfilled. The second condition is that the lands should be adjoining to or near to railways or stations belonging to the company. It is admitted by the respondents that the land in question comes within these territorial limits. The third condition is that the lands are not immediately required for the purposes of the undertaking of the company. The fact that the land is not immediately required for the purposes of the company is not in dispute, but it is said that some difficulty arises from the introduction of the word "immediately." I think that there are two answers. In the first place the word should be interpreted in its ordinary usual meaning, and secondly, its introduction may be readily explained by the complex inquiries which may arise if it is attempted to determine, not only whether land is immediately required, but whether though not immediately required it may or may not be so required at some future time. I therefore come to the conclusion that the lands in question are clearly within the provisions of the section.

The section enacts that notwithstanding anything contained in the Lands Clauses Consolidation (Scotland) Act 1845, or in any other Act or Order relating to the North British Railway Company, the North British Company shall not be required to sell or dispose of any such lands or of any lands acquired under the powers of this Act which may not be immediately required, but may retain, hold, or use, or may lease or otherwise dispose of the same in consideration of such rent, or on such other terms as the North British Railway Company may think fit. The section therefore in terms makes the forfeiture section of the Lands Clauses Consolidation (Scotland) Act 1845 inapplicable, and authorises the North British Railway Company to retain, hold, or use the lands in question without limit of time. It was, however, argued on behalf of the respondents that although section 120 of the Lands Clauses Consolidation (Scotland) Act 1845 was rendered inapplicable the pre-emption rights conferred in section 121 remained in force. I think it is impossible to hold that a pre-emption right, which in the general Act would have terminated at a definite time, has by the operation of this section been indefinitely prolonged. The truth is that the appellants are only exercising a statutory right which the Legislature has expressly conferred upon them and which they derive directly from statutory legislation. The appellants are authorised to lease the lands in question, and this is what they are proposing to do. I desire, however, to add that in my opinion the words "lease or otherwise dispose of" give to the Railway Company all the ordinary rights of a landowner in respect of all lands which come within the provisions of the section.

I agree in the opinions expressed by the Lord Ordinary and the Lord President. The appeal succeeds, and the respondents should pay the costs here and below.

Their Lordships allowed the appeal with expenses and restored the judgment of the Lord Ordinary.

Counsel for the Appellants (Pursuers)—Macmillan, K.C.—Hon. Wm. Watson, K.C. Agents—James Watson, S.S.C., Edinburgh—John Kennedy, W.S., Westminster.

Counsel for the Respondents (Defenders)—Wilson, K.C.—Condie Sandeman, K.C.—Hamilton. Agents—Guild & Guild, W.S., Edinburgh—Thorne, Priest, & Company, London.

COURT OF SESSION.

Tuesday, November 13.

SECOND DIVISION.

[Lord Hunter, Ordinary.

MORRISON *v.* SCHOOL BOARD OF ST ANDREWS.

Trust — Charitable and Educational Bequests—Bona fide perceptio et consumptio.

A person conveyed in trust heritable subjects "for the use and behoof of the Infant School of St Andrews, and with a view to maintain and perpetuate the Madras system of mutual instruction and moral discipline there, . . . and on the discontinuance of that system there, then for the use and behoof of" himself and his heirs and successors. The system was discontinued. The school was transferred to the school board, and the latter continued to receive the rents of the subjects. A scheme for the administration of the school was subsequently drawn up under the Educational Endowments (Scotland) Act 1882, whereby the subjects were transferred to and vested in the school board. The truster's heirs having obtained a decree of declarator of their right to the subjects in virtue of the destination-over in their favour, a decree of denuding was granted them. They now sought an accounting for the rents. *Held* (*dis.* Lord Salvesen) that the school board having received and applied the rents *in bona fide* were not accountable for them.

Alexander Morrison, Dunesslin, St Andrews, *pursuer*, one of the heirs-portioners of the late Very Reverend Andrew Bell, D.D., LL.D., brought an action against the School Board of the Burgh of St Andrews, *defenders*, whereby he sued the latter for an account of their intromissions with the rents of the heritable subjects known as 123 and 125 South Street, St Andrews, in order to ascertain the true balance due to him as one of the above heirs, and failing an accounting for payment of £3500.

The defenders *pleaded, inter alia*—"4. The defenders having received the rents of the subjects in question prior to 3rd May 1888 from the trustees of the endowment, the defenders are under no liability to account therefor to the pursuer; *et separatim*, the said rents having been received and applied or consumed by the defenders in good faith, the defenders are not bound to account therefor, and they are entitled to absolvitor. 5. The defenders having received the rents accruing after 3rd May 1888 in virtue of their statutory title, and having consumed or applied the same in good faith, ought to be assoilzied from the conclusions of the summons."

The *facts* are given in the opinion (*infra*) of the Lord Ordinary (HUNTER), who on 12th January 1917 sustained the fourth and fifth pleas-in-law for the defenders and assoilzied them from the conclusion of the summons.

Opinion.—"The pursuer, who is one of the heirs-portioners of the late Dr Bell, sues the School Board of St Andrews for an account of their intromissions with the rents of the heritable subjects known as 123 and 125 South Street, St Andrews, whereby the true balance due to him as one of said heirs may be ascertained, and failing an accounting for payment of £3500. The circumstances under which the action is brought are these—In 1831 Dr Bell purchased the subjects in question, taking the disposition in name of the Provost of St Andrews and certain other gentlemen in trust 'for the use and behoof of the Infant School of St Andrews, and with a view to maintain and perpetuate the Madras system of mutual instruction and moral discipline there, but on failure of that school, or on the discontinuance of that system of education therein, then to and for the use and for behoof of the Provost and Magistrates, Town Council, and ministers of the Established Church for the time being of Cupar in Fife, and the clergyman of the Episcopal Chapel there, for similar purposes, and their respective successors in office, and on failure of them, or on the discontinuance of that system there, then for the use and behoof of the said Dr Andrew Bell himself and of his heirs and successors whomsoever.'

"Dr Bell was the founder of the Madras College in St Andrews, and the originator of the Madras system of education by which more advanced pupils in schools were employed in the instruction of younger pupils. In 1872, when the defenders came into existence as a corporate body under the Education Act of that year, this system of education was not, or at all events ceased from that date to be, in operation in the Infant School of St Andrews or in any school or institution in the burgh of Cupar.

"From 1872 until 1874 the trustees of Dr Bell collected the rents of the subjects, and are said by the pursuer to have paid them over to the defenders, who employed them for their own, *i.e.* (I presume) educational, purposes. This statement is denied by the defenders. It is not, however, important, as the negative prescription would preclude any claim by the pursuer for rents prior to 19th October 1876.

"In 1874 the trustees of the Infant School at St Andrews, with consent of the Board of Education, transferred that school to the defenders. At the same time, 'with regard