singallbeg, the entries contained in the copy, and quoted in the present summons of proving the tenor, are fully and sufficiently expressed, and afford not the slightest room for supposing that they are otherwise than genuine and literal transcripts from the original sub-valuation.

On the whole matter, I am satisfied that the Court has sufficient evidence before it on which to hold the tenor of this sub-valuation proved as regards the lands of the pursuers. That a sub-valuation of the lands in this parish of Dunblane was regularly and effectually made at the date in question is beyond a doubt; and it is nothing more than the ordinary legal presumption, that the pursuers' lands were included in this sub-valuation with the other lands in the parish. The Court has before it what I think it is entitled to hold as in substance a contemporaneous copy of this valuation, preserved in the family records of one of the parties to the valuation; and the general correctness of this copy, and more particularly its correctness as regards the lands of the pursuers, is liable to no valid impeachment. The loss of the original is not in any way imputable to the pursuers; but must be held as an unfortunate accident happening in the public registers. Whilst no one case of the kind can afford an absolute rule for any other, I think that, in the special circumstances, the pursuers are entitled to the justice of having the tenor of this document held proved, so far as they are concerned in it.

Agents for Pursuers—Jardine, Stodart, & Frasers, W.S.

Agents for Officers of State—W. H. & W. J. Sands, W.S.

Friday, July 2.

SECOND DIVISION.

CALEDONIAN RAILWAY *v.* CITY OF GLASGOW UNION RAILWAY.

(FIRST ACTION.)

Railway—Lands Clauses Act sec. 120—*Superfluous Lands—Notice—Sale.* A railway company having taken certain lands for the purposes of the railway, they were sued for the price thereof, which they disputed, on the ground that the pursuers could not ask payment in respect they could give no title to the lands in question. Not having been used for railway purposes, they were, it was said, superfluous lands in the sense of the 120th section of the Lands Clauses Act, and as such had vested *ipso jure* in the neighbouring proprietors. *Held,* in the circumstances, that due notice and correspondence had passed between the parties, and that a valid contract of sale was concluded between them before the period allowed for the sale of superfluous lands had expired.

This was an action concluding for the price of certain lands taken by the defenders for the purposes of the railway. The defence stated was, that the pursuers could not claim payment of the price because they could not give any title to the lands, in respect that the lands, not having been used for railway purposes, were superfluous lands in the sense of section 120 of the Lands Clauses Act, and as such had vested *ipso jure* in the neighbouring proprietors. The Lord Ordinary (BARCAPLE) sustained the defence.

The following is his Lordship's interlocutor:—

"*Edinburgh,* 15*th April* 1869.—The Lord Ordinary, having heard counsel for the parties, and considered the closed record and proof—Finds that the lands, payment of the price of which is concluded for in this action, were superfluous lands which had been acquired by the pursuers, and were subject to the provision of the Lands Clauses Consolidation (Scotland) Act 1845, section 120; that in default of the same being absolutely sold and disposed of within the period prescribed by statute, they should thereupon vest in and become the property of the owners of the lands adjoining thereto: Finds that, by section 15 of the Caledonian Railway (Improvements) Act 1863, which received the royal assent on 11th May 1863, the period limited by the several Acts relating to the undertaking of the company, or by the Lands Clauses Consolidation (Scotland) Act 1845, for the sale of superfluous lands, was extended until the expiration of three years from the passing of that Act: Finds that said prescribed period for selling and disposing of superfluous lands was further extended by the Caledonian Railway (Lanarkshire and Mid-Lothian Branches) Act 1866, but that the same, in so far as regarded the lands now in question, had expired prior to 6th August 1866, when said last-mentioned Act was passed: Finds that the statutory notice, under which said lands were taken by the defenders the City of Glasgow Union Railway Company, is dated the 7th day of August 1866, and that before said notice was served upon the pursuers the period limited for selling and disposing of said lands had expired: Finds that, in these circumstances, the pursuers are not now *in titulo* to give to the purchasers a valid and sufficient title to said lands, or to demand the price thereof: Sists procedure until the 5th sederunt-day in May next, that the pursuers may state whether they can obtain the concurrence of the adjoining proprietors to the present action, or to the title to be granted to the defenders; and reserves the question of expenses.

"*Note.*—The Lord Ordinary does not think it doubtful that the ground in question must be held to be superfluous lands in the sense of the Lands Clauses Act. It appears to be conclusive upon this point, that they never have been used for any purpose connected with the company's undertaking, but have been let for the same purposes for which they might have been used if they had never been acquired by the company. The mere possibility that such lands may hereafter be useful for some purpose of the undertaking cannot exempt them from the character of superfluous lands, if the prescribed period within which the company is required to sell them be allowed to expire without their ever having been so used.

"The Lord Ordinary also thinks it is clear that the period limited for the sale of these lands, which were acquired under the company's Act of 1846, expired on 11th May 1866, three years after the passing of the company's Act of 1863, by which it was extended for that period. By a later Act, passed on 6th August 1866, the period for selling superfluous lands was again extended for five years. But the Legislature cannot be held to have intended by this enactment, in favour of a company constituted for purposes of speculation, to affect the right of parties in regard to lands, the period limited for selling which had already expired. The point was expressly decided in the case of *Moody* v. *Corbett* (34 L. J., Q. B. 166, 15th May 1865. Affd. in the Exchequer Chamber, L. R., 1 Q.B. 510).

"Holding, then, that the period for selling the ground in question as superfluous lands had expired before the Union Company gave notice of their intention to acquire it under their statute, it follows that the provision of the 120th section of the Lands Clauses Act had taken effect, and that the pursuers were not in a position to sell it or to give a title to the purchasers. The notice under which the ground was ultimately taken, and the only notice ever given in regard to a portion of it, is dated 7th August 1866, several months after the expiry of the period for selling, as it was extended by the Act of 1863. If this had been the only notice served in regard to any portion of the ground, the Lord Ordinary would not have thought the case attended with any doubt. But before the expiry of the period for selling, several prior notices were served in regard to different portions of the ground. The last of these, dated 30th April 1866, included all the portions as to which notice had previously been given, and also additional ground, the whole being described as delineated on a plan, and containing in whole 1907 square yards. It appears from a letter of the same date by the agent for the Union Company that it was believed and intended that this notice included the whole of the property of which the company had previously given notice of their intention to take certain portions. This was done with reference to an intimation received from the agent for the pursuers, that his instructions were to require the Union Company to purchase the whole property. The pursuers were by statute entitled to make this requisition, and if the Union Company did not agree to take the whole, they might refuse to sell them any part of the property. It turned out that the Union Company were mistaken as to the boundaries of the property, which was of greater extent than they supposed, and in consequence they served their final notice on 7th August 1866 for the entire property, containing 2563 square yards.

"The Lord Ordinary thinks it is a question not free from difficulty, whether the notice of 30th April may not be held to have constituted a sale of the portion of ground embraced in it. In the case of the *Edinburgh and Glasgow Railway Company* v. *Monklands Railway Company*, 12 D. 1304, it was held that such notice was an exercise of the company's compulsory powers of taking land within the period prescribed by their Act. Lord Moncreiff said in that case, 'I think that the notice constitutes the taking of the lands, and the contract between the parties, and what follows after it is merely the necessary adjustment of the rights of parties under that contract.' The terms of the 120th section of the Lands Clauses Act are, however, very stringent, in so far as they require that the company shall 'absolutely sell and dispose of' all such superfluous lands within the prescribed period. From the following clauses, as to offering the lands first to the adjoining owners, it would appear that this may imply the completion of a sale within the prescribed period, after procedure necessarily extending over a considerable period of time.

"No such question, however, can be decided in the present case, in which the pursuers conclude for payment of the price of the entire property, as it has been fixed by arbitration in regard to the whole as one undivided subject. There is no means of apportioning the price between the part of the property contained in the notice of 30th April and the remainder included in the subsequent notice. Neither can the pursuers require the purchasers to pay for a portion of the ground while they do not get a title to the whole subject purchased.

"The pursuers contend that the offer of 30th April must be held to have included the whole property, whatever its extent might prove to be. Looking to the very material difference in point of extent, and to the precision necessary to give statutory effect to such a notice, the Lord Ordinary is unable to adopt this view.

"On the whole, he is reluctantly led to the conclusion that the pleas of the defenders are well founded. But he has thought it right, before pronouncing a final judgment, to give the pursuers the opportunity of bringing forward the adjoining proprietors, if they can make an arrangement with them."

The pursuers reclaimed.

SOLICITOR-GENERAL, SHAND and JOHNSTONE for them.

CLARK and LANCASTER for Union Railway.

WATSON and BALFOUR for South Western Railway.

The Court altered. They did not enter upon the question whether or not these lands were superfluous, holding that the notice and correspondence between the companies were sufficient—and, in short, that a valid contract of sale of the said lands had been concluded before the period allowed for the sale of superfluous lands had expired.

(SECOND ACTION.)

This was an action between the same parties, concluding for the price of certain lands, some of which were alleged by the defenders to be superfluous, and some of which were not so. With regard to the latter, the defenders had consigned the price in terms of an interlocutor of the Lord Ordinary. The Court held that the defenders were in safety to make payment of the price to the pursuers, and they therefore decerned for payment, and granted warrant to the defenders to uplift the consigned money for that purpose; dismissing at the same time, as unnecessary, a petition of the pursuers for authority to uplift the same. With regard to the lands alleged to be superfluous in terms of section 120 of the Lands Clauses Act, and to be therefore vested in the neighbouring proprietors, the Court desired a rehearing by one counsel on each side; and Lord Benholme directed the particular attention of counsel to the following points:—

1. Who are the "neighbouring proprietors" in the case of the land in question? In particular, can a public street be a "neighbouring proprietor" to the effect of acquiring lands by forfeiture?

2. Does the fact that these lands were originally taken from Sir John Maxwell, by agreement, and not under the compulsory powers of the Act, make any difference in the application of the statutory forfeiture?

3. With regard to the contention of the pursuers, that their Act of August 1866 must be held to have a retrospective effect, so as to draw back to the Act expiring in May 1866, the Court wished to know whether there were any other Caledonian Acts to which the Act of August 1866 might apply, without giving it any such retrospective effect?

At advising—

LORD COWAN—The sum concluded for in this action is the price of certain lands alleged by the pursuers, the Caledonian Company, to have been

effectually sold to the defenders, the Union Company. These lands were originally acquired for the purposes of the Caledonian Railway, but, not having been used for those purposes, were included in the Union Railway Company's scheme, and entered in their book of reference and relative plans under their Act of 1864 as belonging to the pursuers. Accordingly, certain notices were sent relative thereto, the effect of which is for consideration. A contract of sale was understood to have been thereby completed between the two Companies; and the price of the lands so taken having been submitted to arbitration, was, by decreet arbitral dated 6th June 1868, fixed at the amount set forth in the summons.

The defence stated to the action is in substance that no valid disposition of the subjects sold can be granted by the pursuers, in as much as before the contract of sale can be held to have been concluded, they had lost all right and title to the lands *vi statuti*, and hence that the vice thus inherent to the title of the sellers debars them from insisting on implement of the contract from the defenders as purchasers. Assuming the existence of a fatal blot of this character in the sellers' title, I am far from thinking that the purchasers can be held to be debarred from resisting implement of the contract, unless they have expressly, in the knowledge of the objection, consented to waive it. Certain objections there are, and defects more or less material, against which sufficient protection to the purchaser may be afforded by the absolute warrandice. It is different when the defect is fundamental, striking at the very root of the seller's right and title to the subjects sold.

The Lord Ordinary, who has given effect to the objection, finds by the interlocutor under review (1) that the lands were superfluous lands subject to the provisions contained in section 120 of the Lands Clauses Act, in reference to such lands, and the period within which they can alone be effectually sold; (2) that this period, as applicable in the present question, was 11th May 1866; (3) "that the statutory notice under which the said lands were taken by the defenders is dated the 7th day of August 1866, and that the foresaid notice was served upon the pursuers after the period limited for selling and disposing the said lands had expired"; and (4) that in these circumstances the pursuers were not *in titulo* to give to the purchasers a valid and sufficient title, and to demand payment of the price of the lands.

That a notice, duly served and not afterwards departed from, will be an effective sale of the lands, is not disputed by the parties, and is expressly set forth by the Lord Ordinary in the note to his interlocutor. Taking this proposition as certain, it does not admit of serious doubt that such a sale within the period limited for the disposal of the superfluous lands will satisfy the requirement of the statute. The enactment is that within the prescribed period the "promoters of the undertaking shall absolutely sell and dispose of" superfluous lands, and apply the purchase money to the purposes of the special Act. This cannot be held, on any reasonable construction, to imply that if a sale has been effected and been irrevocably fixed as matter of contract within the period, this will not be enough to satisfy the statutory words. It cannot be held that the completed personal contract must be followed up by the execution of the necessary deeds, and the completion of the real right of the purchaser before the lapse of the period. Farther, there may be many communings between the parties of a subsequent date to clear the title of the sellers, or to bring out the precise subjects in measurement, extent, or otherwise. The completion of the real title of the purchasers may thus be delayed; but such delay, I apprehend, cannot be held to touch the effectiveness of the personal contract to sell the subjects, entered into while the statutory period was yet current for their disposal.

Keeping this in view, it is for enquiry whether the notice under which the lands were taken truly was that dated 7th August 1866 as found by the Lord Ordinary, or whether the lands were not effectually acquired by the Union Company under notices of date prior to 11th May 1866, and relative negotiations, or while the statutory period for the sale of superfluous lands is stated to have expired. Assuming the affirmative as contended for by the pursuers, there will be no necessity for considering the ulterior questions to which the argument was directed, viz., whether the lands taken under the notice truly were superfluous lands in the sense of the 120th section of the statute, and whether the Act which passed on 6th August 1866 can be held to have extended the period for selling beyond the 11th May 1866, and for five years from the date of the later Act.

The lands which it was the object of the defenders to acquire under their Parliamentary powers are distinguished in the book of reference by the numbers 113, 114, 115, and 116. The property is described as follows:—No. 113—"Foundry-yard, brick-shed, and pattern-house." No. 114—"Foundry-yard and buildings." No. 115—"Dwelling-house, passage, washing-house, and coal-cellar." No. 116—"Bleaching-green and garden."

The first notice, dated 2d September 1865, refers to portions of these subjects as required to be taken in conformity with the delineation on a map or plan sent with the notice—the extent being stated to be 550 square yards or thereby.

Again, on 19th September 1865, another notice was served, describing the lands to be taken as including No. 111 as well as the other numbers, and the extent was now stated to be 715 square yards or thereby; and in the letter of same date, which accompanied the notice, the agents of the pursuers were requested to hold the previous notice as withdrawn.

And on 11th October a third notice,—intended, as I understand it, for additional ground, or portions of the same numbers, said to extend to 380 yards or thereby,—was given by the defenders. On 12th October 1865 the original notice of September was by the agents of the pursuers held to be withdrawn.

At this stage of the negotiations there occurred a correspondence between the agents of the two parties having an important bearing on the matter under consideration. By section 90 of the Lands Clauses Act it is enacted, "That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." On 1st February 1866, referring to the notices given by the defenders, their agents requested to be informed "whether it is the intention of the Caledonian Company to claim that the Union Company should take the whole of their ground in that quarter" (in Cumberland and Main Street), "or whether they are to treat with us for

the actual portion required?" The answer, on 12th February 1866, was—"My instructions were to require the Union Company to purchase the whole property, the same being part of a going manufactory." This letter from the agent of the pursuers was acknowledged by the defenders' agents on the following day, and the claim of the pursuers for the whole property at the corner of Cumberland Street and Main Street was requested to be sent as early as convenient.

Supposing no farther communication to have taken place between the companies, the question arises, whether at this stage it is not to be held that the whole ground belonging to the pursuers, portions of which had been made the subject of notices, must not be held to have been conclusively sold to the defenders. The nature of the subjects was such as to bring them within the operation of the 90th section. The description of them, quoted from the book of reference, affords in itself proof of this. But the fact of the property being of this description was not and has never been disputed. Accordingly, it was on this understanding that the request was made by the defenders, whether the pursuers insisted that the whole of the subjects should be taken, and not portions merely, as specified in the notices? The parties were thus clearly at one as to the sale being of the whole ground. This being so, I do not know in what other way the right of the one party to take compulsorily lands which they required for the purposes of their Act, and the right of the other to insist that they should take the whole lands, and not portions merely, could have been exercised, than by the interchange of these letters or missives, as they may be called, between agents having authority to act for their respective clients. I cannot see any legitimate ground on which an action for implement, as of a completed sale, at the instance of the Union Company, could have been resisted by the Caledonian Company as for the whole of their ground at the corner of Cumberland and Main Streets.

Taking this to be the true view of the state of matters so far as the negotiations had advanced, it has to be considered whether any thing occurred subsequent to February and March 1866 which interposes any obstacle to the transaction being settled on the footing of a completed sale. No doubt, though concluded, it admitted of being passed from by both parties, but certainly it could not be set aside by one of them without the consent of the other. It will be seen from their subsequent communications that nothing of the kind occurred, and that the true view of what did take place was to clear away ambiguities, and to make more simple the settlement of the transaction, on the footing of a completed sale concluded of anterior date.

Thus, on 30th April the defenders' agents write that their clients were prepared to acquire the whole of the property for a portion of which notice was served on 12th Oct. 1865, but that it was thought convenient "that a fresh notice be served including the whole of that property, and the former notice withdrawn." A new notice and plan embracing the whole was sent of the same date, viz., 30th April 1866, in which the extent of the ground was stated to be 1907 yards or thereby. Some further letters passed between the agents, in the course of which it was stated that the extent of the whole property of the Company was not 1907 yards only, but 2563 yards; and this led to the last of the notices sent by the defenders to the pursuers, of date 7th August 1866, referred to in the interlocutor. The steps thus resorted to by the defenders were not taken with the view to the purchase of a single foot of ground beyond what they had previously acquired. The whole property had been sold already to them. What then was the purpose and what the effect of this last notice?—merely to prevent confusion, as the defenders expressed it, and make the settlement of the price, and the adjustment of the title, more convenient. There was no consent on the part of the agent for the Caledonian Company to hold the previous notices of 19th September, or 11th October, or 30th April—all of which was served in good time—withdrawn as proposed by the defenders' agent. On the contrary, the agent of the pursuers, in holding the last notice as served, expressly stated that he did not see how he could hold the previous notices withdrawn, of which there had not been less than five sent relative to the property—the more so as, in consequence of the previous notices, the tenants of the subjects had been removed from the premises, and a variety of other procedure taken. The whole of the letter of 18th August 1866 is on this subject all important, when read in connection with the previous letters of 1st and 12th February relative to the non-letting of the property.

"Having regard to the communications between the parties as now explained, it is impossible for me to hold that the lands in question were taken under the notice of date 7th August 1866. It might be well enough to follow up what had been previously done by a notice of that kind for convenience sake, and to prevent confusion. But it will not do for the Union Company now to contend that the notice of that date is to be regarded as having alone effected the sale of the lands. The previous notices stood entire with the exception of the first notice in September 1865, and possibly of the second notice in that month, held to be withdrawn on the service of the subsequent notices. But the essential matter is that the agreement engrafted on these notices, and concluded between the parties in conformity with the statutory right conferred on the one party, and the obligation imposed on the other, never was recalled. The whole subjects were included within that statutory right and obligation. There was, therefore, in my opinion, a sale of the lands in question effected between the parties prior to 11th May 1866. This effectually prevents the application of the 120th section of the Act, whether the lands are to be held superfluous or not in the sense of that section, and whether the statute of 7th August 1866 be effectual to continue the period beyond 11th May 1866 or not.

On the ground now stated, I think the interlocutor of the Lord Ordinary should be recalled, and decree pronounced in terms of the conclusions of the summons.

Lord Benholme and Lord Neaves concurred.

Lord Justice-Clerk declined.

Agents for the Caledonian Railway Company—Hope & Mackay, W.S.

Agents for the City of Glasgow Union Railway Company—Murray, Beith, & Murray, W.S.

Agents for the Glasgow and South-Western Company—Gibson-Craig, Dalziel, & Brodies, W.S