doubt in the case. I have consequently given very great attention to the evidence, and particularly to the correspondence.

I should like to reserve my opinion as to how far English authority may be referred to in the matter of collusion. I quite understand that the law of divorce in England and in Scotland has been and is quite different. But I have felt in reading the English decisions that, however different that law may be from ours, there is much that is valuable to be found in the explanations and expressions of the English judges when dealing with this subject.

I was on reading the Lord Ordinary's judgment struck with what he says—"It is one thing to stay the hand of the Court in the public interest, so as to secure that the marriage tie shall not be dissolved, in proceedings conducted under conditions which tend to prevent a full disclosure of the truth. It is, I think, a different case where, as here, one of the spouses seeks to set aside a decree of divorce." Having regard to this fact I cannot yet make up my mind, although I have studied the evidence on that point, as to whether the real initial motive in the husband's mind in raising this divorce was to obtain freedom from his wife or freedom from his marriage-contract. I cannot help regarding the divorce proceedings from the beginning with suspicion, and I am prepared to say that, had I been sitting as a Judge of first instance in the divorce proceedings themselves, and had I known then what I know now, I think I should have refused divorce. But then it is a different question whether we are to upset a divorce which has already been granted, and I agree with your Lordship in thinking that this lady has by no means substantiated her case for reduction with such evidence as we can accept as satisfactory, far less as sufficient. I think, after more than one perusal of her correspondence, that Mr M'Cann sums her up in two lines of his evidence—"She is a most peculiar person. She is very difficult to dispose of;" and I think no one can read her correspondence without seeing that she has a distorted and constantly fluctuating view of life in all its relations and circumstances. I do not think her evidence is to be regarded as representing truly what happened at any definite time, for to me her mind shifts and shifts like a kaleidoscope at every turn, however slight, and without her evidence she has no case.

I therefore entirely agree with the judgment which your Lordship proposes.

LORD SALVESEN was sitting in the Second Division.

The Court adhered to the interlocutor of Lord Cullen dated 7th December 1909, refused the reclaiming note, and decerned.

Counsel for the Pursuer and Reclaimer—Morison, K.C.—W. T. Watson. Agent—George Scott, S.S.C.

Counsel for the Defenders and Respondents—M'Lennan, K.C.—Lippe. Agents—L. & J. M'Laren, W.S.

Saturday, November 12.

FIRST DIVISION.

[Lord Guthrie, Ordinary.

FRASER (FRASER'S TRUSTEE) AND OTHERS *v.* THE CALEDONIAN RAILWAY COMPANY.

Superior and Vassal—Railway—Statutory Title—Compensation to Superior for Loss of Casualties—Date at which Compensation Falls to be Assessed—Interest—Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. c.* 19), *secs* 80, 107–111, *and* 126.

In 1846 a railway company acquired certain lands by compulsory purchase under the Lands Clauses Act 1845. The proprietor having refused to grant a conveyance, the company in 1847 deposited the compensation found due and took possession. On the proprietor's death in 1874 the company obtained from his heir a conveyance in statutory form, which they recorded in 1875. In 1903 the superiors brought an action against the company for compensation for loss of casualties.

Held (1) that the execution of the statutory title in 1875 destroyed the superior's rights of superiority in the lands taken, giving to him as from that date a right to compensation therefor—a right which was not barred by the promoters having in the meantime obtained access to the land—and (2) that the pursuers were entitled to interest on such compensation from 1903, the date when their demand was made.

Dissenting Lord Johnston, who was of opinion that the recording of the statutory title did not affect the obligation on the company to pay the feudal charges, and that these (so far as not prescribed) subsisted till they had been redeemed, and that accordingly the pursuers were entitled to recover (*a*) such charges down to the date of their redemption, and (*b*) compensation for their loss, with interest on such compensation from 1903, the date when the company were called on to redeem.

On 8th December 1908 Major Francis Fraser of Tornaveen, Aberdeenshire, sole surviving trustee under the antenuptial contract of marriage between the late Mr and Mrs Fraser of Tornaveen, and others, brought an action against the Caledonian Railway Company for payment of (1) the sum of £885, with interest thereon at 5 per cent. from 14th December 1875, or otherwise from 25th February 1903, and (2) the sum of £307 odd.

In 1846 the defenders, in virtue of the powers contained in the Act 8 and 9 Vict. c. clxii, entituled "An Act for making a railway from Carlisle to Edinburgh and Glasgow and the North of Scotland, to be called the Caledonian Railway," took compulsorily from N. D. Laurie of Lauriston, then proprietor of the lands of Orchardfield, in the county of Edinburgh, a por-

tion of that estate. In 1847 the defenders, in virtue of another of their Acts, viz., the Caledonian Railway (Edinburgh Station and Branches) Act 1847" (10 and 11 Vict. c. ccxxxvii), compulsorily acquired from him an additional portion of that estate. Both of these Acts incorporated the Lands Clauses Consolidation (Scotland) Act 1845. Mr Laurie having refused to grant a conveyance of the ground taken, the compensation payable therefor was duly consigned in bank. At the time the defenders acquired the ground they made up no title thereto, nor did they pay to the then superior of the lands any compensation for loss of casualties. After Mr Laurie's death his heir-at-law granted a conveyance of both portions of ground to the defenders. The conveyance, which was dated 25th and 28th October 1875, and which was in the form prescribed by section 80 of the Lands Clauses Consolidation (Scotland) Act 1845, was duly recorded in the Register of Sasines on 14th December 1875. The superiors made no formal demand upon the defenders for compensation for loss of casualties till 25th February 1903. In 1907 the compensation payable to the superiors therefor was valued by an arbiter nominated by both parties as at three different dates, viz., 1846-47, when possession was taken, 1875 when the statutory title was recorded, and 1903, when the demand for compensation was first made. On the assumption that the claim fell to be valued as in 1846 the compensation was assessed at £381, and on the assumption that the valuation should be made as at either of the other alternative dates the sum payable was fixed at £885. The defenders were found liable in the expenses of the arbitration, these being afterwards taxed at £307 odd, the sum second concluded for. The pursuers in the present action were the representatives of the superiors in 1875 and 1903.

They averred—"(Cond. 4) . . . Up to the date of their obtaining and registering said conveyance the defenders had no title to said portions of ground, but on their registering said conveyance they obtained a good and undoubted right and complete and valid feudal title thereto in all time coming in terms of said section 80. On their registering said conveyance the defenders took or otherwise destroyed the superiority of said portions of ground which until said date continued unaffected in the persons of the superiors thereof. The defenders, however, did not pay compensation to the superiors for their said estate of superiority. Under the titles on which Mr Laurie held, *inter alia*, said portion of ground the feu-duty was nominal, the proportion effeiring to said portions being only tenpence, and the entry of singular successors was untaxed. With reference to the statement in answer, it is admitted that said payment was made to the superiors of Orchardfield. Explained that said payment was made under error in law, in respect that at the date when said payment was made the relationship of superior and vassal did not exist between the parties in consequence of the extinction of the estate of superiority. (Ans. 4) The said conveyance is referred to. Admitted that the defenders did not pay compensation to the superiors for their said estate of superiority. *Quoad ultra* denied. Explained that on 3rd October 1877 the defenders paid to the superiors the sum of £500 in settlement of a composition then claimed in consequence of the death of Mr Laurie in 1874."

The defenders further averred—"Explained that the sum payable as compensation falls in terms of the statutes to be ascertained and valued as at the date of the acquisition of the said portions of land, viz., 31st August 1846, or alternatively as at the date of the pursuer's first demand for compensation, viz., 25th February 1903. Explained further that the said award was made under reservation of and without prejudice to the parties' rights and pleas in respect of the interest recoverable upon the sums fixed in the said alternative findings. In the event of it being held that the sum payable as compensation falls to be ascertained as at 1846 or as at 1875 the defenders aver and maintain that no interest is due on said sum, or at least that, in respect of the pursuers' delay in making their claim, interest should be restricted to 3 per cent. In any event, the defenders are entitled to credit for the sum of £500 paid in 1877 as aforesaid either in extinction *pro tanto* of the capital sum found payable, or alternatively in reduction of such interest, if any, as may be found payable on said sum."

The pursuers pleaded, *inter alia*—"(1) The defenders having by completing a statutory title thereto on 14th December 1875 taken or otherwise destroyed the superiority of the two portions of ground, parts of the lands of Orchardfield taken compulsorily by them as aforesaid, are bound to pay full compensation therefor, and the pursuers as being in right of said compensation are entitled to decree for the amount thereof fixed by arbitration with interest at 5 per cent. from the date of said acquisition. (2) Alternatively the pursuers are entitled to decree for the amount of said compensation, with interest at 5 per cent. as from 25th February 1903, when the defenders were formally called on to pay compensation for the loss of casualties. (3) The payment of £500 having been made under error in law cannot in any event be pleaded as a set-off to the pursuer's claim."

The defenders, *inter alia*, pleaded—"(6) The compensation payable by the defenders falling to be valued and assessed as at the dates of the acquisition of the said lands, the action should be dismissed. (7) In any event, the said sum of £500 paid on 3rd October 1877 falls to be deducted from the sum assessed as payable by the defenders in respect of said claim for compensation."

On 12th August 1909 the Lord Ordinary (GUTHRIE) pronounced the following interlocutor:—"Decerns and ordains the defenders, under the first petitory conclusion of the summons, to make payment to the

pursuers of the sum of £885, with interest thereon at the rate of 5 per cent. per annum from 14th December 1875 until payment, under deduction of the sum of £500 paid by the defenders to pursuers on 3rd October 1877, and which sum of £500, with interest thereon at 5 per cent. per annum from said 3rd October 1877, the defenders are entitled to set off against the foresaid sum of £885 and interest; and further, decerns and ordains the defenders to make payment to the pursuers of the sum of £307, 6s. 1d., in terms of the second petitory conclusion of the summons."

Opinion.—"The pursuers' claim against the defenders for loss of casualties was valued by an arbiter as at three alternative dates—1846-47, when the contract of purchase by the defenders from the pursuers' predecessors was completed and possession taken; 1875, when a statutory title was given by the pursuers and recorded by the defenders; and 1903, when the pursuers first demanded compensation for loss of casualties. If compensation falls to be assessed as in 1846-47, then prescription admittedly applies, and even if it does not, the pursuers do not represent, and have no assignation from, the then proprietors. No argument was submitted to justify 1903, so that the pursuers can only succeed if 1875 be the proper date. Their right to claim in that event is admitted in answer 5.

"1. *Date at which Compensation for Loss of Casualties falls to be assessed.*—This question depends on when the pursuers' estate of superiority was extinguished, and must be solved by a construction of sections 80, 107, 108, 109, 110, and 126 of the Lands Clauses Consolidation (Scotland) Act 1845. The pursuers say that their estate of superiority remained unextinguished till the statutory conveyance was recorded; while the defenders allege that it was extinguished either on 31st August 1846, when notice completed the contract of purchase, or at least on 6th March 1847, when possession was taken.

"I am of opinion that the pursuers are right, and that 1875 is the proper date. Although a completed purchase took place on service of the notice, the question remained open, as between the proprietor and the Railway Company, whether this would involve destruction of the superior's right to casualties. Had these two subsequently resolved to cancel the purchase, the superior could not have objected, and his right to casualties would have remained unaffected. Equally, while under section 80 either proprietor or company could have insisted on a statutory title, it was open to them by agreement to have executed and accepted an ordinary feudal title completed by recorded sasine, which would have left the superior's position untouched. After service of notice the proprietor could have conveyed to another, and on registration would have given a feudal right preferable to that of the Railway Company, voidable only, even after possession, if the third party were in bad faith to found on his title. In these circumstances I do not see how, unless the contrary appears in the statute, the superior's rights could be affected by any proceeding prior to the recording of the statutory title, to which he was no party, and with which he had no right to interfere. I do not think the sections founded on by the defenders justify the conclusions drawn from them. Section 126 shows that it was anticipated that compensation for casualties would be paid before entering upon the lands, because it was anticipated that a statutory title would be executed and recorded before taking possession. But if this has not been done, and the question remains open whether the casualties will ever be extinguished, it does not follow, either from the letter or the spirit of the Act, that compensation is to be ascertained as at a date anterior to the recording of the instrument, which for the first time affects the superior's rights. The cases of *Magistrates of Elgin* v. *Highland Railway Company*, 11 R. 950; *Magistrates of Inverness* v. *Highland Railway Company*, 20 R. 551; and *Magistrates of Inverness* v. *Highland Railway Company*, 46 S.L.R. 676, do not seem to me to touch the question raised in this case. These cases decide that compensation for loss of casualties is not excluded from failure to claim it before possession is allowed to be taken; but they do not deal with the question of the date at which compensation is to be assessed, whether at the date of the notice, or at the date of taking possession, or at the date of recording the statutory title, or at the date of making the claim.

"2. *Interest.*—Although not a condition-precedent, it was the defenders' duty to pay compensation for extinguished casualties before taking possession of the ground, the acquisition of which by them was not intimated to the superior. The ground has been a profit-earning subject in their hands, and I see no sufficient reason why interest should not be allowed, or why the rate of interest should be less than 5 per cent.

"3. *Defenders' Claim to set off £500 paid by them on 3rd October* 1877.—This sum was paid to the pursuers in settlement of a composition claimed by them in consequence of the death of Nathaniel Donaldson Lawrie, of whom the ground had been acquired by notice in 1846. The pursuers plead that this sum, having been paid to them under error in law, cannot be set off by the defenders. I think I am not precluded from refusing effect to so grossly inequitable a plea. The money was claimed by the pursuers. They were not entitled to it, and they cannot found on their own mistake as to the footing on which payment fell to be made. It would be against 'good conscience' to hold otherwise—*Dixons* v. *Monkland Coal Company*, 5 W. & S. 445. On this sum, which I hold must be set off, interest will run at 5 per cent. . . ."

The defenders reclaimed, and argued—The superior's claim arose in 1846, on the company's entry to the lands, and he ought to have made it then. The taking of the land put an end to the feudal relation, and

that being so he had no title to sue—*Magistrates of Elgin* v. *Highland Railway Company*, June 20, 1884, 11 R. 950, 21 S.L.R. 640; *Magistrates of Inverness* v. *Highland Railway Company*, March 16, 1893, 20 R. 551, 30 S.L.R. 502; *Magistrates of Inverness* v. *Highland Railway Company*, March 19, 1909 S.C. 943, 46 S.L.R. 676. The only claim he had was for compensation, and he could have enforced it by preventing entry on the land (section 126). If, however, as here, he had neglected to enforce it, his claim was gone. A superior was clearly not entitled to lie bye for many years and then make a claim, for the *data* necessary to fix it might have entirely changed. The logical inference therefore was that it arose at or prior to the company taking possession. It was the intention of the Act to put an end to burdens affecting the land taken, subject of course to compensation. So much so was this the case that the only parties entitled to notice were the owners of the land to be taken—*Clark* v. *School Board for London* (1874), L.R., 9 Ch. App. 120; *Macey* v. *The Metropolitan Board of Works* (1864), 33 L.J. Ch. 377. The date of recording the title could not be the date of compensation, for that would infer that the superiority existed after the land had been taken, which was inconsistent with the provisions of the statute. Further, the omitted interest clauses (117, 118) fixed the compensation as at the date when the interest was destroyed, and that was when the land or interest was taken.

Argued for respondents—The question really came to this—When did the company acquire a "complete and feudal title?" It could not be the service of the notice or the entry on the land, for neither affected the superior's right to the land. His right to it was not affected till the company recorded their title and deprived him thereby of his vassal in the land. The company, moreover, were bound to complete a title—*Alexander* v. *Bridge of Allan Water Company*, February 4, 1868, 6 Macph. 324, 5 S.L.R. 227. Till the vassal's assignee claimed to enter in his own right by recording his title the superior was not affected. That being so, his right to compensation did not arise till the assignee recorded his title. If the assignee refused to pay compensation the superior could interdict him using the lands, for he was given his statutory right subject to payment of compensation. The *Elgin* case relied on by the reclaimers was distinguishable, for that case was decided on the hypothesis that a title had been recorded. The Lord Ordinary therefore was right.

At advising—

LORD JOHNSTON—The pursuers are now the superiors of an area of ground, part of which the Caledonian Railway Company took in connection with their Princes Street Station in Edinburgh.

The Railway Company served their notice on the proprietor of the property in the year 1846, and entered into possession in 1847. The proprietor refused to convey, so they deposited the amount of compensation awarded and awaited until his death in 1874, when they obtained from his heir a conveyance in statutory form, which was recorded in the year 1875. The pursuers made no claim for compensation in respect of their superiority until 1903.

The question at issue is whether their claim of compensation has prescribed, and if it has not, as at what date it is to be calculated and paid? This depends upon whether the superior's rights were brought to an end and resolved into a mere personal claim for money compensation in 1846/47, or in 1875, or even later in 1903.

This being the question at issue, it is to be determined on a consideration of the enactments of the Lands Clauses Consolidation (Scotland) Act of 1845, which provides for the acquisition of lands for the purposes of undertakings authorised by local and personal Acts, which incorporate it. It thus provides for purchase by agreement, for compulsory purchase and ascertainment of compensation, for payment, and for the transfer of title.

The phraseology of the Act is not entirely uniform or consistent. But a general consideration of its provisions has satisfied me that, not only where it speaks of the "owners" of any land to be acquired, but also where it speaks in various phrase of parties having any right or interest in such lands, it confines its attention to the owner in the popular sense, or in legal terms to the proprietor of the *dominium utile*, and to those whose rights or interests are carved out of his, to the exclusion of the encumbrancer, and still more particularly of the feudal superior, the latter of whose rights are not considered as rights or interests in such lands but as something separate. Hence no notice to take is required to be served on the superior. He cannot, I think, though opinions have been incidentally expressed to the contrary, prevent possession being taken without first compensating him; and he may remain uncompensated without the promoters of the undertaking being restricted in subsequently dealing with him by the terms of section 117, which empowers them to purchase omitted interests in lands only where the omission to acquire has arisen from mistake or inadvertency.

But under the general heading of lands subject to rent charges, &c., which prefaces section 107 and following sections, special provision is made for dealing with the interests, *inter alios*, of the superior, and it is clear that in the minds of the draughtsmen of the statute, who were adapting the corresponding English Act to Scotland, there was no very intelligent distinction between the feu-duties and casualties of the superior and English rent charges. The preamble to this fasciculus of clauses is general, and applies without distinction to any lands which shall (confining attention to that part of it which is directly pertinent to the present question) be charged with any feu-duty and casualty of superiority. I do not think it is necessary to canvas the meaning of the word "charged." I think it is intended to cover

all the patrimonial or beneficial incidents of the estate of superiority. If, then, these clauses apply to any lands charged with feu-duties and casualties of superiority, it follows that they are really applicable to every parcel of lands in the kingdom of Scotland, for every such parcel is held on feudal tenure, and is capable of being acquired under compulsory powers by virtue of a special Act and this Act. The statute then proceeds to enact as follows (section 107)—It shall be lawful for the promoters to enter upon and continue in possession of such lands without redeeming the charges thereof, that is, the dues of the superior, provided (1) they pay the amount of such recurring payment when due, that is, the feu-duty; and provided (2) they otherwise fulfil all obligations accordingly, that is, meet any casualty of superiority, and comply with any other conditions of the tenure; and provided (3) they be now called upon by the party entitled to the charge, that is, the superior, to redeem. Now this applies, as I have said, to all lands. And in some, though I should think the minority of cases, the promoters take the whole lands held under one progress of titles. In the great majority of cases a part only of such lands is taken, leaving with the owner the balance of the lands held under such progress of titles. Accordingly section 108 provides for the ascertainment of the consideration to be paid for the discharge of such lands from the dues of superiority, or—and I call particular attention to the following words—"from the portion thereof affecting the lands required for the purposes of the special Act." Now that a portion thereof only should affect the lands taken it is necessary that the taking should be of a portion only of the lands held under any title. This appears to me to make it abundantly clear that the previous section is not confined to the case of a taking in whole, but applies also to a taking in part, and on this point I am unable to follow the reasoning of the late Lord President Inglis in the *Magistrates of Elgin*, 11 R., at p. 959. There could have been no suggestion even to the contrary had section 109 preceded, as it perfectly well might have done, section 108. It was then seen that special provision required to be made for the case where part only of the lands charged with such dues of superiority required to be taken. And consequently provision is made (section 109) for the apportionment of such charge between the lands taken and the lands left in the hands of the owner, to which apportionment the superior, the owner of the lands, and the promoters are all necessarily parties. But then there follow the important provisions of section 110, viz., upon payment or tender of the compensation agreed on or ascertained to the superior he is required to execute to the promoters of the undertaking a discharge, and if he fails to do so, or to adduce a good title to the superiority, the promoters may deposit the amount of the compensation in bank, and may also expede a notarial instrument and register the same, all in manner before provided in the case of the purchase of lands, *mutatis mutandis*, and thereupon the feu-duty and casualties of superiority, "or" (and I again accentuate these words) "the portion thereof in respect whereof the compensation shall so have been paid, shall cease and be extinguished." I do not enter on the details of section 111, except to say that, consistently with the sections already noticed, where part only of lands is taken, they carefully provide for the maintenance of the legal relations between the superior and his vassal in the remainder of the lands held under the same progress of titles. These sections, then, sections 107 to 111, comprise a complete scheme for the redemption and discharge on compensation of the superior's interests, equally and indiscriminately applicable whether the whole or part only of the superiority subjects are taken.

I must now advert for a moment to two earlier sections of the statute, viz., sections 74 and 80, in order to contrast them and their purpose and effect with section 110 and its purposes and effect.

Assuming lands purchased or taken under compulsory powers, and compensation agreed on or awarded, how is conveyance to be made and title completed? Section 74 says that the owner of such lands shall duly convey to the promoters, or as they shall direct; and section 80, by reference to Schedules A and B, defines the form of statutory conveyance, and declares that such conveyances being duly executed and being registered, "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." Turning back to section 74, the case of the owner failing to convey is met by empowering the promoters to expede a notarial instrument reciting certain matters specified, and to register it; "and such instrument being registered in the Register of Sasines in manner hereinafter" (*i.e.*, by section 80) "provided in regard to conveyances of lands, shall have the same effect as a conveyance so registered."

Notwithstanding that it is said (section 80) that either of these courses shall confer a complete and valid feudal title, it is manifest that it does nothing of the kind. It creates an unassailable statutory title no doubt, nominally in the promoters, but really in a statutory corporation assumed to have perpetual existence, but that title is independent of feudal tenure, and establishes no relation whatever between the promoters or the company and the superior.

Sections 107 to 111 are then the complement of sections 74 and 80. The feudal tenure and the feudal relation in its bearing on title being gone, the beneficial interest of the superior had to be provided for. It would have been forfeited on the letter of sections 74 and 80 without some further provision. Accordingly these sections 107 *et seq.* provide for the situation created

by destruction of the feudal tenure, accompanied by the acquisition of the vassal's whole right and interest, and by entry into possession. What they do is to keep up *ad interim* the feudal prestations, not as a feudal claim enforceable by feudal remedies, but as a personal debt. The promoter's right of possession and continued possession is conditional on the payment of the current dues of superiority. The superior has in my opinion two remedies for non-payment after possession taken. First, if possession is taken and kept under such condition I can have no doubt that an ordinary action would lie for enforcement of that condition, *i.e.*, for payment of what is past due; and second, he has given him the right to end this interim situation, which *ex hypothesi* is an unsatisfactory condition of affairs, by calling on the promoters or the company to redeem, the initiative in redemption being always open to the promoters as well as to the superior. A little confusion was introduced into the argument by dwelling on the term redemption as if it was in contrast to compensation. It is not so. It is the same thing from a different point of view—the redemption of section 107 becomes the consideration to be paid for the discharge of the lands from the charge in question of section 108, and the compensation agreed on or determined payable to the party entitled to such charge of section 110.

Accordingly these sections 107 *et seq.*, the feudal tenure having already been destroyed, provide for discharge on compensation of the feudal charges or superiority dues. And how is this effected as matter of title? That is provided for by section 110, on the same lines as were adopted in making title to the *dominium utile*, viz., by the execution voluntarily of a discharge, or in default the expeding of a notarial instrument and registering the discharge or the instrument "in the manner hereinbefore provided in the case of the purchase of lands," whereupon the feu-duty, &c., "or the portion thereof in respect whereof such compensation shall so have been paid, shall cease and be extinguished."

I think I am justified, therefore, in saying that section 110 is the complement of sections 74 and 80; and although the statute bears evidence of having been a very inartistic if not careless adaptation of an English Act to a totally different system of law and tenure, still if a broad view be taken, what the Legislature intended can, I think, be seen and receive effect with some consistency. I have endeavoured to analyse the scheme, because I have thought it necessary as the foundation of this opinion, and because it is a necessary precedent to the consideration of an isolated section in a subsequent part of the Act which is supposed to create difficulty, and to need reconcilement with the provisions with which I have hitherto been dealing. But what these sections 107 *et seq.*, taken by themselves, provide is, I think, shortly and very clearly this, that there shall be no compulsitor upon the promoters to take the initiative in compensating and redeeming the dues of superiority in whole or in part as the case may be, and that so long as they hold off and do not do so, while the legal relation of superior and vassal is not constituted between them and the superior, by reason of the provisions of sections 74 and 80 for the transfer of title, which in my opinion makes the promoter's title when statutorily completed analogous to an English freehold title, as that title has subsisted since the abolition in England of feudal tenure, they are still bound until redemption to make payment of the dues and fulfil all the obligations of the vassal just as if that relation had been constituted. Accordingly I do not think that the fact of the promoters or the company making up a statutory title and vesting themselves with all the rights which that title confers, in any way affects the obligation imposed on them by section 107, and that whether they acquire in whole or in part. But they may offer to redeem, and they may be called upon to redeem, and whenever they pay or deposit the compensation, by registering either a voluntary or a notarial discharge, they *vi statuti* extinguish all further liability to the superior for such dues and obligations. The superiority both as a feudal relation and as a patrimonial interest is then wiped out.

I come then to the above-mentioned general section, the provisions of which have created difficulty before, and doubtless will again, and which have justly been described as ambiguous, and to some extent even unintelligible. I admit that it is ambiguous, and on the surface unintelligible, not made the less so that it contains a patent mistake either of draughtsman, transcriber, or printer. But, notwithstanding, I cannot strain it as I am asked by the defenders to do, to override the intelligible and consistent scheme of the statute, as I have endeavoured to unfold it. Section 126 is among a number of isolated general provisions, and it is obvious that it is intended not to affect the general scheme, which is complete in itself, but to supply something awanting, to provide for some special need or fancied need. What that need, or rather fancied need, was has I think been conclusively explained by the late Lord President Inglis, then Lord Justice-Clerk, in the *Monklands Railway* case (2 Macph. 519). I refer to his Lordship's exposition of the effect which the old freehold or superiority franchise had upon the development of railway legislation in this department. This freehold franchise was abolished in 1832, and the Act in question in the *Monkland* case was passed so soon thereafter as 1835. It was not therefore to be wondered at that clauses, hitherto considered necessary to preserve those voting superiorities, were thoughtlessly continued in a private Act only three years later in date than this abolition. But having been thus unreflectingly continued, and probably stereotyped in the period from 1832 to 1845, while it is

little to the credit of the Parliamentary draughtsman of the latter date, I accept with complete conviction the suggestion incidentally made by the same eminent Judge in the *Magistrates of Elgin* v. *Highland Railway* (11 R. 958) that the same piece of legislative history explains the first clause at anyrate of section 126, and renders it totally inapposite to anything in fact existing at the date (1845) of the statute. But if I accept this as the explanation of the first limb of the section I cannot stop there. I cannot divorce the second paragraph from the first, and hold that it was actuated by a different idea altogether, was intended to meet a different requirement, and to apply to a general and not to a special state of circumstances. I am the less able to do so that I think the source of the second branch of the clause is historically the same as that of the first; that it is connected as a rider with the first branch by the conjunction "but," which I cannot ignore, and that it is required to carry out to the full that idea, erroneous though it may have been, which I assume actuated the first branch. The section enacts "that the rights and titles to be granted in manner herein mentioned in and to any lands taken," &c., "shall in nowise affect or diminish the right of superiority in the same." Now that is wholly inconsistent, if taken literally and without explanation, with the provisions of sections 74 and 80 and of section 110, and with their effect. For it is impossible to deny that what has abrogated the tenure and extinguished the interest, whether the taking has been in whole or in part, has affected or diminished the right. But it is perfectly intelligible, though unnecessary futile and negligible, if one conceives in the mind of the draughtsman the idea that he had still to conserve the old freehold or superiority franchise, or that he swept in, which is more likely, an old stock clause which he found in prior use, without the slightest idea of its genesis, its use, and its obsolescence. The section then says, "which," *i.e.*, the right of superiority, "shall remain entire" in someone's person. And here follows a manifest blunder not very difficult to correct, for the right of superiority would not "*remain* entire" except where it formerly was, viz., in the person of the superior. Now why I say that what immediately follows is part of the same provision actuated by the same idea as what goes before is not merely that it is connected with the previous sentence by the conjunction "but," not merely that it carries on the same idea, but that it is a necessary complement of what has been already provided if my explanation of the first half of the provision is correct. It says "but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, the said company shall not be liable for any feu-duties or casualties to the superior thereof, nor shall the said company be bound to enter with the said superior." Assume a superiority such as I have suggested, this or something very similar in terms had always been considered necessary in the earlier statutes to provide for the case of the property being split by the company's taking.

The first part of section 126, then, is unintelligible as it stands, for it is absolutely impossible to contend that "titles to be granted in manner herein mentioned" can do other than affect or diminish the right of superiority in the same. This part of the clause must therefore be held either to override all that has gone before, in which case it upsets the whole scheme of the Act, or must be taken as *pro non scripto*, or must be explained away. I think the only feasible explanation is equivalent to taking it as *pro non scripto*. But if that is necessary I wholly fail to see how the second limb of the same connected sentence can be preserved and receive effect as if it were a separate and independent provision containing an absolute and general enactment. Nor am I aided in overcoming this difficulty by the consideration that, taken as an independent and general enactment of absolute application, it is inconsistent with a comprehensive and intelligible scheme already completely dealt with in the statute as a *unum quid*, and that it can only be given the effect claimed for it by ignoring the condition contained in the proviso which follows it. In truth, it contains in itself an indication that the origin I have suggested is correct. The final words "nor shall the said company be bound to enter with the said superior" have some sense if the object of the whole is the conservation of a superiority voting qualification, but they are unmeaning if not ridiculous as a tag to an Act which has already abolished, except by the choice of the promoters, the feudal relation, and provided for the completing of title without any entry with or other reference to the superior.

But though I have adopted the explanation of this section given by the late Lord President Inglis, the opinion I have formed does not depend on its acceptance. It is at least a feasible explanation. No other has been offered or attempt made to reconcile its inconsistencies. Whatever be the history of section 126, it is impossible to interpret it intelligibly as a whole with reference to the law as it stood in 1845, and the situation created by the scheme already completely set forth in a definite compartment of the statute. And it is, I think, equally impossible to take some lines of it and sever these from their context, and say, taken by themselves, they are capable of an intelligible meaning, and they must receive literal effect, though to give it them should upset the general scheme of the portion of the Act in question to which they are assumed to be relative.

I venture very humbly to conclude that the whole of section 126 is a blundered addition to the statute, which can have no effect on its interpretation and application, and which though coming later in the statute cannot be strained and twisted to override a previous complete and consistent series of provisions.

Applying, then, the enactments of sections 107 to 111 to the present case, as the

company entered on possession of the lands in 1847 without redeeming the dues of superiority, and have continued so to possess without being called upon to redeem the same by payment of compensation from 1847 to 1903, I should, did I feel myself at liberty to do so, have held that they were during that period bound to make all payments and fulfil all obligations due by the vassal to the superior, or the portion thereof effeiring, on apportionment, to the part of the lands taken, and that on being called upon to redeem in 1903 they were then bound to make payment of compensation to the superiors for the loss of their rights, whereupon on registration of a statutory discharge their liability for such dues and obligations would cease. So far as the period between 1847 and 1903 is concerned, nothing has been paid. But the superior's right cannot prescribe. All that can prescribe is his right to individual prestations—his claim year by year to the annual feu-duty, and equally any claim to an emergency casualty. As regards the redemption, that must, I think, be deemed to have been made at the date when the promoters were called upon to make it. Hence, in my opinion, the right of the pursuers here is to recover all dues and casualties within the prescriptive period, and down to the demand for compensation effeiring to the proportion of lands taken, together with compensation for the loss of their rights of superiority, with interest on the latter from 1903, when the company were called upon to redeem.

As the feu-duty is practically illusory, there is nothing in the first item, unless there had happened to accrue a casualty during the period when the dues of superiority remained unredeemed. Had, for instance, Mr Lawrie sold his property, subject to the taking by the company, and the rights acquired by them thereby, to a stranger, a composition would have been due and have become exigible by conjunction of the death of Mr Lawrie in 1874 and the passing of the Conveyancing Act of that year. But it was explained at the Bar that Mr Lawrie's property transmitted to his heir-at-law, and therefore that nothing had accrued on this head.

The second item, *i.e.*, the compensation, has been assessed at £885. But then, on an erroneous conception of their liability, the defenders made payment of a composition of £500 in 1877, as in respect of their assumed entry, by recording their title in 1875. For this the pursuers must give credit, notwithstanding that it was paid in error in law. It was paid and accepted on an erroneous view of the rights of parties, which the pursuers now repudiate by the present claim. If so they must refund the payment made. They cannot both approbate and reprobate the error.

But in coming to the above conclusion, while I fully accept the judgment in the case of *Magistrates of Elgin* v. *Highland Railway Company*, 11 R. 950, I cannot fail to see that my opinion, though it receives support from the learned Lord Ordinary who is now one of your Lordships, is not in accordance with the views expressed by the eminent Judges in the Inner House who pronounced that judgment. The position of that case has given me much difficulty, and caused me to hesitate whether I was justified in expressing the opinion which I have formed.

The action was in the ordinary statutory form which the Conveyancing Act of 1874 provided to replace the declarator of non-entry. It was a superior's remedy, attempted to be taken where no relation of superior and vassal existed. As the Judges in the Inner House pointed out, this was the sufficient and proper answer to the action, and it would have resulted in its being dismissed, but for some reason they proceeded to deal with a plea based on section 126, to the effect that the action was excluded by that section, and to express opinions on the general interpretation and application of the Act, which, though wholly unnecessary for the judgment, as a question of competency takes precedence of a special plea in bar of the action, were the foundation of their interlocutor, which recalled the Lord Ordinary's and sustained this plea. I am precluded therefore from treating the opinions of the Court as *obiter* merely. But no such claim as is here in question was before the Court, and more than one of the Judges in the Inner House indicated that there might, notwithstanding their judgment, be a relation between the promoters or the company and the superior as regards a liability for money. I cannot think that the question of such liability is concluded against the superior by a judgment pronounced under such peculiar circumstances, though unquestionably it would lie on him in the circumstances to show good cause why the question should be reconsidered. With the utmost deference to the Judges who took part in the decision in the *Elgin* case in the Inner House, I still think that notwithstanding the decision in the second *Inverness* case, 1909 S.C. 943, such cause exists.

I do not think that the question is in the least affected by the first *Inverness* case, 20 R. 551, the decision in which is entirely in accordance with the view I have taken of the statute.

LORD PRESIDENT — As the result to which I have eventually come is almost exactly the same as that arrived at by my brother who has just spoken, I confess I feel considerable hesitation in saying what I am going to say — in fact I find myself suspecting myself of the ecclesiastical mind where the goal is the same, but there is nothing but condemnation for the road by which the opposing sect proposes to get there.

Lord Johnston's opinion practically comes to this, that there is no claim for compensation or redemption — for I think my learned brother treats these two things as the same—until it is made, and that in the intermediate period, that is to say, the time from the taking of the lands until the

claim is made by the superior, or until the taker comes forward to the superior and says, "Give me my discharge," there is a right in the superior to get money. Now I ask, what money? Not the compensation or redemption, for that, according to my learned brother's opinion, is what the superior is not entitled to get until he makes the demand for it. Then it must be something that is not compensation or redemption, but something to which he is entitled as superior. Now I think in the case—and I am confining myself to that case—where a statutory title is concerned, the superior can get nothing, for two reasons—first, that it has been so decided in three decisions of this Division which we cannot go back upon, and, secondly, that it is directly against the words of the 126th section. As to the first reason, I agree with my learned brother that in the earliest case—*The Magistrates of Elgin* v. *The Highland Railway Company*, 11 R. 950—what was said in the opinions was in one sense not necessary for the decision; but undoubtedly the root of the whole matter, beginning with the judgment of the Lord Ordinary, was that a title under the 80th section created a relationship which was not the relationship of superior and vassal, or rather, if I may amend my phrase, did not create a relationship at all; and that a title having been taken under the section, no relationship of superior and vassal remained or was created. This view was, I think, accepted by all the Judges of the Inner House. I agree with Lord Johnston that that being so, it might have been enough to say, "Well, then, as you, the superior, have got no vassal, you cannot bring an action under the 4th section of the Conveyancing Act of 1874," and the Court need not have gone on to consider the 126th section at all. But still there is the opinion; and if you come to the second case, the first *Inverness* case in 20 R., it becomes matter of actual decision, for there there was a charter, which had to be got rid of, and it could only be got rid of upon the same view of the effect of a statutory title as was taken in the *Elgin* case. Secondly, I think that the superior can get nothing, for this would be contrary to the 126th section itself, which says, after first of all providing that the right of superiority shall remain intact, "but in the event of the lands so used or taken being a part or portion of other lands held by the same owner under the same titles, 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." Well, if the company is not liable for a feu-duty or casualty, and is not bound to enter, I cannot see what action the superior can have against it. There is nothing left for him, and he cannot have an action for compensation, for *ex hypothesi* he has not claimed it. That is the reason why I cannot travel along the same road as my learned brother. I confess it is easier to criticise this statute than to give one's own view of its construction, but I think I am sure, not of what precisely the blunders are, but of what the key to the blunders is. If you place the English and the Scottish statutes side by side, keeping in view what is, I am sorry to say, common knowledge, namely, that statutes drawn in Westminster Hall, especially in the decade about 1845, were apt to be drawn with either contempt or ignorance or both of Scots law, I think that key will be found. You cannot look at the Lands Clauses Act of Scotland without seeing that it is a mere copy of the Lands Clauses Act of England, with an alteration of such terms as the framers knew were English law terms into what they thought were Scots law terms, and that, I think, is the history of the fasciculus of clauses which begins with section 107 of the Scottish statute and section 115 of the English statute. The heading in the English statute, the earlier Act, is—"And with respect to lands charged with any rent service, rent-charge, or chief or other rent, or other payment or incumbrance not hereinbefore provided for"; while in the Scottish statute it is—"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." Now here the framers of the Act have just put in *holus bolus* feu-duty, ground annual, &c., and they omitted to notice that whereas all the things enumerated in the English section are proper burdens, that is to say, things to which land may or may not be subject, when they came to Scotland they put in along with burdens something which affects all land in Scotland, and which therefore is more than a burden, viz., feu-duties. There is no land in Scotland, excluding the northern islands, held without a feu-duty; the feu-duty may be of an illusory character, but still it exists; whereas on the other hand a ground annual is a thing which may or may not be imposed on lands, and is a real and proper burden; and there are others which are not mentioned by name in the section, such as a real burden pure and simple. Well, that being so, the statute proceeds, copying pretty closely the English clauses, and then at the end it seems to have occurred to some one that perhaps enough had not been done; that there was also this continuing relation of superior and vassal; and that this relation had been placed in a very awkward situation owing to the form of the statutory conveyance. Now there is a statutory conveyance in the English Act too, and if your Lordships will look at the statutory conveyance in the English Act you will find that the statutory conveyance given to us in Scotland is an absolute copy of that in the English Act, with only an alteration of certain words. Really, however, it is exactly the same. Well, as everyone knows, the ordinary forms of conveyance were perfectly different in the two countries at that time. I am not entitled to say that I know English law, but I cannot pretend to be entirely ignorant of it, and I may say that it is perfectly clear that this class of question

did not arise under the English Act at all. There is no question under the English Act that where lands were taken from the owner these charges would still continue exigible unless they were redeemed, and there is nothing in the form of the English conveyance to lead to any other result, and therefore there was no trouble. The lands were taken and the burdens were got rid of in the way in which the fasciculus of sections beginning with 115 provides. But when the framers of the Act came to the Scottish fasciculus these difficulties had arisen in their minds, and I think that this is the genesis of the 126th section. This is clear if for no other reason from the words with which it begins—"Be it enacted that the rights and titles to be granted in manner herein mentioned in and to any lands taken and used for the purposes of this Act shall, unless otherwise specially provided for, in nowise affect or diminish the right of superiority in the same, which shall remain entire in the person granting such rights and titles." In other words the 126th section is merely a determination of what is to be the effect of the statutory conveyance and nothing else, because it is quite clear that as regards the statutory conveyance which was introduced by section 80 there really were three courses open to the promoter after he had got the lands. He could either take a conveyance according to the common law of Scotland. That is clear enough from the fact that the words in section 80 are only "may be." There is nothing against his taking a conveyance at common law, and many a conveyance has been so taken. Or he could take a conveyance under section 80. And then there was a third way—he could make a hybrid sort of conveyance by taking the statutory form and then tacking on to it a precept of sasine. I do not mean to say that I should like to be the author of such a deed, but those who drew that section thought you might do so, and this is made perfectly clear by the proviso after the provision for the statutory form and its registration. In 1845 there was no such thing known as the registration of a conveyance for the purpose of infeftment. You might register anything if you liked in the Books of Council and Session, but registration as affecting infeftment did not come in till 1858. In 1845 you had only got so far in the march of reform that in that year it was made unnecessary for the notary to go to the lands. The proviso in section 80 is "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 registration or precept of sasine, or which may be completed by infeftment." Now of course so far as these words are concerned this would apply, no doubt, to an ordinary common law conveyance, but that they did not so apply is apparent, I think, from the words that follow—"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." Now the only conveyance that could be recorded in the register of sasines was this statutory one. Nobody could speak of a certain thing happening until a common law conveyance was recorded, for nobody at that time had any idea that it could be recorded. Therefore it is, I think, quite clear that there were these three courses open to a person, and I think it is equally clear that section 126 was intended to clear the doubts as to what was to happen if people took advantage of the statute. If they do not take advantage of the statutory conveyance, there is no difficulty of course, because then there is nothing to prevent a superior from having his ordinary remedies.

The complainers argued that the whole alteration of the position of parties took place when the lands were taken. Now I do not think that was so at all. The statute begins with the provisions for notices and so on, and then after dealing with the various ways in which notices are to be given, it provides that parties are to be called, and that parties who are not in a position to treat may be dealt with under the 74th section, which enacts (omitting unnecessary words) that on the compensation agreed on being deposited in bank, the owner of such lands shall, when required to do so by the promoters of the undertaking, duly convey such lands to the promoters of the undertaking, and in default thereof—that is to say, if he will not or cannot do so—then they are to take a notarial instrument, and when the notarial instrument has been stamped the lands are to vest absolutely in the promoters of the undertaking, which notarial instrument being registered in the register of sasines is to have the same effect as the statutory conveyance so registered. Now that seems to me to make it perfectly clear that really nothing passes until there is either a conveyance or a title made up by this notarial instrument, and I think the judgment of the Court in the *Alexander* case, 6 Macph. 324, makes that quite clear. In that case it seems to me that the promoters would have been entitled to possession, although they had not completed a title, if the whole matter had been ended by the service of the notices as was argued to us. Accordingly I think that case really destroys the argument for the complainers.

My view, therefore, of the whole matter comes to be, that it has been practically decided that the moment a statutory title is taken the promoters have a title independent of the superior altogether, and that it has been decided that, notwithstanding the blundering expression of section 126—for nobody can take that section as it stands, it has to be adapted whatever view is taken—there is no superior the moment his rights are taken away by the execution of the statutory conveyance. I think a right to compensation and a right to be paid a sum for redemption are separate things,

and I think the fasciculus of sections beginning with 107 really applies to the position where you have not taken a statutory title; then you may call upon the person to redeem. When the statutory title has been taken I think it has been practically held by the Court in the first and second *Inverness* cases, 20 R. 551, 1909 S.C. 943, that there there and then emerges a right in the superior to compensation, and he is not barred by the fact that the promoters have been allowed access to the ground. I do not think it matters whether the dictum of the Lord President in the *Elgin* case, 11 R. 950, is or is not right, for it is at least settled by the second *Inverness* case.

The result of that would be that the date would be that which the Lord Ordinary has taken here, namely, that of the execution of the statutory title in 1875, and not as my Lord Johnston thinks when the claim was made. But as it happens there has been an award here, and the sum is precisely the same at whichever date you take it, and the result is the same as that at which Lord Johnston has arrived, for although the date is different, it is quite settled by the case of *Caledonian Railway Co.* v. *Sir William Carmichael*, 2 H.L. (Sc.) 56, that interest is not payable until the demand is made, and consequently interest is not payable here because the superior made no demand. The view of the House of Lords, further, is that interest can never be due unless a person is in some way in default of paying. The sum of course is that found by the arbiter. The £500 which was paid in October 1877 must be taken as a payment to account of the debt due but not demanded, and consequently the sum now payable under the decree will be the £885 minus £500, with interest upon the difference between these sums from the date of the demand in 1903.

LORD KINNEAR—I agree with the Lord President.

LORD SALVESEN was sitting in the Second Division.

The Court pronounced this interlocutor—

"Recal said interlocutor: Decern and ordain the defenders under the first petitory conclusion to make payment to the pursuers of the sum of £385, with interest thereon at 5 per centum per annum from the 25th day of February 1903; and further decern and ordain the defenders to make payment to the pursuers of the sum of £307, 6s. 1d. sterling, in terms of the second petitory conclusion of the summons: Find the pursuers entitled to expenses, and remit," &c.

Counsel for Pursuers (Respondents) — Solicitor-General (Hunter, K.C.) — Chree. Agents—Melville & Lindesay, W.S.

Counsel for Defenders (Reclaimers) — Clyde, K.C.—Blackburn, K.C.—Hon. W. Watson. Agents—Hope, Todd, & Kirk, W.S.

Thursday, November 10.

FIRST DIVISION.

[Lord Cullen, Ordinary.

SMITH AND OTHERS *v.* OLIVER.

Proof—Contract—Innominate Contract—Writ or Oath—Promise—Mandate—Rei interventus—Agreement to Leave Money by Will.

The finance committee of a church, as trustees for behoof of it, raised an action against the executor-dative of a deceased lady for declarator that he was bound to pay them a sum of £6000 odds. They averred that the deceased, by representing that she would be responsible for the increase in cost, had induced them to give orders for the erection of a church on a more expensive scale than they had originally proposed; that she had given money from time to time towards the increased cost; that she had, however, been unable to give out of her capital owing to it being settled in England, and consequently had undertaken to leave the necessary money by her will.

Held that these averments did not amount to an averment of mandate, or of any onerous contract, but merely of a promise to pay or leave by will, and could only be proved by writ.

Millar v. *Tremamondo*, January 29, 1771, M. 12,395; and *Edmondston* v. *Bruce or Edmondston*, June 7, 1861, 23 D. 995, *followed*.

The Most Reverend James Augustine Smith, Roman Catholic Archbishop of St Andrews and Edinburgh, residing at 42 Greenhill Gardens, Edinburgh, and others, being the members of the Finance Committee of the Roman Catholic Church in the Archdiocese of St Andrews and Edinburgh, and, as such, trustees for behoof of the said church in the said Archdiocese, raised an action against James Henry Edward Anscombe, otherwise known as Edward Oliver, executor-dative of the deceased Mrs Julia Catherine Squance or Oliver, as such executor and as an individual.

The pursuers sought to have it found and declared that the sum of £7000, or such other sum as the Court might fix, was a true, just, and lawful debt resting-owing by the deceased Mrs Oliver to the pursuers, and that they were entitled to payment thereof out of her estate, and to have the defender ordained to make payment thereof.

The pursuers' averments appear sufficiently from the opinion of the Lord Ordinary (Cullen), and are summarised in the opinion of the Lord President.

The pursuers pleaded — "(1) The said deceased Mrs Oliver having undertaken to make payment to the pursuers of the sum of £7000 upon condition that the pursuers erected a church in accordance with her desires, and the pursuers having erected