plicable, and whether, therefore, it was a case in which under the provisions of section 68 there was an obligation on the Railway Company to give access underneath the railway if they could do so? I do not express any opinion upon the construction of that section; I merely call attention to the fact that the section in question was the ground of the decision of one of the learned judges in *Gonty's* case, and undoubtedly I do not think it can be disputed that if what is suggested be the true effect of section 68, that would be an element to be taken into account in answering the question under such a provision as that contained in section 13 of the private Act.

As to all those points I reserve my opinion. I express no opinion on them at the present time, because it appears to me that they do not arise before this House, inasmuch as the arbiter, whether he has rightly decided or wrongly decided, is supreme. There is no power to review his decision, whether he has made a mistake in law or whether he has made a mistake in the facts, and consequently it is impossible for your Lordships to entertain the bulk of the arguments which have been addressed to you on behalf of the appellants by the Lord Advocate.

LORD SHAND—I am of the same opinion and I shall only add, in concurrence with the view expressed by my noble and learned friend on the Woolsack, that it seems to me it would be desirable that those interested in such questions should endeavour to obtain legislation more clearly defined than section 13 of the private Act here—a section which, as I understand, is now commonly inserted in many statutes, and to consider whether such a case as we have now had before us should not be specially provided for.

LORD JAMES—I concur in the view already expressed that this appeal should be dismissed, and I do so upon the two grounds which have been already mentioned—first, that it appears to me that this is not a road—it is part of the premises—it is really curtilage and not road; and secondly, for the reason just stated by my noble and learned friend Lord Herschell, that the decision of the arbiter is supreme, and we cannot review that decision either upon a point of law or of fact.

Ordered that the appeal be dismissed with costs.

Counsel for the Appellants—The Lord Advocate, Q.C.—Clyde. Agents—Grahames, Currey, & Spens, for Hope, Todd, & Kirk, W.S.

Counsel for the Respondents — Cripps, Q.C.—Salvesen. Agents—Stibbard, Gibson, & Company, for Boyd, Jameson, & Kelly, W.S.

Friday, February 25.

(Before the Lord Chancellor (Halsbury) and Lords Watson, Herschell, and Shand.)

MACFIE *v.* CALLANDER AND OBAN RAILWAY COMPANY.

(*Ante* July 16, 1897, vol. xxxiv. p. 828, and 24 R. 1156.)

Railway — Superfluous Lands — Lands Clauses Consolidation (Scotland) Act 1845 (8 *and* 9 *Vict. cap.* 19), *sec.* 120.

The proprietor of lands adjoining brought an action against a railway company for declarator that two plots of land, distinguished as plot A and plot B, which had been acquired by the company under the powers of a special Act, not being required for the purposes thereof, had become superfluous lands within the meaning of section 120 of the Lands Clauses Consolidation (Scotland) Act 1845, and had vested in him as at 17th July 1892, the date prior to which the company was bound to sell superfluous lands under the said section.

The pursuer maintained that the defenders were barred from pleading that the lands were required for the purposes of the undertaking by the following circumstances—As regards plot A, the directors of the company had, subsequently to 17th July 1892, resolved to sell part of it, and had remitted to their secretary and solicitor to carry out the sale, but on their learning that the sale was illegal it was not carried out. As regards B, the directors prior to the said date considered various proposals for the purchase of parts of it, but declined them on the ground that the price offered was too small. After the said date they let portion of B on lease for five years.

Held (*aff.* the judgment of the First Division) that the actings of the directors, although relevant as evidence on the question of fact whether the lands were, as at 17th July 1892, required for the purposes of the undertaking, did not operate as a bar to the company pleading that the lands were so required.

Opinion (by Lord Watson) that the plea of personal bar was inapplicable to a claim arising under section 120 of the Act.

London and South-Western Railway v. *Blackmore* (1870), L.R., E. & I. App. 610, *distinguished and explained.*

Evidence on which *held* (*aff.* judgment of the First Division) that the plots in question were required for the purposes of the undertaking.

The case is reported *ante ut supra.*

The pursuer appealed against the judgment of the First Division.

At the conclusion of the argument for the appellant, counsel for the respondent not being called on, their Lordships delivered judgment as follows:—

LORD CHANCELLOR—This case has occupied your Lordships for a considerable time, but I confess I have come to the conclusion without the smallest doubt that the interlocutor appealed from is well founded, and ought not to be disturbed.

I do not think that it would be possible to put in more terse and vigorous language the grounds for the conclusion at which I have arrived than they are put in the language of the Lord President in his judgment, which appears to me with great accuracy and precision to have met every point. In particular, I notice how admirably he has pointed out the difference between that which is evidence and that which is conclusive as an estoppel or bar. That seems to me to dispose of the whole of this case. If the Lord President's reasoning is as right as I think it is admirably expressed, the question of fact has been determined unanimously by all the Judges who have heard this case, because as to the Lord Ordinary, although I think his Lordship took an erroneous view as to how an estoppel could have been created or a bar could have been made, under these circumstances as to the question of fact he was entirely in accord with the rest of the Judges. Therefore upon this question of fact, so far as it is a pure question of fact, I think I may say the unanimous judgment of the Court below was a very satisfactory one, and certainly it was one to which I should myself have come.

With respect to the reasoning of the Lord President, if we are entitled to look at the facts, and not begin to split straws about what may or may not be the right of a railway company in respect to this or that little piece of land adjoining a station—if, I say, we are entitled to look at the facts, as the Lord President's judgment shows that we are entitled to look at them, I should come myself to exactly the same conclusion as all the other learned Judges have done. I do not wish to add anything to what the Lord President has said in his judgment either upon the law or upon the facts, for I should despair of putting it more clearly, tersely, or ably than he has done.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD WATSON — This appeal in my opinion raises only one substantial question, which is a mixed question of fact and law, namely, whether these plots which are claimed by the appellant as adjoining proprietor under section 120 of the Lands Clauses (Scotland) Act 1845 were or were not, at the date when the period of ten years expired, superfluous lands within the meaning of that clause. Although it is a mixed question of fact and law, the legal question which it involves appears to me to be an exceedingly simple one. The question of fact may be attended with some nice considerations; indeed, the question of fact is the only question of the two which to my mind involves the least nicety. The question of fact which is raised is simply this, whether at the expiry of the decimal period these two plots were land which had become requisite for the purposes of the company, or would in all probability become necessary within a reasonable time after that date. If these two propositions are answered in the affirmative, there is an end to the appellant's case, because in that case that they would be within section 120 does not appear to me to admit of dispute. On the contrary, if they had not been affirmed, or if we ought not to affirm them, the result would be equally plain in favour of the appellant.

I am perfectly satisfied with the terms of the judgment of the Lord President delivered on behalf of the First Division. I quite concur in the way in which he deals with the so-called question of estoppel. I do not like that word introduced in this casual way into the midst of a Scotch proof, but all that I can say about it is this, and I am perhaps weakening the Lord President's language by saying so, that in this case the plea in my opinion is both contrary to principle and is most certainly unwarranted by authority. I do not mean to say that it has not been supported by a citation of so-called authorities; it has been largely so supported; but those authorities have in my opinion in reality no bearing upon the point.

I therefore concur in the judgment that has been moved.

LORD HERSCHELL—I am of the same opinion.

Treating the question as one of fact, I see not the slightest reason to dissent from the conclusion at which I understand all the Judges to have arrived, that these lands were within the meaning which this House has placed on the words of the section—"lands required for the purposes of the undertaking."

The only point which really gives rise to any question of law is, whether the steps taken by the directors in this case can be regarded as precluding the company from now insisting that the lands are required. I think, for the reasons which the Lord President has given, that there is no such bar to their insisting upon that case now. I only desire to add one word with regard to the English authorities which were supposed by the learned Lord Ordinary to support a contrary conclusion.

The case of *Blackmore* (4 E. & I. App. 610), which was chiefly relied upon for certain expressions used by Lord Westbury, does not appear to me to be relevant, and for this reason, that there was no controversy there as to the lands being superfluous. The only controversy there was this, at what time did the right of pre-emption arise? Was it postponed in all cases until just before the ten years expired? Had the company in all cases the right to postpone the question until then, or if they in fact sold the piece of land as superfluous, did that entitle the person from whose land the piece in question had been severed to insist that he should then have a conveyance to him, the

price being ascertained in the manner provided by the Act? That depends, not upon the construction of the section with which your Lordships have to deal, but upon the construction of the following section, which provides that before disposing of land they shall offer it to a certain person. In that case they had actually disposed of the land; they had sold it to a purchaser. The person entitled to pre-emption then said, You have sold this land to a purchaser, you have disposed of it without giving me the offer to purchase which the statute says you are to give. The decision was that under those circumstances he was entitled to be put in the same position as if before so disposing of it they had made an offer to him, in which case, of course, the sale would have taken place at that time. That was the decision in *Blackmore*, and nothing more. It did not in the least determine that even in England under our doctrine of estoppel there would have been anything to prevent the company at the end of the ten years, by reason merely of any steps that they had taken, from saying that the lands were "required for the purposes of the Act."

The same remarks really apply to the other cases relied upon. Perhaps the expression "stamping the lands" with the character of superfluous lands has given rise to the misapprehension under which I think the Lord Ordinary laboured. Perhaps it is not a very happy expression, because it seems to me it would not necessarily stamp them at all times and for all purposes and under all circumstances; but one must take the expressions used in relation to the question that was then before the House.

For these reasons I add nothing more, because I am thoroughly satisfied with the judgment of the Lord President.

LORD SHAND—I am also of the same opinion, and the only observation I think it necessary to make is in regard to the ground on which it appears that the Lord Ordinary in his judgment differed from the view that was ultimately taken by the First Division of the Court.

It seems to me to be clear that at the end of the ten years in 1892 the land in question was required for railway purposes. We have a body of evidence, which seems to preponderate greatly over that of the pursuers, to show that at this terminal station there is a very small amount of spare land, and from the evidence of a number of the officials of the company it seems to me to be clear that it would really practically have been folly to have given that land away—that the station itself is contracted, that more accommodation is required there —and that there is the prospect of additional traffic coming in large quantities to that place; therefore I am satisfied that the land was in point of fact required for railway purposes.

I go further, and say that the learned Judges who have dealt with the case, both the Lord Ordinary and the Inner House, are entirely of the same opinion. It is true—and that has raised some difficulty in the case—that it appears that the directors were negotiating for the sale of part of this land for a considerable time, that there were offers given, and that these offers were really declined because the price was not high enough. I have felt the difficulty of that circumstance here upon the question of fact. I think the pursuer may very well say that the inference to be drawn from the way in which the directors conducted these negotiations was that they did not regard this land as superfluous; but although that appears to have been their view, I do not think the company is now precluded from maintaining, what appears to have been the fact, that that was a mistaken view, and that the ground was really required.

In regard to the different view which was taken by the Lord Ordinary, founded, I think, upon the case of *Blackmore*, I entirely concur in what has fallen from my noble and learned friend Lord Herschell. In *Blackmore's* case it is to be observed, in the first place, that section 121 was the section which the Court had to deal with, and not the section with which we are here concerned. In the next place, it appears to me that in that case both parties were agreed that the land was superfluous, whereas here we have the parties directly in controversy upon that subject; and in the third place, it appears that in the case of *Blackmore* not only had the directors taken the view that the land was superfluous, to which indeed they adhered to in the transaction, but in point of fact they had gone on and actually sold the land. In these circumstances it appears to me that that case can be of no authority for the present case; and I agree with what has been observed by the Lord President and with what has been indicated by the noble and learned Lord who has last spoken, that the Lord Ordinary has attached rather too great importance to the use of the word "stamping" in the judgment of Lord Westbury, which probably was an expression which may be said to have been a little stronger than the case either required or warranted.

Agreeing as I do with your Lordships in thinking that the reasons for the judgment have been exhaustively, clearly, and satisfactorily stated in the able opinion of the Lord President in this case, I concur in thinking that that judgment ought to be affirmed.

Ordered that the appeal be dismissed with costs.

Counsel for Appellant — The Dean of Faculty — Cripps, Q.C. — Dundas, Q.C. Agents — Martin & Leslie, for Finlay & Wilson, S.S.C.

Counsel for Respondents — The Lord Advocate — Cozens Hardy, Q.C. — Clyde. Agents — Grahames, Currey, & Spens, for Hope, Todd, & Kirk, W.S.